THE

# INDIAN LAW REPORTS.

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BOMBAY SECTION.

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# THE LAW REPORTS OF BRITISH INDIA

BY

M. SUBRAMANIAM, B.A., B.L.,

AND

M. V. KRISHNASWAMY, B.A., B.L.

VAKILS, HIGH COURT, MADRAS

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## BOMBAY Vol. 10.

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1927.

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# JUDGES OF THE HIGH COURT OF BOMBAY DURING 1897—1898.

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|---|---|---|
| HON'BLE | SIR CHARLES F. FARRAN, *Knight*, (*Died on 9th September 1898*), | Chief Justice. |
| ,, | H. J. PARSONS, (*Acting 1898*), | |
| | SIR LOUIS A. KERSHAW, *Knight* (*Appointed on 9th November 1898*), | |
| HON'BLE | J. JARDINE, (*Retired 7th February 1897*), | Puisne Judges. |
| ,, | H. J. PARSONS, | |
| ,, | E. T. CANDY, | |
| ,, | M. G. RANADE, | |
| ,, | A. STRACHEY, (*Resigned on 9th December 1898*), | |
| ,, | B. TYABJI, | |
| ,, | E. M. H. FULTON. | |
| ,, | L. P. RUSSELL (*Appointed on 9th December 1898*), | |
| HON'BLE | B. LANG, | Advocate-General |
| ,, | M. H. STARLING (*Acting 1897*), | |
| HON'BLE | H. BATTY, | Legal Remembrancer. |
| ,, | A. S. MORIARTY (*Acting*). | |

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*Privy Council* .. C. BOULNOIS, *Middle Temple*.

*High Court* ..
- H. C. KIRKPATRICK, *Lincoln's Inn*.
- GANPAT SADASHIV RAV,
- GANGARAM BAPSOBA RELE, *Assistants*.

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## S

THE INDIAN LAW REPORTS BOMBAY SERIES, CONTAINING CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT

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**BOMBAY Vol XXI-1897**

ORIGINAL CIVIL

*The 20th December, 1895.*

PRESENT

THE HONOURABLE CHIEF JUSTICE FARRAN AND MR JUSTICE STRACHEY

Damodardas Tapidas . . (Original Defendant) Appellant

*versus*

Dayabhai Tapidas (Original Plaintiff) and another (Original Defendant No 2) . . . . Respondents *

*Will — Construction — Gift to sons — Life estate — Intestacy*

Tapidas Varajdas, a Hindu, died leaving a widow (Navivahu) and two sons (Damodar and Dayabhai), and a grandson Karsandas the son of Dayabhai. Damodar had had two sons born to him in Tapidas' life-time but both had died in infancy and before the date of Tapidas' will. This fact was not known at the hearing of the suit or of the appeal to any of the counsel appearing in the case, and was only disclosed after the first judgment of the Appeal Court had been delivered. By his will dated 1885 Tapidas disposed of certain dwelling houses which belonged to him and of the residue of his estate as follows: —

8 "I have given the houses to my wife Navivahu for her to enjoy the income thereof . . . .

"In the event of the decease of my wife Navivahu, my sons Bhai Damodar and Bhai Dayabhai may take in equal shares, half and half, the income that may be received, and may enjoy and may expend and may make donations for religious and charitable purposes and the heirs also of both these my sons may always take the income from time to time, and may divide and take the income. To the same no one has any claim or title "

13. "Afterwards giving to all what is written in this will, all the residue of the estate (*iskamat*) the whole of it should be divided and taken in equal shares by my sons Damodardas and Dayabhai . . And on the death of the two sons (*kaza razae*) he who may have issue sons that issue is in every way the heir of his father's property, and if in the life-time of the two above mentioned sons one should not have issue sons, then on his death, if my other son should be alive, he should get all the estate, cash and whatever else there may be, in that no son can raise a dispute . . . As to the rest, whichever son of mine may survive

* Suit No. 572 of 1894, Appeal No. 881.

(*hayatimo hoe*) should get all that is given by me, and should there be no survivorship of that child, [2] and should he have a son or sons, then he (or they) should get all, according to what is written above; in that no one can raise an objection."

*Held*, (confirming CANDY, J.) that under clause 8 Damodar and Dayabhai took only a life-interest in the house as tenants-in-common, and that the ulterior interest therein not being validly disposed of fell into the residue.

*Held*, also (varying the decree of CANDY, J.) that Damodar and Dayabhai each took a life-estate in a moiety of the residuary estate, and that if Damodar died without leaving a son, his moiety should devolve upon Dayabhai, or, if he were dead, upon his son Karsandas (if then living), and if Dayabhai should die without leaving a son, his moiety should devolve upon Damodar if then living."

SUIT for the construction of a will.

The plaintiff (respondent No. 1) and the first defendant (appellant) were the sons of one Tapidas Varajdas and the second defendant (respondent No. 2) was the plaintiff's son.

Tapidas Varajdas died on the 31st May 1886, leaving him surviving his widow Navivahu, his two sons Dayabhai and Damodar (plaintiff and first defendant), and his grandson Karsandas (defendant No. 2), the son of the plaintiff Dayabhai. Damodar had had two sons born to him in Tapidas' life-time, but they both had died in infancy, and before the date of Tapidas' will. This fact was not known to the counsel of the parties at the time of the hearing either in the Division Court or in the Appellate Court.

By his will dated the 26th May 1885, he appointed his said two sons his executors, and they proved the will on the 27th November 1886.

The testator's widow Navivahu died on the 12th August 1887.

The plaintiff in this suit prayed to have the said will construed and for a declaration of his rights and those of his son (defendant No. 2) and his brother (defendant No. 1).

The material clauses of the will were the eighth, thirteenth and eighteenth, which were as follows:—

Eighth as follows:—We (*i e.*), my said wife Navivahu and I and(my) family are now residing in the old house. That house was purchased in the name of my respected mother Jivkor from Shah Jamnadas Ranchordas. As to the house near that house, I purchased it in S. (Samvat) 1919-1920 (A.D. 1862-63) from Bai Devkor Shah Lalubhoy Ranchordas. In that house I and my son Bai Dayabhai now sleep That house (with) all the boundaries on the four sides:—and now in the front part Shah Jamnabhoy Vijbhucandas and Vaid Chandra Shanker reside as tenants; and in the rear there is a compound and there are privies. Along with [3] the same there is the boundary of the chawl as far as the rear wall. And close to this house in the front part there is a gateway within, which is in the occupation of Shah Vizbhoocandas Pranjivandas and other tenants. Along with all these (appurtenances) *I have given (the houses) to my wife Navivahu (for her) to enjoy the income thereof* Whatever rent may be received for those houses, my wife Navivahu herself may take, may enjoy, may spend and (she) may make donations for religious and charitable purposes (*dharam*). She cannot be questioned by my "executors" and "trustees" and heirs. A "trust deed" for these houses shall be made and delivered by my "executors" and "trustees" and heirs to my wife Navivahu. In the same *the authority to take the whole of the income during her life-time is (hers)*, and these houses cannot be sold or cannot be mortgaged by any one. *In the event of the decease of my wife Navivahu, my sons Bhai Damodardas and Bhai Dayabhai, both (these) persons, deducting the expenses may take in equal shares half and half*

*the income thereof that may be received and may enjoy and may expend and may make donations for religious and charitable purposes (dharam), and the heirs also of both these my sons may always take the income from time to time and may divide and take the income.* To the same no one has any claim or title. As to the old house in which I now reside, in that house where my place of business (*dukan*) is there is a door (through which) to go from it out of the place of business to the above-mentioned house, and there is another door in my sleeping room; and there is a door (through which to go) from the third storey. All those doors when it may be the pleasure of my wife Navivahu shall be closed. None of my "executors" and "trustees" and heirs and no one else can raise any objection or dispute in any respect in regard to that. They shall always assist my wife Navivahu. This will be creditable to all.

Thirteenth as follows:—The management (of the business) is being carried on in the name of Shah Tapidas Varajdas and Co. from S. (Samvat) 1928 (A. C. 1871-72). In the same during the life-time of my brother Tulsidas, (his) share and my (share) and my son Damodardas' (share *i.e.*), the shares of us three persons were equal. Since the decease of Tulsidas, his share has been discontinued and the money and such other (property) appertaining to brother Tulsidas' share that may come out of this company and what may come out of the household accounts in respect of his share, both those (amounts) being added together on payments being made out of the same, in accordance with what is written in brother Tulsidas' "will" what may remain over should be received by me according to what is written in the "will." Thereafter in Shah Tapidas Varajdas and Co.'s business there are my two shares, and there is my son Damodardas' one share. I shall make Bhai Dayabhai a partner in Shah Tapidas Varajdas and Co. in my life-time Dayabhai will get a small share therein, but in the event of my decease my sons Damodardas and Dayabhai both persons remaining joint shall carry on the management of the aforesaid Shah Tapidas Varajdas and Co. In the same the shares of these two persons are half and half. Shah Tapidas Varajdas and Co. are the secretaries and treasurers of the Alliance Cotton Manufacturing Company, Limited. There is received their commission money which after my decease shall be received by my sons Bhai Damodardas and Bhai Dayabhai, both persons, in equal shares by both brothers half and half. But if my son Bhai Damodardas should not make Dayabhai a partner in accordance with what is written above and should not annually give him an equal moiety out of the commission money of [4] the Alliance Cotton Manufacturing Company, Limited, that may be received annually, then out of my property of all descriptions and moneys he shall first give Bhai Dayabhai Rs. 2,00,001, namely, two lakhs and one. For this money a legal "trust deed" shall be made and with the same money "estates" or Government loan "notes" bearing interest shall be purchased and given. Whatever income the same may yield, Bhai Dayabhai shall take: and in the event of his decease, Bhai Dayabhai's heir or heirs shall get (the same). *Afterwards on what is mentioned in this "will" being given to all, as to the whole of the property which may remain over, my sons Bhai Damodardas and Bhai Dayabhai may divide and take the whole in equal shares*, and if God should bring it to pass and a son should be born to my wife Navivahu, then (the property) shall be divided and taken in three shares. None of such sons as may be born to both (these) my sons can ask for (or demand anything) during the lifetime of both these (my) sons. *In the event of their (my sons') decease, they (their sons) are their heirs.* With regard to what I have mentioned in this "will" and have given to my sons, two persons, and all that I have particularly specified in this "will," in accordance therewith, my sons Bhai Damodardas

and Bhai Dayabhai, both brothers shall divide and take (their) shares; *and in the event of the decease of both (my) sons, the sons of him who may have (left sons) are the heirs in every respect of his father's property and if either of (my) above-mentioned two sons should not have sons in his life-time, then in the event of his decease my other son who may be living shall get all estate and ready money and whatever else there may be*. In regard to the same, no son can raise a dispute, and it one of my two sons should have daughters, then should there be one or more daughters. Rs.25,000—namely, rupees twenty-five thousand—shall be given to her (or to them) and to my son's wife Rs. 15,000—namely, rupees fifteen thousand—shall be paid. *As to the residue, such son of mine as may be living shall get all that is given by me, and in case that son should not be living and should he have a son or sons, he (or they) shall get all in accordance with what is mentioned above*. No one can raise a dispute or an objection in regard to the same.

Eighteenth as follows.—On the "legacies" and "estates" and other (property) mentioned in this "will" to be given being given according to what is written in this "will" and on the religious and charitable donations (*dharmada*) being set apart, I of (my) free will and pleasure give the immoveable and moveable property, the (personal) ornaments and jewellery of all kinds and the ready-money to my two sons Damodardas and Dayabhai. *They may divide and take all that property in equal shares*. But if God should bring it to pass, and a son should be born to my wife, then (the property) shall be divided and taken in three shares, or if a daughter should be born, then (a legacy) shall be given to her in the same way as I have written in this will (directing legacies), to be given to my daughters Divali and Kiki. In regard to that no one shall raise any kind of objection or dispute

The first defendant Damodardas (the appellant) contended that the widow Navivahu being dead, he and the plaintiff Dayabhai took an absolute estate under the will as tenants-in-common in the house mentioned in clause 8 and in the residue under clauses 13 and 18.

[6] The second defendant, the plaintiff's son, in his written statement submitted that after the death of the plaintiff and the first defendant he was absolutely entitled to the house and the residue, and that the plaintiff and the first defendant had no power to alienate any of the property beyond the term of their natural lives.

At the hearing the following issues were raised :—

1. Whether the plaintiff and first defendant take an absolute estate as tenants-in-common in the house property recited in clause 8 of the will after the death of Navivahu.

2. Whether on the death of Navivahu the interest of the testator in the said house was undisposed of by the said will

3. Whether under clauses 13 and 18 of the said will, the plaintiff and first defendant took an absolute estate as tenants-in-common in the residue of the testator's estate.

4. Whether on the death of Navivahu the interest of the testator in the house recited in clause 8 of the said will fell into the residue of the testator's estate.

5. Whether the second defendant is not absolutely entitled to the house and property referred to in clauses 8, 13 and 18 of the will after the death of the plaintiff and the first defendant.

6. Whether the plaintiff and the first defendant have any power and right to alienate the said house and property beyond the term of their natural lives.

*Macpherson* and *Inverarity* appeared for the Plaintiff and *Starling* and *Lowndes*, for the Defendant No. 2 (the Plaintiff's son).

*Lang* (Advocate General) and *B. Tyabji*, for Defendant No. 1.

*Macpherson* :—We contend that under the 8th clause there is a gift to the testator's sons of the income only for their joint lives. The provision in favour of their heirs must be rejected, as the heirs were not ascertainable at the death of the testator and, therefore, after the life interests are expired the property falls into the residue.

As to the residue, we say that by clause 13 it is given to the testator's two sons as tenants-in common for their lives with remainder over of the share of each to his son or sons capable of taking, and in case either of the testator's sons should die without leaving a son, then his share is to go to the surviving brother. The second defendant (the plaintiff's son) now has the whole remainder in expectancy vested in him—Theobald on Wills (3rd [6] Ed.), p. 342; Jarman on Wills (5th Ed.), p. 1596; *Cooper* v. *Cooper*, 1 Kay and J., 658.

As to clause 18, we say that this clause merely provides for an after-born daughter. The rest of it is merely an imperfect repetition of clause 13.

*Lang* for Defendant No. 1 :—We contend that the words "in the event of the death" in clause 13 refer to the death of either of the testator's sons in the testator's life. The whole of the residue is given to the two sons absolutely, but if one of them should die without issue, then his share goes to the other. He cited section 111 of the Indian Succession Act (X of 1865). Clause 18 refers only to what is to be done on his death.

CANDY, J. :—The decision on the questions which arise in this case depends upon the construction of the will executed by the late Tapidas Varajdas on 26th May 1885, by which his sons the present plaintiff Dayabhai and the first defendant Damodardas were made his trustees and executors. Tapidas died on 31st May 1886, leaving him surviving his two sons above mentioned, his widow Navivahu, who subsequently died on 12th August 1887, and Karsandas, present second defendant, son of the plaintiff, who was admittedly the only issue of a son of the testator born in the life-time of the testator.

Briefly, the first defendant Damodardas contends that under the will of his father he and his brother the plaintiff take an absolute estate as tenants-in-common in the house mentioned in clause 8 of the will and in the residue of the testator's estate under clauses 13 and 18 of the said will, while on the other hand the plaintiff and his son (the second defendant) contend that he (the plaintiff) and the first defendant are entitled to a life-interest only in the houses and the residue of the property referred to in clauses 8, 13 and 18 of the said will, and that after the death of the plaintiff and of the first defendant the second defendant will be absolutely entitled to the houses and the said property.

The provisions of the will which require notice are as follows:—

[7] After providing for certain pecuniary legacies the will in clause 8 proceeds to deal with certain house property which testator gives

"to my wife Navivahu to enjoy the income thereof; whatever rent may be received from those houses my wife Navivahu herself may take, may enjoy, may spend, and may make donations for religious and charitable purposes. She cannot be questioned by my executors and trustees and heirs. A trust-deed for these houses shall be made and delivered by my executors and trustees and heirs to my wife Navivahu. In the same, the authority to take the whole of the income during her life-time is (hers), and these houses cannot be sold or cannot be mortgaged by any one. *On the death of my wife Navivahu* my sons Damodardas and Dayabhai, both persons, deducting the expenses may take in equal shares half and half the income thereof that may be received, and may enjoy and may spend and may make donations for religious and charitable purposes, and the heirs also of both these my sons may always take the income from time to time and may divide and take the income."

The words which I have italicised above have been rendered by the official translator as "in the event of the decease of my wife Navivahu," but there is

no contingency in the vernacular words used,—they are simply "on the death" ("*kasa rasae*")

To proceed with the will In clause 10 it provides "Of the parties to whom I have directed legacies to be given according to what is written above, *if any one should die*, which God forbid, then the owner of that legacy shall be the son or sons, or if there should be no sons or daughters of the deceased, then the amount of that legacy shall be *received by my heirs who may be living*" I call attention to this clause solely with regard to the words italicised above which are in the vernacular "*koine kasa thay*," clearly indicating a contingency, and meaning that if one of the legatees named in the will should die before the testator, then the legacy should be taken, &c

The next clause requiring notice is the thirteenth It begins by dealing with the business of Shah Tapidas Varajdas and Co, in which testator had two shares and his son Damodardas had one share It proceeds "I shall make Dayabhai a partner in Shah Tapidas Varajdas and Co in my life-time Dayabhai will get a small share therein. *but on my death* my sons Damodardas and Dayabhai both persons remaining joint shall carry on the management of the aforesaid Shah Tapidas Varajdas and Co In the same the shares of these two persons are half and half" The words italicised above are as before simply "*mari kasa rasae*" [8]—*i e*, on my death Then the will after dealing with the commission money received by Shah Tapidas Varajdas and Co as secretaries and treasurers of the Alliance Cotton Manufacturing Company, Limited, proceeds (to give the closest literal, though somewhat uncouth, translation of the Gujarati)

"Afterwards giving to all what is written in this will, all the residue of the estate (*iskamat*) the whole of it should be divided and taken in equal shares by my sons Damodardas and Dayabhai, and if God should bring it to pass and a son should be born to my wife Navivahu, then the property shall be divided and taken in three shares Such sons as there shall be to these two sons shall not have the power to claim during the life time of my above mentioned two sons On their death are his heirs (there is an ellipsis here—the Gujarati is simply, '*teoni kasa rasae tena varaso che*'), what I having written in this will have given to two persons my sons and what is written in this will with full detail according to that my sons Damodardas and Dayabhai two brothers should divide and take, and on the death of the two sons (*kasa rasae*) *he who may have issue sons that issue is in every way the heir of his father's property, and if in the life-time of the two above mentioned sons one should not have issue sons, then on his death, if my other son should be alive he should get all the estate cash and whatever else there may be*, in that no son can raise a dispute And if of my two sons one should have a daughter, then the one daughter or if there be more to her should give (the testator meant 'should be given') Rs 25,000, and to my son's wife should give Rs 15,000 *As to the rest, whichever son of mine may survive (hayatimo hoe) should get all that is given by me, and should there be no survivorship of that child and should he have a son or sons, then he (or they) should get all according to what is written above*, in that no one can raise an objection"

After some further provisions which it is not necessary to recapitulate, the will proceeds in the 18th clause—

"On the legacies and 'estate' and other property mentioned in this will to be given being given according to what is written in this will and on setting apart *dharmada*' and the immoveable and moveable property of every kind, ornaments, jewellery and cash to my two sons Damodardas and Dayabhai I of my free will and pleasure give all that property, they should divide and take in equal shares But should God bring it to pass, and my wife Navivahu should have a son, then they should divide in three shares, or should a daughter come, then according to what I have written to be given in this will to my daughters Devali and Kiki there should be given to her In that no one can raise any objection."

After some other miscellaneous provisions, the will ends by a recital that "the whole of whatever kind of property I possess I myself have acquired by the grace of God." This is not denied.

Now first to deal with the residue which was apparently the bulk of the property left by the testator. What were his inten-[9]tions? At first sight the answer is clear:—to give a moiety to each of his two sons Damodardas and Dayabhai. Both in the thirteenth and eighteenth clauses he contemplates a third son being born to him, and in that event the three sons were to take each one-third of the estate, but there is not a single word limiting the estate to be taken by each of these three sons; therefore each would have taken his share absolutely. Possibly the testator did not think it probable that another son would be born to his wife Navivahu, but the fact that he made no further directions which can be taken as limiting the estate given to each of his three sons should he die leaving three, indicates his intention that in any case his sons who should survive him should take an absolute estate in their shares. Do the further directions cut down the devise as regards the estate of the two sons named in the will? In the thirteenth clause the testator passes from the possibility of there being a third son born to him, and directs that the sons of his two sons Damodardas and Dayabhai should not have the power to claim during the life-time of their fathers. The testator apparently meant that his grandsons could not insist on a partition during their father's life-time. That is a truism. The property being self-acquired and devised to Damodardas and Dayabhai their sons would have no right to insist on partition. There was no provision, it may be remarked, directing that Damodardas and Dayabhai should not, if they chose, partition with their own sons.

Then we come to the words "on their death (*i. e.*, on the death of the two sons) are his heirs" This can only mean that the sons of Damodardas are the heirs of Damodardas and the sons of Dayabhai are the heirs of Dayabhai. Then the will repeats that his two sons should take all the estate in equal shares, and provides that on their deaths the male offspring should be in every way the heir of his father's property. There is no attempt to give the male offspring of Damodardas and Dayabhai anything less than an absolute estate of inheritance.

Then the will provides that if either of his sons Damodardas and Dayabhai should not have, in the life-time of both, male offspring, then on the death of the sonless son the surviving son should take all. This is like the well-known case of *Sreemutty* [10] *Soorjeemoney Dossee* v. *Denobundoo Mullick*, 9 Moo. I. A., 123, in which there was a gift of one-fifth of the testator's property to each of his five sons, with a gift over in the event of any of the five sons dying without a son or son's son to the surviving sons. As all the five sons were alive at the testator's death, the gift over on the subsequent death of one of the sons was held to be good. So here; it is true that the contingency is not that either Damodardas or Dayabhai should die without leaving a son or son's son living at his death, but that either should die without having had a son in the life-time of both. But that does not make the gift over the less good in law. It is to take effect upon an event which is to happen, if at all, immediately on the close of a life in being, and the gift over is to a person in existence at the time of testator's death. As when the will was executed one of the testator's sons had already had a son born to him, one would have expected that the will would simply have provided that should Damodar not have a son born to him, his estate should go over. But we must take the words as we find them. They are literally as shown above. The official translation is not quite accurate, but the sense of this passage is fairly given.

Next we come to the provision that should either of the two sons have a daughter or daughers, then to her or them Rs. 25,000 are to be given and to the son's widow Rs. 15,000; the rest should be taken by the surviving son or his son or sons if he has not survived. The only reasonable interpretation to be put upon this passage is that the testator meant that if either Damodardas or Dayabhai died having had no son born to him in the life-time of himself and his brother, but leaving a daughter or daughters and widow, then the daughter or daughters and widow should not succeed to the share of the deceased, but should get specified legacies, and that the residue of the property of the deceased should go over to the surviving son, or should he not be alive, to his son or sons. In short, the will in this respect was almost identical with the will in the case just quoted. It is unnecessary to discuss the validity of the gift over to the son or sons of the other brother. At present Damodardas has not had a son at all, and Dayabhai has had one son only, the second defendant, born in [11] testator's life-time. But it is clear, if the above interpretation of the will is correct, that Damodardas and Dayabhai have an absolute estate in their shares of the residue of the testator's property, that Dayabhai's absolute estate can never be divested, because he has had a son born in the life-time of both Damodardas and Dayabhai, and that the absolute estate of Damodardas may be divested, because he has not had a son born to him. I am asked by the sixth issue to declare that neither Damodardas nor Dayabhai has any right to alienate his share of the residue beyond the term of his natural life. But it is clear that Dayabhai is absolute master of his share, and as to Damodardas, the only limitation of his absolute estate is the contingency that he should not have a son born to him in the life-time of himself and Dayabhai; it has not been contended that it is impossible for him to have a son.

In the *Mullick's* case quoted above the Privy Council held (6 Moo. I. A., 526, at p. 552), that it was safe to conclude that the intention of the testator was that his sons should in any event enjoy during their lives the income of their shares of his property. That was as far as it was necessary to go for the determination of the question before the Court. The Supreme Court of Calcutta held (*ibid*, at p. 537) that the will gave to the deceased son an absolute interest subject to be divested in the event which happened, and see Sir B PEACOCK'S remarks on this case in his judgment in the *Tagore* case, 4 Beng. L. R., O.C.J, 103 at p. 192. So here if there was no intention of the testator to give his residuary estate to his two sons for their lives only, with remainder to their sons and the gift over in the event described above, then the Court cannot declare that Damodardas has only a life-estate in his share, because no son has up till now been born to him. Can it be said that it appears from the will that only a restricted interest was intended for Damodardas and Dayabhai? The testator never once said directly in the will that he gave the residue in equal shares to his two sons for their lives He knew well enough what a life-estate was. In the eighth clause he directed that his wife should enjoy the income of certain house property during her life-time, and he distinctly prohibited alienation of the said [12] property. With regard to the residue, he made no such provision. This shows the difference between this case and the *Tagore* case, L. R., Ind. Ap. Sup. Vol., 47 at pp. 77, 78, and the case of *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhareswar*, L. R., 10 Ind. Ap., 51 at pp. 58, 59. Here there was no gift of the residue to Damodardas and Dayabhai for the defrayment of certain pious acts, providing that they, their sons, grandsons, and other descendants in the male line, should enjoy the same, and that if either of them died without leaving a male child, then his share should devolve on the survivor and his descendants, and not on

the other heirs of the deceased. Here there was simply a gift to *A* and *B* with a direction that the sons of each should be the heirs of their father, not that the moiety of the residue devised to *A* should on *A's* death go to *A's* son or sons, but that *A's* son or sons should be in every respect the heir or heirs of *A's* estate. Of course, the testator could not validly direct who should take any subsequently self-acquired property of his two sons. But if we reject as void all reference to anything but the testator's estate still the language is important as showing that the testator's intention was not to devise and bequeath certain properties to *A* for life with remainder to *A's* sons, but rather an absolute estate to *A* and his sons, defeasible should *A* die without ever having a son. That is more like the case of *Bheobun Mohini* v. *Hurrish Chunder*, L. R., 5 Ind. Ap., 138, than it is like *Tarakeswar Roy's* case quoted above, L. R., 10 Ind., Ap. 51.

Taking the will as a whole, it appears that the testator intended to convey more than a life-estate to each of his two sons. He intended to convey an absolute estate to each son defeasible on no son being born to either devisee during the life-time of both. That is an estate which the Hindu law does not prohibit. No doubt the testator did (if my interpretation is correct) contemplate the daughters (if any) of Damodardas and Dayabhai being shut out should those daughters not have a brother or brothers born in the life-time of their father and uncle. But that was all. Thus no inference arises that the testator had really an estate tail in contemplation. The only argument which occurs to me (it was not put forward in such argument as there was at the bar) as [13] showing that the testator may have intended to give only life-estates to his two sons is that he made them trustees as well as executors. But that may have been (as the testator thought) for the purposes of the will other than the devise of the residuary estate. For all these reasons, I cannot say that the spirit of the will is strong enough to overcome the letter and that the absolute estates apparently conferred on Damodardas and Dayabhai in their shares in the residuary estate must now be declared to be life-estates only.

It only remains to deal with the provisions of the eighth clause. Two interpretations are open. Either it provides that Damodardas and Dayabhai and their heirs should on Navivahu's death enjoy the income of the property, in which case Damodardas and Dayabhai would be entitled to the property itself (Act X of 1865, section 159, illustration C), or else it is a gift to Damodardas and Dayabhai for their joint lives and remainder to their heirs, which would be void for uncertainty and then it would fall into the residue. I accept the latter interpretation, because though there is no direction that the sons should enjoy the income during their lives, as was the case with Navivahu's enjoyment, still the enjoyment is apparently burdened with the defrayment of certain religious and charitable expenses, and thus the intention of the testator was, it seems, that his sons should have a life-estate in the income. They are also entitled to it as part of the residue—and their interest in the residue is as shown above absolute

My findings, therefore, on the issues will be—

1 In the affirmative—the first defendant's interest being defeasible in a certain event.

2. In the negative.

3. In the affirmative—the first defendant's interest being defeasible in a certain event

4. In the negative—not on the death of the testator.

5. In the negative—the Court cannot say what will be the interest of the second defendant in the properties in question after the death of the plaintiff and the first defendant.

[14] 6. In the affirmative—subject to the fact that first defendant's interest is defeasible in a certain event.

All costs to come out of the estate.

The first defendant Damodar appealed and contended—

1. That his share in the estate was not defeasible in any event.

2. That the house mentioned in clause 8 was on the death of Navivahu undisposed of by the will, and that he and the plaintiff then took it as co-parceners.

3. That if the house fell into the residue on the death of Navivahu, then that he and the plaintiff took moieties absolutely.

4. That he and the plaintiff each took a moiety of the residue absolutely and not subject to defeasance in any event.

5. That at all events he and the plaintiff took identical interests in the residue, whether absolute or otherwise.

*Starling* (Acting Advocate-General), *Scott* and *Lowndes*, for the Appellant (Defendant No. 1).

*Macpherson* and *P. M. Mehta*, for Respondent No. 1 (Plaintiff).

*Branson* and *Jamietram Nanabhai*, for Respondent No. 2 (Defendant No. 2).

The following authorities were cited:—*Rogers* v. *Rogers*, 7 W. R., 541; *Wright* v. *Stephens*, 4 B. and Ald., 574; *Howard* v. *Howard*, 21 Beav., 550; *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 Moo I. A., 526; *Bhoobun Mohini* v. *Hurrish Chunder Chowdry*, L. R., 5 I. A., 138; *Kumar Tarakeswar* v. *Kumar Shikhareswar*, L. R., 10 I. A., 51.

**Farran, C.J.**:—Upon this appeal we have to determine whether the construction put by the Division Court upon the eighth clause of the will of the testator Tapidas Varajdas and upon the thirteenth [15] and eighteenth clauses of the same will read together is correct; and (if not) what construction should be placed upon them.

Before reading the clauses, we mention the few facts which it is necessary to bear in mind when considering their meaning. Tapidas, the testator, was a Hindu inhabitant of Bombay possessed of considerable self-acquired property. The will in question was made by him in Bombay. It bears date the 26th May 1885. His family then consisted of his wife Navivahu, his two sons Damodar and Dayabhai, who were both married, and of whom one, Dayabhai, had a son Karsandas, and two daughters Bai Divali and Bai Kiki. He apparently contemplated the possibility of having further children born to him. No change, however, took place in his family before his death. He died on the 31st May 1883. His widow Navivahu has since died. Her death took place on the 12th of August 1887. It is only necessary to add that Dayabhai (the plaintiff) has still only one son, the second defendant Karsandas, while Damodar, the first defendant, has never had a son. The testator appointed his sons Damodar and Dayabhai executors and trustees of his will. They duly proved it on the 12th November 1887. The rules laid down in the Indian Succession Act are applicable to the construction of its clauses.

By the eighth clause the testator after an elaborate description of his two contiguous dwelling-houses provides that his wife Navivahu shall have a life-interest in them, with absolute powers of disposition over their rents and profits. He then proceeds to deal with them after her death as follows:—

"In the event of the decease of my wife Navivahu, my sons Bhai Damodar and Bhai Dayabhai may take in equal shares half and half the income that may be received, and may

enjoy and may expend and may make donations for religious and charitable purposes, and the heirs also of both these my sons may always take the income from time to time, and may divide and take the income. To the same no one has any claim or title."

We think that Mr. Justice CANDY is correct in holding that under this clause Damodar and Dayabhai take only a life-interest in the houses as tenants-in-common, and that the ulterior interests therein not being validly disposed of, fall into the residue. Though the gift of the income of the property in general terms carries with it a gift of the property itself, yet that is only where [16] the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration (Indian Succession Act, section 159). Here the power of disposition over the income given to Damodar and Dayabhai is in identically the same terms with the power of disposition over it given to the widow, who clearly had only a life-estate given to her, and the testator manifests his wish that the heirs of each son should enjoy the income in the same way as the sons. The use of the word "also" in connection with the heirs seems to us to indicate an intention on the part of the testator that their enjoyment should be something distinct and separate from that of the sons. On the whole, we think that the testator when he gave the income of the houses to his sons equally did not intend to give to them the houses themselves, but desired that their enjoyment of the houses should be in point of time co-extensive with their respective lives.

The bequest of the residue gives rise to more difficult questions. Though the official translation of the clauses 13 and 18 does not materially differ from the translation adopted by Mr. Justice CANDY, we refer mainly to the latter as it is more literally accurate than the translation made in the Translator's Department. The translation which we allude to is at page 88 of the Paper Book. It runs thus :—(His Lordship read the thirteenth clause as given in the judgment of CANDY, J., *supra* page 8, and continued).

Upon the terms of that clause it is contended for the appellant that Damodar and Dayabhai take absolute estates in the residue as tenants-in-common, and that the defeasance does not operate. The death of one brother issueless in the life-time of the other refers, it is argued, to the period anterior to the death of the testator, and as both survived him, the defeasance does not in any event take place. It is also contended for the appellant that, even if this be not so, the provisions of clause 18 over-ride those of clause 13, and confer an absolute indefeasible estate upon each of the brothers.

For the respondent Karsandas, on the other hand, it is contended that Damodar and Dayabhai take only estates for their [17] respective lives in the residue. Counsel for the respondent Dayabhai, who had in the Division Court contended that the brothers only took life-estates in the residue, and who had obtained a decree more favourable to his client than he had contended for, supported the judgment of the Division Court, which decided that Dayabhai and Damodar took respectively estates absolutely in a moiety of the residue, but liable to be defeated and to pass over to the surviving brother in the event of either of the brothers dying without leaving a son. Three alternative constructions have thus to be considered.

There is also a minor question as to whether the defeasance clause or the gift over comes into operation in the event of a brother dying without leaving issue or without having had issue.

The appellants' contention based upon section 111 of the Succession Act illustrated in the English cases cited by Mr. Starling (*Rogers* v. *Rogers*, 7 W. R., 541; *Wright* v. *Stephens*, 4 B. and Ald., 574; *Howard* v. *Howard*, 21 Beav., 550; *Edwards* v. *Edwards*, 15 Beav., 357 at p. 361), hardly arises when we

refer to the translation of the will which we have read. In the official translation, the death of one brother in the life-time of the other appears as a contingency "in the event of his decease," but that is a form which for some inscrutable reason is almost always adopted by our translators. It is a sort of traditional form of translation. In the original, no contingency is contemplated. The correct translation as given in Mr. Justice CANDY'S version is "on the death." Accordingly we are of opinion that upon the proper construction of clause 13 of the will on the death of one brother before the other "without having had issue sons" or "without having issue sons," whichever be the correct construction of the passage, the gift over to the surviving brother would take effect, although both brothers survived the testator.

With regard to the eighteenth clause of the will, we do not regard it as being substitutionary for the thirteenth clause or as overriding the latter. It appears to us rather to be a comprehensive summing up or recapitulation of the contents of the whole will and an emphatic declaration by the testator of his former dis-[18]position in favour of his sons, with the addition of a provision for a future daughter should one be born to him—a provision which he had forgotten to make when penning clause 13, than to indicate any change of purpose on his part or wish to vary or control what he had previously directed. The two clauses must, we think, be read together and reconciled, and cannot be treated as antagonistic, but as mutually explanatory of each other. The general expression contained in clause 18 does not, we think, defeat or affect the gift over between the brothers which is set out in clause 13.

We have next to consider the extent of the estate which Damodar and Dayabhai take in the residue. The ellipsis in clause 13 as translated by the learned Judge does not occur in the official translation The translator introduces the pronoun "they" as the predicate to the verb "are," but whether the genius of the language admits of this, or whether there is really an ellipsis, the repetition of the same phrase later on in the clause shows that the sense is correctly rendered by our Court translator. We have then twice repeated in the same clause this limitation, "on their death their sons are their heirs" or, as it is put later on, "on the death of both of my sons, the sons of him who may have sons are the heirs in every respect of his father's property." The "both" in this sentence should evidently, as in the eighth clause, be read distributively, and the grammatical meaning of the limitation is "on the death of each of my sons, his sons, or issue sons are the heirs of his father's property," meaning the property which has come to his father under the will.

It is now contended for the second respondent, as in the lower Court it was contended for both the respondents, that full effect should be given to this direction, which can only be done by treating it as limiting the half shares of each of the testator's sons to their sons respectively on their father's death; and that it should be read as amounting to a gift of a moiety of the residue to the sons of each of his sons on the death of their respective fathers. The result, of course, of giving this effect to the testator's directions would be to reduce the absolute estate which, subject [19] to defeasance, the lower Court has held that each of the sons of the testator is entitled to, to a life-estate. There is, we think, much force in this contention. It is common knowledge that Gujarati testators seldom use direct words of gift when disposing of the bulk of their estate: a common form used by them is "As long as I live I am the owner and on my death my son, or my wife, &c., is" (sometimes) "the owner" or (sometimes) "the heir." Such expressions are usually construed by the Court as gifts. It would not, therefore, we think, be opposed to the

genius of the language to interpret the expression in the present will "that the sons are the heirs of their father's property" as a limitation in favour of or as a gift to the sons. And, if possible, we ought to adopt that construction of the words assuming them to be susceptible of two meanings which will give some effect to them rather than that which will give none—Indian Succession Act, section 71.* The provision in favour of the daughters of the sons of the testator affords a further clue to the intention of the testator. If a son has daughters only, they are to have a pecuniary legacy of Rs. 25,000, while if there are sons, they are to be the heirs of their father's property. The gift over of each brother's estate in the event of his being sonless, or dying without leaving sons, points also in the same direction, as also does the appointment of the sons as "trustees" as well as executors. On the whole we think that to hold that the testator's sons take only life-estates in the property which they are to divide and take under clause 13, and which he of his free will gives them by clause 18, and which under the same clause they are to divide and take, gives effect better to the intention of the testator as he has declared it, than to hold that Damodar and Dayabhai take absolute estates which will enable them to will away the whole property to strangers or to favour their daughters at the expense of the sons.

We have next to consider the effect of the gift over and under what circumstances it takes place. It only, we think, comes into effect if either of the brothers dies without having or having had sons. The words are "and on the death of the two sons, he who may have issue sons that issue is in every way the heir of his [20] father's property, and if in the life-time of the two above mentioned sons, one should not have issue sons, then on his death, if my other son should be alive, he shall get the estate." The most natural meaning to attach to this limitation and its plain grammatical one is that on one brother, not having male issue in the lifetime of the other, dying, the estate of the brother so dying, subject to the provision for his daughter and widow, passes to the surviving brother. There is no rule of law which prevents this gift over from taking effect. The birth of a son, however, to either of the sons makes such son the inheritor of his father's estate and the gift over does not come into operation. So far no difficulty arises. The last sentence of the clause apparently puts the son of a son in the place of his father for the purpose of receiving the gift over.

The result, then, is this—Damodar and Dayabhai each takes a life-estate in a moiety or half share of the residue. The reversion of Dayabhai's share is now vested in his son Karsandas, and as to that share no further question arises. If Damodar die without having a son, his moiety will devolve upon his brother Dayabhai, or, if Dayabhai be then dead, on Karsandas.

It would be premature for us to determine what will be the result if Damodar shall have a son. We can make no direction as to the rights (if any) of such son which would be binding on him, or as to the rights (if any) of any further sons of Dayabhai if he should have other sons.

The decree will be amended accordingly. The parties respectively to have their costs out of the estate.

On the 20th March 1896, the appeal was called on to speak to the minutes of the decree, when the fact that the appellant Damodardas had had two sons, both of whom were born and died before the date of the said will, was

Where a clause is open to two constructions,* that which has some effect is to be preferred.

* [Sec. 71:—Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred.]

brought to the notice of the Court. This fact was not known at the hearing either of the suit or of the appeal to any of the counsel instructed in the case, and was only disclosed after the above judgment of the Appeal Court was delivered.

[21] By consent of counsel for all parties it was arranged that the Court should give its decision on the new facts as if the case had been argued in review upon such facts.

After consideration the Court delivered the following **judgment**:—

*27th March.* **Farran**, C.J.—When minutes of the decree were spoken to on Friday last, it was pointed out that there was an inconsistency in the judgment as to the circumstances under which the gift over in the event of either of the brothers dying without "issue sons" took effect. We have struck out the words from the judgment which occasioned the inconsistency. It was at the same time brought to our notice that Damodar had had two infant sons, who were born and died before the date of the will, one having been born on the 1st July 1873, and having died on the 22nd July 1873; the other having been born on the 22nd November 1880, and having died on the 12th February 1881. This circumstance was unknown to the Court and to counsel when the appeal was argued. The importance of this change of circumstances upon the construction of the substitutionary clause was obvious. To avoid the necessity of an application for a review, counsel agreed that the matter should be considered by the Court in the same way as if a review had been granted on this ground.

We have now to construe the substitutionary clause having regard to this circumstance. At the time when the testator made the provision that "on the death of the two sons he who may have 'issue sons' that issue is in every way the heir of his father's property, and if in the life-time of the two abovementioned sons one should not have 'issue sons,' then on his death, if my other son should be alive, he shall get all the estate," each of his sons had had "issue sons." If the expression "have issue sons" is read as "have issue sons at the time of death" or as equivalent to "leave issue sons," a sensible interpretation according with the actual circumstances is given to the provision. If, on the other hand, "have issue sons" is read without reference to the time of death, or as equivalent to "have had issue sons," the provision, having regard to the actual circumstances, becomes meaningless. As both the sons had had "issue sons" at the date [22] of the will, there could not be (if the expression is taken in this latter sense) any contingency at all. But it is plain that the testator contemplated a contingency. We think the expression ought to be read so as to give it some effect, and not in such a way as to render the whole provision inoperative. Here there is a reason derivable from the will for reading "have issue" as meaning "leave issue," which was wanting in the case of *Gurusami* v. *Sivakami*, L. R., 22 Ind. Ap., 119. There their Lordships say: "There is absolutely nothing on the face of the will to suggest a secondary meaning. The words 'have issue' are often read as meaning 'leave issue', but not without some reason derivable from the will." Reading, then, the expression "have issue" in the sense which we have indicated, the result expressed at the end of our judgment as to the reversion of Dayabhai's share being now vested in his son Karsandas and the succeeding paragraph must be struck out. Minutes of the decree will be settled accordingly.

The following were the minutes of decree as finally settled:—

This Appellate Court doth vary the said decree dated the 28th day of March 1895, and in place and lieu thereof doth pass the following decree and doth declare that the appellant Damodardas Tapidas and the first respondent Dayabhai Tapidas take a life-interest only

as tenants-in-common in the two contiguous dwelling-houses (other than the old house dealt with by the will of Tulsidas Varajdas) at Kalbadevi Road mentioned in clause 8 of the said will, and that the ulterior interest therein not having been validly disposed of fall into the residue; and this Appellate Court doth further declare that the said appellant Damodardas Tapidas and the first respondent Dayabhai Tapidas each takes a life-estate in a moiety or half share of the residuary estate of their deceased father Tapidas Varajdas; and this Appellate Court doth further declare that if the said appellant Damodardas Tapidas die without leaving a son, his moiety in the said residuary estate will devolve upon his brother the said Dayabhai Tapidas if then alive or, if the said Dayabhai Tapidas be then dead, then upon his son the said respondent Karsandas Dayabhai (if then alive), and that if the said Dayabhai Tapidas die without leaving a son, his moiety in the said residuary estate will devolve upon his brother the said Damodardas Tapidas if then alive; and this Appellate Court doth lastly order that the costs of all the parties to the suit and this appeal, including the costs of the said review of judgment and speaking to the minutes of the decree when taxed as between attorney and client and noted in the margin hereof, be paid out of the property of the deceased.

Attorneys for the Appellant:—Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for the Respondents:—Messrs. *Chitnis, Motilal and Malvi.*

NOTES.

[The Privy Council reversed this decision in (1898) 22 Bom., 833.]

## [23] ORIGINAL CIVIL.

*The 19th March, 1896.*

PRESENT:

MR. JUSTICE CANDY.

Purshotamdas Tribhovandas............Plaintiff

*versus*

Purshotamdas Mangaldas Nathubhoy............Defendant.*

*Marriage—Betrothal—Contract of marriage—Suit against father of betrothed girl to have betrothal declared void and for damages for breach of contract—Kapole Bania caste.*

The plaintiff, who had been betrothed to the defendant's daughter Kamlavanti, sued for a declaration that unless the defendant was willing that the marriage should be performed before the expiration of the month of Baishakh 1952 (May-June 1896) the contract for the marriage should no longer be binding on the plaintiff and that the betrothal was void, and for Rs. 25,000 damages for breach of the contract of betrothal and marriage.

The defendant pleaded that his daughter Kamlavanti was not willing to marry the plaintiff within the period mentioned, and that he had no right to force his daughter against her will. At the trial Kamlavanti stated that she was unwilling to be married for three or four years. The Court found that in the Kapole Bania caste, to which the parties belonged, marriages ordinarily take place when the bride is between twelve and fifteen years of age. Kamlavanti was born on the 2nd May 1881, so that she was nearly fifteen at the date of suit (16th January 1896). Before filing the suit the plaintiff had called upon her and the defendant (her father) to fix a date for the marriage, but the defendant had declined to do so on the ground that his daughter did not wish to marry at that time, and that he would not force her to marry against her will.

* Suit, No. 26 of 1896.

*Held*, that the plaintiff was entitled to the declaration prayed for. The marriage of Hindu children is a contract made by the parents, and the children themselves exercise no volition. This is equally true of betrothal, and there is no implied condition that fulfilment of the contract depends on the willingness of the girl at the time of marriage.

It was contended that plaintiff could not obtain damages; that defendant had not broken the contract, the plaint assuming that the contract of betrothal was still in force, and the defendant having a *locus pœnitentiæ* until Vaishakh 1952 (May-June 1896).

*Held*, that the plaintiff was entitled to damages. There was practically a repudiation of the betrothal. The plaintiff's willingness to marry Kamlavanti at any time before the end of Vaishakh (May-June) did not disentitle him to damages, seeing that Kamlavanti had declared her unwillingness to be married to plaintiff then, and the defendant had declared that he could not compel her to change her mind.

THE plaintiff had been for eight years betrothed to the defendant's daughter. He complained that the defendant now refused to fix a date for the marriage, alleging that the girl did not [24] wish as yet to become the plaintiff's wife. In January 1896, the plaintiff brought this suit, praying that unless the defendant was willing to have the marriage performed before the expiration of Vaishakh, Samvat 1952 (May-June 1896), the contract for the same might be declared not binding on the plaintiff, and the betrothal void. It was alleged in the plaint (and not denied in the written statement) that after Samvat 1952 there was no day on which the marriage of a Hindu could be lawfully performed until the end of Samvat 1953, *i.e.*, for a period of eighteen months. The plaintiff also claimed Rs. 25,000 as damages for the loss of reputation in the caste, which, he alleged, he would sustain if the contract were not carried out.

From the evidence given at the hearing, it appeared that the plaintiff was betrothed to the defendant's daughter (Kamlavanti) on the 15th January 1888, the intention of the parties being (as the Court found) that the marriage should be solemnized when the girl attained the age at which according to the custom of their caste (the Kapole Bania caste) betrothed girls were ordinarily married, *viz.*, between the age of twelve and fifteen. Kamlavanti was born on the 2nd May 1881. At the date of betrothal she was over six and a half years of age, and the plaintiff was still at school. At the time of suit, Kamlavanti was fourteen years and six months old and the plaintiff was twenty-four years of age.

The betrothal was arranged between the plaintiff's mother Ramkorbai and uncle Keshavdas (who acted for him) and the defendant, who acted on behalf of his daughter Kamlavanti. Early in the year 1895 the defendant was called upon to fix a date for the marriage, but he declined to do so on the ground that Kamlavanti did not wish to marry at that time, and that he would not force her to marry against her will. On the 18th December 1895, the plaintiff wrote to Kamlavanti, requesting her to name an early day for the marriage, and on the same day Ramkorbai's solicitor wrote to the defendant on her behalf and on that of the plaintiff requesting him to "fix some day in the month of Maha Fagan or Vaishakh (February to June) (after which no marriage could be performed for eighteen months) for the celebration of such marriage." No reply was given to [25] that letter, and this suit was filed on the 16th January 1896, praying for the relief above stated.

The suit was heard by CANDY, J.

*Lang* (Advocate-General), *Macpherson* and *Lowndes* with him, for Plaintiff:—Defendant is liable to carry out his engagement. Is he ready and willing to carry it out? There is an implied condition always in such a contract that it should be carried out in reasonable time—Leake on Contracts (3rd Ed.), p. 723. In cases under Hindu law, the Court will consider what is

the usual age of marriage for females in the particular caste. Why should plaintiff have to wait when the girl is admittedly fully grown?

If the contract is broken, the plaintiff is entitled to damages and is entitled to sue for them now as the defendant's admission of his inability to carry out the contract gives a right of action—*Frost* v. *Knight*, L. R., 7 Ex., 111; *Cherry* v. *Thompson*, L. R., 7 Q B., p. 573.

The defendant is not freed from liability by the refusal of the girl. The consent of the minor is not necessary—Mayne's Hindu Law (5th Ed.), para. 86.

As to the amount of damages, *Umed Kika* v. *Nagindas*, 7 Bom. H. C. Rep., 122 (O. C. J.); *Smith* v. *Woodfine*, 1st C. B. (N. S.), 660; *Mulji Thackersey* v. *Gomti*, I. L. R, 11 Bom., 412. We say we are entitled to substantial, if not exemplary, damages.

*Inverarity* (*Scott* with him) for Defendant:—This is a suit of an unprecedented character. The plaint is based on the assumption that the contract of marriage is still in force. No damage has as yet been sustained. And a suit does not lie for threatened damages—*Dreyfus* v. *Peruvian Guano Co*, 43 Ch. D., 316 There is no injury here alleged at date of suit, and no proof of loss of reputation prior to suit; on the contrary one witness said that a lower opinion of the plaintiff prevailed since he has filed the suit. All the cases cited are cases where the contract is repudiated before the time for performance arrives. Here defendant has until next May to get Kamlavanti's consent to the performance of the marriage. We do not wish to hold the plaintiff to his contract if he is unwilling to wait, and will restore him his "*palla*" and [26] presents. But we deny that there has been or is any breach of contract on our part. All contracts for marriage among Hindus are subject to the condition that the girl is willing to be married. The only contract in such cases is to *give* the girl in marriage. *Shridhar* v. *Hiralal*, I. L. R., 12 Bom., 480, shows that you cannot compel a girl to marry. Our main contention is that a father, who will not force his daughter to marry, is under no liability for breach of contract of betrothal, even if she declines to marry at all. A bachelor can adopt a son.

**Candy, J.**:—The facts of this case are simple, but the question at issue is of an admittedly unprecedented character. The parties belong to the Kapole Bania caste, of which the well-known citizen of Bombay, the late Sir Mangaldas Nathubhoy, was the head. Defendant is the second son of the late Sir Mangaldas. On 15th January 1888, his daughter Kamlavanti was betrothed to the present plaintiff. The evidence of Dr. Blaney, which is accepted by both sides, shows that that gentleman at the earnest request of defendant and of defendant's wife induced the plaintiff's mother Ramkorbai and her brother Keshavdas to agree to the contract of betrothal. Plaintiff's father was then dead. It is said that Sir Mangaldas, and not defendant, was really the contracting party. But this is not proved. No doubt Sir Mangaldas as head of the undivided family did take some part in the proceedings, which resulted in the contract of betrothal; and the "*palla*" money (Rs. 401) was paid over to him. But it is clear that defendant, who as the father of the girl is according to Hindu law the person who has the right to dispose of her in marriage, was the person who actually betrothed Kamlavanti to plaintiff; and he has in effect admitted himself to have been the contracting party, or at least has accepted and approved of the contract. Kamlavanti was born on the 2nd May 1881; so at the time of her betrothal she was a little more than six and a half years old. Plaintiff is now twenty-four years old. At the time of his betrothal he was still at school.

At first things apparently went smoothly. There were the usual visits paid by the girl to the house of plaintiff's family, [27] and by plaintiff to the house of defendant. But about three years ago their visits ceased. The exact cause of this has not been satisfactorily established. No doubt the ostensible reason may have been that defendant and his wife refused to let their daughter visit at plaintiff's house unless plaintiff paid as many visits to their house; and Keshavdas says this is not according to the custom of the caste, and he and Ramkor did not send plaintiff. But I think that most probably there was some cause of tension between the families which has not been disclosed. Defendant says that plaintiff's family wanted money from him. I doubt whether any such demand was really made, or if made whether it resulted in friction. It is useless to speculate as to what was the true cause of dispute. Parties sometimes litigate in this Court without disclosing even to their own legal advisers the full facts of their case. This much seems clear that the two families were not on good terms before any question arose as to fixing the date of plaintiff's marriage with Kamlavanti.

It is alleged on plaintiff's behalf that at the time of the contract of betrothal it was agreed that the marriage should take place when Kamlavanti attained the age of twelve years. The evidence of Keshavdas on this point is far too vague to establish such a term in the contract. Defendant denies it; and I have no doubt that the intention of the parties was simply that the marriage should be solemnized when the girl attained the age at which, according to the custom of the caste, betrothed girls are ordinarily married. As to what that age is, there is practically no dispute. Defendant's witnesses Kaliandas and Devidas admitted that the majority of girls are married after they reach the age of twelve and before they are fifteen. There is no rule in the caste by which a girl must be married before she reaches a certain age. There is often a difficulty in obtaining suitable husbands. and parents who are particular in this respect may see a daughter reach the age of fifteen or become older still before a suitable husband has been found for betrothal and marriage. But as regards a girl who has been betrothed (as Kamlavanti was) when she was of a very tender age, and thus has a husband ready at hand, there can be no doubt that ordinarily the marriage is solemnized when the bride is between twelve and fifteen. [28] Exception to this rule may have occurred when the girl is of a delicate constitution or not fully developed in proportion to her years, or when the relatives of both bride and bridegroom are willing that the marriage should be postponed for a time. There is no hard and fast rule; but the ordinary custom of the caste has been clearly established by the evidence in this case.

These being the facts, it remains to consider the conduct of the parties which resulted in the present suit being filed. It appears that about a year ago plaintiff's relatives approached defendant and his wife with a view to the marriage day being fixed; but defendant and his wife replied that they did not intend to give Kamlavanti in marriage just then. Messages on the plaintiff's part having proved fruitless, Messrs. Brown and Moir, solicitors of Ramkorbai, wrote on the 26th April 1895, to defendant giving him notice that, unless he on or before the 29th instant signified his consent in writing to solemnize the marriage during the current month of Vaishakh, and fix a day for that purpose, and otherwise carried out the previously agreed on conditions and arrangements in their entirety, Ramkorbai would treat the betrothal as at an end and would seek to recover from defendant the "*palla*" money and the other moneys from time to time given to Kamlavanti, as well as the damage sustained by Ramkorbai in consequence of the breach of contract, and would have her son betrothed to some other girl. Messrs. Nanu and Hormusji replied for defendant on the 2nd

May that Kamlavanti "does not wish to be married at present, and nothing will induce her to alter her mind. Our client (defendant) therefore cannot accede to your client's wishes . . . If your client should break off the alliance, she will do so at her risk, although according to the custom of the caste he cannot prevent her from doing so." Messrs. Brown and Moir replied to this on the 7th May 1895, that "our client (Ramkorbai) is entitled to know now when she (Kamlavanti) proposes that the marriage should be solemnized, she (Kamlavanti) bearing in mind that our client and her son have already offered to perform their part of the contract, and that they are not bound to wait for this more than a reasonable time, such as is the current month of Vaishakh . . . In default of hearing from your client on or before the 9th instant, [29] the contract will be deemed to have broken, which circumstance will entitle our client and her son to recover damages." Messrs. Nanu and Hormusji replied on the 13th May 1895, "that it is not the case that the objection to the marriage comes from our client and his wife. The objection is on the part of our client's daughter, who, moreover, declines at present to name any particular time for the solemnization of the marriage. Our client cannot be reasonably called upon to force his daughter to declare her wishes on the point, at least till she attains the age of discretion. Under these circumstances . . . if your client and her son break the contract they will do so at their own risk, and our client cannot be held responsible in damages." There the matter ended for a time.

On 18th December 1895, plaintiff addressed a formal letter to Kamlavanti requesting her to name some early day for their marriage, and on the same day Messrs. Brown and Moir wrote to defendant on behalf of Ramkor and her son, the plaintiff: "With a view of giving you a final opportunity of giving your daughter Kamlavanti in marriage to the latter, and celebrating such marriage, we require you to fix some day in the months of Maha Fagan or Vaishakh (after which no marriage can be performed for eighteen months) for the celebration of such marriage, and to give you notice that in default of our hearing from you in the course of the next fourteen days naming such a date, our client and her son will take such steps in the matter as they may be advised." No reply was given to that letter.

The plaint in the present suit was filed on 16th January 1896, the plaintiff (Ramkor's son) praying—(*a*) that unless the defendant is willing to perform the marriage between his daughter and the plaintiff upon some day before the expiration of Vaishakh, 1952, the contract for the said marriage may be declared to be no longer binding upon the plaintiff and the betrothal void and of no effect; (*b*) that unless the said marriage shall be performed as aforesaid, the defendant may be ordered to pay Rs. 25,000 as damages. Defendant replied that it is Kamlavanti who is not willing to marry plaintiff before the expiration of next Vaishakh, and he has no right to force his daughter against her will; and if under [30] those circumstances plaintiff wishes to be relieved from the contract, the (defendant) has no objection to a decree being made declaring the contract no longer binding and the betrothal void; but he (defendant) denies that plaintiff is entitled to damages, and he is willing that the "*palla*" and presents made to Kamlavanti should be returned to the plaintiff. The plaintiff and Kamlavanti have both been examined in open Court. Plaintiff states his unwillingness to wait till after next Vaishakh; while Kamlavanti states that she is unwilling to be married for three or four years.

It is now possible to consider the various arguments which have been ably urged by the learned counsel on both sides. The first and main point on which Mr. Inverarity for defendant took his stand is that a Hindu father who has

betrothed his daughter in marriage, but declines to force her to marry against her will, is not liable for any breach of contract, even though the daughter declares that she will not marry at all. This argument is based on the proposition that all contracts of betrothal in Hindu families are subject to the implied condition that when the time for the marriage has arrived, the girl is willing to be married. The contract is to give the girl in marriage: that involves the willingness of the girl to be given. But to ask the Court to accept this proposition is virtually to ask the Court to disregard the precepts of Hindu law, which treat the marriage of daughters as a religious duty imposed on parents or guardians, and to look at the matter from the purely English point of view, which sees in marriage nothing but a contract to which the husband and wife must be consenting parties. (See the remarks of Sir C. SARGENT, C. J., in *Dadajee* v. *Rakhmabai*, I. L. R., 10 Bom., 301, at p 312.) The marriage of Hindu children is a contract made by their parents, and the children themselves exercise no volition. (West and Bühler, p. 908. See also Mayne, section 88.) If this is true of the marriage, it is equally true of betrothal, and there can be no implied condition that fulfilment of the contract must depend upon the willingness of the girl at the time of marriage. There is no trace of such a proposition to be found in the Hindu law books. In *Umed Kika* v. *Nagindas*, 7 Bom. H. C. Rep., 122, GREEN, J., pointed out (page 134) that according to the Mitakshara (Ch. II, sec. 11, v. 27) a retractation or repudia-[31]tion of a betrothal is authorized if there be good cause for it, and the only good cause there specifically mentioned is "if a preferable suitor present himself." GLOVER, J., also in the matter of *Gunpat Narain Singh*, I. L. R., I Cal., 74, remarked on the same passage that one, if not the only, good cause for retractation of betrothal is said to be the coming of a "preferable suitor." There is no mention of unwillingness of the girl to be married. The idea, however consonant with European ideas, is foreign to the policy of the Hindu law, which vests the girl absolutely in her parents and guardians, and her consent or non-consent cannot be considered by a Court. (Grady's Hindu Law, 7.)

Then there is another aspect in which the case may be regarded. Mr. Inverarity did not specifically quote section 56 of the Contract Act IX of 1881; but doubtless he relied on it when urging that his client could not be liable in damage for declining to force his daughter to marry the plaintiff Section 56 provides that a contract to do any act, which after the contract is made becomes impossible, becomes void when the act becomes impossible. Messrs. Cunningham and Shepherd in their commentaries on the Contract Act have pointed out that in these words a rule is laid down in general terms and for all cases, which is declared in the English authorities as exceptional and applicable to particular cases only. They observe that the term here used is simply "impossible," and, therefore, it may be supposed that, when the act stipulated for becomes impracticable in the ordinary sense of the word, the contract becomes void. Now applying that principle to the present case, it is not open to defendant to say that it is impossible for him to carry out his contract of giving his daughter in marriage to plaintiff within a reasonable time, *i.e.*, before the end of next Vaishakh. The act is neither impossible in itself, nor impracticable in the ordinary sense of the term. No doubt the defendant says that it is impossible, because the girl declares that she will not marry for three or four years, and defendant declares that she will not listen to his persuasion, and he will never consent to force her, his counsel quoting the remark of WEST, J., in *Shridhar* v. *Hiralal*, I. L. R., 12 Bom., 480 at p. 486, that a girl should not be forced into a marriage that would be odious to her. But here apparently the plaintiff is not [32] odious either to Kamlavanti

or to her parents. Though physical force cannot for one moment be thought of, it is no doubt the duty of defendant, according to the terms of his contract, to use to the utmost his persuasive powers, and his position as parent, in order to induce his daughter to be married. He, like many others, may entirely sympathise with her desire to go on with her education, and her unwillingness, therefore, to be hampered by the ties of marriage, and possibly the cares of maternity. But he, like the Court, must also regard the matter from the strictly legal point of view. The contract to give his daughter in marriage has not become "impossible," and, therefore, it has not become void.

There can be no doubt that, if the case be treated according to the English law, the result would be the same. The general rule of law is clear, that a man may by an absolute contract bind himself to perform things which subsequently become impossible, and in default he will have to pay damages for the non-performance of his agreement. The exceptions to this general rule will all be found to be contracts in which the law implies exceptions and conditions which are not expressed The whole question is what the original contract was, and whether it was a contract with or without a condition (See BRAMWELL, B., in *Robinson* v. *Davison*, L R., 6 Exch., 269 at p. 277). Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because when it is an answer to a complaint of an alleged breach of contract, what is meant is that it was not within the contract. (See per HANNEN, J., in *Baily* v *DeCrespigny*, L R., 4 Q B., 180 at p 183). An apt illustration of this principle, and one peculiarly applicable to the present case, is to be found in *In re Arthur; Arthur* v. *Wynne*, 14 Ch. D., 603. There by a marriage settle-[33] ment a husband covenanted on or before a certain date to insure his life He took no steps till just before that date, when his health had become so bad that he was unable to effect an insurance. The question was whether he was relieved from the obligation to insure, or pay damages. The Master of the Rolls, Sir G JESSEL, said (p 609): "It is said that the man's health may fail to such an extent, as it did here, that no insurance office will take the risk. Can I say that such an event was excluded from the contract? Can I say that it cannot be reasonably supposed to have been within the contemplation of the contracting parties? It does appear to me, looking at the whole settlement, though the parties may not have actually had in contemplation the very event which has happened, you cannot say that it cannot reasonably be supposed to have been in their contemplation." The same remarks apply here. Though the parties may not have actually had in contemplation the possibility of Kamlavanti declining to marry when she reached the marriageable age (such possibility as a young lady in that position ever asserting any wishes of her own has apparently never been contemplated), we cannot say that it cannot reasonably be supposed to have been in contemplation The fact is that such an idea would have been dismissed at once with the thought that a father could of course induce his daughter to be married at the proper time. A contract of a father to give his daughter in marriage is analogous to the contract of a father apprenticing his son and binding himself for the performance by his son of all and every covenant on his part. "It is undeniable" (said BLACKBURN, J., in delivering the judgment of the Court in *Taylor* v. *Caldwell*, 3 B. & S., 826, at

p. 836), "that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father. . . Yet the only reason why it would not is that he is excused because of the apprentice's death." In *Boast* v. *Firth*, L. R., 4 C. P., 1, this principle was further illustrated. There to an action for breach of an apprenticeship's deed the father pleaded that his son was by permanent illness, happening after the making of the indenture, [34] prevented from serving the plaintiff during all the term. It was held that this was a good defence, and that both parties must have known and contemplated at the time of entering into the contract that the performance of the services was dependent on the son's continuing in a condition of health to make it possible for him to render them. But I cannot find any apprenticeship case in which a father or guardian was relieved from his obligation on the ground that his son or ward was unwilling to serve as contracted. In *Khooshal* v. *Bhugwan*, 1 Borr., 155, plaintiff sued his betrothed Krishni and her uncles to recover from the uncles damages for loss of character in the caste by their breaking off a marriage contracted between him and Krishni. The Judge of the Surat Adalat passed a decree declaring the contract good and valid, and demanded security of the uncles that they would not marry Krishni, who was then under their guardianship, to any other person. This was affirmed by the Sadar Court. The decree was resisted by the uncles, Krishni positively refusing to marry plaintiff, and her uncles preferring the sacrifice of the penalty entered into in the Zilla Court. The Sadar Adalat consulted its law officer, who replied that a betrothal pronounced valid by the caste cannot be set aside, and the woman on refusal to celebrate the marriage should be compelled by the caste, in whatever manner they think proper, to consummate it, and orders should be given to the caste for the purpose. Before this *vyavastha* was given, Krishni was clandestinely married to some one else, and the caste having been examined declared this last marriage legal. So the Sadar Adalat left the plaintiff to seek redress if he choose, letting him find out the proper course for himself; he had already received the damages sued for, Rs. 1,183, and all costs, and the amount of the penalty bonds was carried as a fine to account of Government. This is the only case which I can find in which the bride's unwillingness to marry the plaintiff is recited. Whether the decision would in all its details be now considered an authority, may be questionable: but there is no trace of a suggestion that the bride's unwillingness to marry the plaintiff could ever deprive the plaintiff of his right to recover damages from the lady's guardians, who were responsible for the [35] contract of betrothal. It may be in the course of time that in some castes a father when contracting to give his daughter in marriage will insert a condition that at the time of the marriage his daughter shall be willing to solemnize the same. In the present state of things such a condition cannot be implied; and thus on the main point my decision must be against the contention raised for the defendant.

The other points can be disposed of briefly. It is contended that defendant has not broken the contract; the plaint assumes that the contract of betrothal is still in force according to the plaintiff's evidence. Defendant has still a *locus pœnitentiæ* till May next. How, then, can plaintiff sue for damages? The answer to that is that plaintiff's willingness to be married to Kamlavanti at any time before the end of next Vaishakh does not disentitle him to damages, seeing that Kamlavanti has declared her unwillingness to be married to plaintiff then, and defendant has declared that he cannot compel her to change her mind. This is practically a repudiation of the betrothal;

and as pointed out by GREEN, J., in *Umed Kika's* case (*supra*) in such cases as shown by the instances quoted from Borrodaile's reports, the Sadar Adalat directed the betrothal or promise of marriage to be carried into effect, and decreed that, if it was not carried into effect within a certain limited period, the defendant should pay a certain sum by way of damage. Since the decree in *Umed Kika's* case the Court has refused to decree specific performance in cases of betrothal, and that doubtless is the reason why there is no prayer for specific performance in the present plaint."

Then it was contended that the plaint did not disclose any breach of contract except as to the marriage of Kamlavanti when she attained the age of twelve. But the plaint discloses the correspondence between the parties long after Kamlavanti reached that age, and the learned Advocate-General when opening his case stated that he relied also on the custom of the caste that betrothed girls were married between the age of twelve and fifteen.

It was also argued that plaintiff's suit was unnecessary, for it was open to plaintiff to put an end to the contract, and defendant had always expressed his willingness that this should be done and [36] so the plaintiff was not obliged to come to the Court for relief. Indeed, according to the correspondence between the parties, plaintiff had himself put an end to the contract. On the other hand, it must be remarked that defendant always contended before suit that if the plaintiff put an end to the contract he would do so "at his own risk." Defendant "now" expresses his willingness that plaintiff should take back the "*palla*" and presents; but he did not say so before. It was always open to the plaintiff before suit to give defendant the opportunity of performing the contract. Even now he only prays that the contract may be declared to be no longer binding, provided that defendant is not willing to perform his agreement before the end of next Vaishakh.

To the argument that there has been no repudiation before the time for performance has arrived, and that damages cannot be awarded for a future wrong (*Dreyfus* v. *Peruvian Guano Co.*, 43 Ch. D., 316, pp 333 and 342,) the answer is no doubt that in the case just quoted it was ruled that, where there has been no wrong done, Lord Cairns's Act confers no power to give damages. Lord Justice BOWEN said that "the only weapon with which the Court is armed by virtue of the section (section 2 of Lord Cairns's Act) is to award damages to a party injured, which must, I think, mean damages where damages have arisen, and in a case where no damages have arisen in the ordinary sense of the term as known to lawyers, I am of opinion that the Court has no power to give damages." Here there is no question of Lord Cairns's Act. This Court, as pointed out before, has decreed that if a betrothal or promise of marriage is not carried into effect within a certain limited period, the defendant should pay a certain sum by way of damages. Here the position of the parties is this. Plaintiff says: "I am twenty-four years old, and anxious to be married: it is no answer to say that I, even as a bachelor, can adopt a son: I am entitled to perform the duty which is imposed on every Hindu grihastha of being married. If I am not married before the end of next Vaishakh, I shall (owing to the Sinhasth year) have to wait for eighteen months more. Kamlavanti before the end of next Vaishakh will admittedly have passed [37] her fifteenth year: unless defendant within a reasonable time fixes a day for my marriage with Kamlavanti before the end of next Vaishakh, he in effect repudiates the contract." In my opinion this position is unassailable; and the principle on which *Frost* v. *Knight*, L. R., 7 Exch., 111, was decided applies. Defendant's attitude towards the plaintiff does constitute a wrong "*in præsenti*," not merely "*in futuro*," and if defendant will not within a reasonable time

fix a day for Kamlavanti's marriage with plaintiff, the latter is entitled to damages.

What those damages should be, is a difficult question. The plaint states that, if the contract is not carried out, the plaintiff will suffer greatly in reputation in his caste. As Mr. Justice GREEN said in *Umed Kika's* case, 7 Bom. H. C. Rep., 122, he must necessarily have sustained some damage to his credit and reputation. Having regard to the position of the parties, and to the notorious disinclination which exists to the assertion of such rights in a Court of law, something more than a nominal sum must be awarded, though there is no call for anything exemplary. I fix the sum of one thousand rupees, which will include anything given by way of presents; and plaintiff will also be entitled to receive from the Official Trustee the "*palla*" with the interest which may have accrued.

The decree will run that unless defendant do within a fortnight from this date fix a day for the solemnization of the marriage of Kamlavanti with the plaintiff before the end of next Vaishakh, the contract for the said marriage be declared to be no longer binding upon the plaintiff, and in that case that plaintiff do recover from defendant one thousand rupees as damages (the said sum to include all presents given by plaintiff or his family to Kamlavanti or her family in respect of the betrothal), and also be entitled to recover from the Official Trustee the "*palla*" money with interest. Defendant must pay the plaintiff's costs.

Attorneys for the Plaintiff :—Messrs. *Brown and Moir.*

Attorneys for the Defendant :—Messrs. *Nanu and Hormusji.*

NOTES.

[1. This was followed in (1909) P R., 88; (1913) 28 I.C., 376 (Burma-Buddhists). See also (1915) 39 Bom, 682, as regards the right of the Hindu father (guardian) to give away the minor daughter in marriage, notwithstanding the previous betrothal to another.

2. In (1912) 24 M L. J., 310 : 37 Mad., 393, an agreement to pay a certain sum on failure to carry out a contract of marriage was held to be opposed to public policy.

3. In (1911) 15 I C., 757 (Sindh) the principle that if a man chooses to answer for the voluntary act of a third person he is held to warrant his ability to procure that act, was applied.]

## [38] APPELLATE CIVIL.

*The 10th September, 1896.*

PRESENT :

THE HONOURABLE CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Harilal Girdharlal...... .....(Original Defendant No. 2) Appellant

*versus*

Nagar Jeyram...........(Original Plaintiff) Respondent.*

Damdupat—*Mortgage—Mortgage by Mahomedan to Hindu—Assignment of mortgaged land by mortgagor to Hindu assignee—Subsequent suit by mortgagee against assignee—Amount of interest allowed—Liability of land.*

*A*, a Mahomedan, having in 1869 mortgaged certain land for Rs. 61 to *B*, a Hindu, afterwards assigned it to *C*, who was also a Hindu. At the date of this assignment the interest due on the mortgage (Rs. 124 15-10) was much more than the principal debt. *B* (the

* Second Appeal, No. 398 of 1894.

mortgaged subsequently ... A and C for Rs. 270, being Rs. 61 for principal and Rs. ... for interest. A did not appear. C contended that the plaintiff and himself being Hindus the law of damdupat applied and that only as much interest as principal could be recovered. The lower Courts passed a decree for the principal (Rs. 61) together with all interest due at the date of C's purchase. They disallowed subsequent interest, as the amount then due was already more than damdupat. On appeal to the High Court,

*Held* (confirming the decree) that C was not personally liable to pay anything at all, but that the land which he had purchased was charged with the amount due at the date of his purchase. Unless, therefore, he wished the land to be sold, he should pay that amount.

The rule of *damdupat* did not apply in this case to the original mortgagor, who was a Mahomedan. He charged the land with a debt which included principal and interest, and he and his land were liable for both. He could not by any assignment prejudice his creditor or reduce the amount due to him, nor could he by assigning his land to a Hindu free it from any charge that existed on it at the date of the assignment.

SECOND APPEAL from the decision of Rao Bahadur Lalshankar Umiyashankar, First Class Subordinate Judge of Surat, confirming the decree of Rao Saheb L. P. Parekh, Subordinate Judge of Dholka.

The plaintiff (mortgagee) sued to recover Rs. 270 due on a *san*-mortgage bond passed to him on the 16th May 1869, by Hasan Beg (defendant No. 1). Of the sum claimed, Rs. 61 was for principal and Rs. 209 for interest. Subsequently to the above mortgage Hasan Beg on the 30th April 1888, had again mortgaged the property in question by a registered deed of mortgage to Shah Harilal Girdharlal (defendant No. 2) to whom on the 16th May he also sold the equity of redemption.

[39] Defendant No. 1 did not appear.

Defendant No. 2 pleaded that his mortgage had priority to the plaintiff's mortgage, and that in any case the plaintiff could not under the rule of *damdupat* recover more than double the amount of the principal debt (Rs. 61).

The Subordinate Judge held that the plaintiff was entitled to a decree, but only allowed the amount of interest which had accrued due up to the date (30th April 1888) at which the second defendant had become mortgagee, *viz.*, Rs. 122-15-10. As the amount of interest then due was more than the principal sum (Rs. 61) he disallowed all subsequent interest. He, therefore, passed a decree for the plaintiff for Rs. 183-15-10. On appeal by defendant No. 2, the Judge confirmed the decree.

Defendant No. 2 preferred a second appeal.

*Govardhanram M. Tripathi*, for the Appellant (Defendant No. 2):—The question relates to *damdupat* interest. The transaction in dispute was a *san*-mortgage, which is a mortgage without possession. The original debtor and mortgagor was a Mahomedan. He assigned the mortgaged property subject to the mortgage to defendant No. 2, who is a Hindu. The plaintiff is also a Hindu. Therefore the dispute now lies between Hindus, and the rule of *damdupat* applies. The Judge has awarded interest, which is more than *damdupat*, on the ground that up to the time that we obtained the mortgaged property the debtor was a Mahomedan to whom the rule of *damdupat* did not apply. But the claim now is by a Hindu against a Hindu, and the rule is that a Hindu creditor cannot be allowed more than *damdupat* against a Hindu debtor. The fact that originally the debtor was a Mahomedan cannot affect the present claim or the application of the rule—*Dhondu Jagannath* v. *Narayan Ramchandra*, 1 Bom. H. C. Rep., 47; *Khushalchand* v. *Ibrahim*, 3 Bom. H. C. Rep. ...

*Gokuldas K Parekh*, for the Respondent (Plaintiff):—We originally dealt with a Mahomedan debtor, and the right which we acquired against him cannot subsequently be diminished by his making an alienation in favour of a Hindu. So far as we are concerned, defendant No. 2 stands in the shoes of our Mahomedan debtor, and is subject to all his liabilities. Further, what is primarily liable under the transaction is the property and not the person of the debtor, and that being so, it is not open to defendant No. 2 to say that he is not liable to pay more than *damdupat* because he happens to be a Hindu.

[40]

[FARRAN, C. J —Does a *san* mortgage create any personal right against the debtor?]

It does. But in the present case that right is time barred. The personal right is in addition to the right against property. Under section 26 of Regulation IV of 1827, the law to be applied is the law which governs the defendant. The real defendant in the present case is defendant No 1, and he being a Mahomedan, the rule of *damdupat*, which is a rule of Hindu law, is not applicable. The decision in *Dawood Durvesh* v *Vullubhdas*, I L R, 18 Bom, 227, is in point. We are clearly entitled to recover more than *damdupat* on account of interest.

**Farran C J** —In this case the plaintiff sued to recover Rs 270 as due on a *san* mortgage-bond passed to him by the first defendant. He joined the second defendant as the purchaser of the equity of redemption. The first defendant is a Mahomedan, the second defendant is a Hindu.

The plaintiff claimed Rs 61 for principal and Rs 209 for interest from the date of the mortgage. The defendant No 2 contended that under the rule of *damdupat* he was not liable to pay more than double the amount of the principal. The Judge of the lower Court awarded Rs 183 15 10, *viz*, Rs 61 for principal and Rs 122 15 10 for interest down to the date of defendant No 2's mortgage. He disallowed interest after that date, as the debt had been more than *damdupat* on that date. The plaintiff has not objected to the amount so awarded to him, and we, therefore, express no opinion as to whether that amount is all that he can legally claim.

The defendant No 2 only has appealed, urging the same contention as in the lower Court. We are of opinion that the decree must be confirmed. The case of *Gopal* v *Gangaram*, I L R, 20 Bom, 721, shows that the rule of *damdupat* as acted upon in this Court [41] does not in all cases prevent land in the hands of a Hindu being subject to a claim for interest in excess of the amount of principal. In the present case, however, the mortgage was by a Mahomedan, to whom the rule of *damdupat* did not apply. See *Dawood Durvesh* v *Vullubhdas*, I L R, 18 Bom, 227. He had charged his land with a certain debt, and that debt included both principal and interest. The mortgagor, therefore, and his land were liable both for the principal and for the interest. The mortgagor could not by any assignment prejudice his creditor or reduce the amount due to him, nor could he by assigning his land to a Hindu free it from any charge that existed on it at the date of the assignment. The defendant No 2 is not personally liable to pay anything at all, but the land that he has purchased is charged, and is liable to be sold if the charge is not paid. Unless, therefore, defendant No 2 wishes the land to be sold he must pay the amount that was charged upon it when he purchased.

We confirm the decree with costs. In default of payment of the decretal amount and the costs within six months from this date, plaintiff can apply for the sale of the land.

*Decree confirmed.*

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## [42] APPELLATE CIVIL.

*The 11th September, 1895.*

PRESENT:

THE HONOURABLE CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Ramchandra Parsharam and another.................(Original Plaintiff and Defendant No. 2) Appellants

*versus*

Bhagubai and another.........(Original Defendants Nos. 3 and 4) Respondents.*

*Regulation II of 1827, Sec. 52,† Appendix L‡—Act I of 1846, Sec. 7 §—Costs—Fee of pleader—Maintenance—Partition—Party to suit claiming only maintenance—Fee of pleader of such party.*

The plaintiff sued for partition and made two widows, who were entitled to maintenance out of the estate, co-defendants in the suit. The plaintiff and the male defendants compromised the suit and a decree was passed in terms of the compromise. By the compromise the costs of the widows were to be paid by the estate, and in estimating the costs the lower Court allowed each widow a separate set of costs and calculated the amount to be paid to each as pleader's fees on the value placed on his claim by the plaintiff. On appeal to the High Court,

[43] *Held* that the pleaders of the widows were not employed in prosecuting or defending an original suit of the value of the plaintiff's claim so as to be entitled under section 52,

* Appeal, No. 174 of 1894.

† Section 52 of Regulation II of 1827—

LII. *First.* Each pleader employed in prosecuting or defending an original suit shall be entitled to a percentage on the amount sued for, according to the rates specified in Appendix L, as a remuneration for his trouble in acting in behalf of his client, until the decree in the suit is passed, and thereafter until such decree is fulfilled.

*Second.* The remuneration to a pleader employed in prosecuting or defending an appeal, regular or special, shall be the same as is above prescribed in the case of an original suit.

*Third.* The above rules shall not prevent an express agreement being entered into between pleader and client, for either a larger or smaller sum than the established fee.

*Fourth.* But, if a larger sum than was agreed for between a pleader and client is awarded in costs against the other party, the pleader, notwithstanding his agreement with his own client, shall be entitled to the excess when recovered.

‡ Appendix L, section 52, Regulation II of 1827—

Statement showing the fees to which pleaders are entitled for acting throughout ordinary suits, when there is no specific agreement.

| | | |
|---|---|---|
| The Pleader's fee is | In suits for not more than Rs. 2,000 ... ... .. ... | 3 per cent. |
| | In suits for from Rs. 2,000 to 10,000 inclusive, on Rs. 2,000 as above, and on the remainder ... ... . | 2 per cent. |
| | In suits for from Rs. 10,000 to 20,000 inclusive, on Rs. 10,000 as above, and on the remainder .. . ... . | 1 per cent. |
| | In suits for more than Rs. 20,000, on that sum as above, and on the remainder ... .. ... . | ½ per cent. |

§ Section 7 of Act I of 1846—

VII. Parties employing authorized pleaders in the said Courts shall be at liberty to settle with them by private agreement the remuneration to be paid for their professional services, and that it shall not be necessary to specify such agreement in the vakalatnama; provided that when costs are awarded to a party in any regular suit, original or appeal, decided on the merits, against another party, the amount to be paid on account of fees of pleaders shall be calculated according to the rules contained in the sections of Regulations specified in section VI of this Act; and that when costs are awarded in other cases the amount to be paid on account of such fees shall be one-fourth of what it would have been in a regular suit decided on its merits.

Regulation II of 1827, to a percentage on the amount that the plaintiff sued for according to the rates specified in Appendix L. The widows were in reality prosecuting a suit for their maintenance, and their pleaders were entitled to a percentage only on the amount claimed by them for maintenance.

Case remanded for the amount of the pleaders' fees to be correctly calculated.

When a case is decided on the merits, the full percentage is to be paid; in other cases one-fourth only should be paid under section 7 of Act I of 1846.

APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Dhulia.

Plaintiff sued for partition of ancestral family property and for recovery of his share therein. The claim was valued at Rs 5,87,586 2 0 The defendants were plaintiff's co-sharers and two widows (defendants Nos. 3 and 4) of two deceased co-sharers, who had a claim for maintenance on the property. After the written statements were filed, the plaintiff and the male defendants compromised the suit. As to the costs of the suit, it was agreed that costs of certain defendants should be borne by defendant No. 1 and the remainder by the estate. The compromise was silent as to the widows' claim for maintenance. The Judge passed a decree in the terms of the compromise, and in estimating the costs incurred by the widows, he allowed them each a separate set of costs and awarded to each of them Rs. 3 158 for pleaders' fees according to the usual rate on the sum of Rs 5 87,586 2 0.

The plaintiff and defendant No 2 appealed.

*Inverarity* (with *Manekshah J Taleyarkhan*), for the Appellants (Plaintiff and Defendant No 2):—The two widows were joined as co-defendants, because they were entitled to maintenance from the family property. In the plaint we admitted that they were entitled to maintenance, and notwithstanding this admission we have been directed to pay to each of them a separate set of costs. Their pleaders' fees have been calculated on the amount of the claim according to section 52 of Regulation II of 1827, Appendix L, and Rs 3,158 have been awarded to each of them. They are not entitled to that amount. The most that they are entitled to is a fee calculated on the amount of maintenance awarded to them Even under section 7 of Act I of 1846 they [44] would be entitled to recover only a fourth of Rs 3 158 and nothing more.

*Daji A. Khare*, for the Respondents (Defendants Nos 3 and 4):—We engaged pleaders before the compromise was arrived at. Maintenance was a charge on the whole estate and, therefore, we were interested in the entire subject-matter of the suit The costs are, therefore, properly calculated

**Parsons**, J :—This was a suit for partition brought by the plaintiff against his co-sharers, the defendants Nos 1 and 2, in which the defendants Nos. 3 and 4 were made co-defendants as widows having a right to maintenance The suit was compromised by the plaintiff and the defendant No. 2 agreeing to buy the share of the defendant No 1 for 1½ lakh.

The Subordinate Judge ordered the costs of the defendants Nos. 3 and 4 to come out of the estate He gave each a separate set of costs and calculated the amount to be paid on account of fees of pleaders in each set at the full rate on the value placed on his claim by the plaintiff, and thus made those fees alone come to Rs. 6,316.

Against this order the present appeal has been brought, and it is contended before us that the fees ought not to have been calculated on the value of the plaintiff's claim, or that, if that calculation is right, yet, as the suit was not decided on the merits, one-fourth only of the ordinary fees should have been allowed It is clear, we think, that the order is bad. The pleaders of the defendants Nos. 3 and 4 were not employed in prosecuting or defending an original

suit of the value of the plaintiff's claim, so that they would be entitled under section 52 of Regulation II of 1827 to a percentage on the amount that the plaintiff sued for according to the rates specified in Appendix L Their clients were not, strictly speaking, defending the suit at all, for their right to maintenance was admitted Even if it had been denied, however, their position would not have been very different. They were in the suit as claimants of a right to maintenance, which right they asked to have determined and awarded to them by the Court. They were, therefore, in reality prosecuting a suit for their maintenance, and their pleaders ought to be entitled to [46] a percentage only on the amount claimed by them for maintenance. If this claim were decided on the merits, the full percentage would be paid, in other cases one-fourth only would be paid under section 7 of Act I of 1846 In the present case, there has been no decision passed on their claim either on the merits or in any other way The lower Court decided the case on the compromise, which is silent as to the amount of maintenance to which the defendants Nos 3 and 4 are entitled. It does not appear that they asked the Court below when it decided the case on the compromise to proceed on their claim and to define and award them their maintenance, and they have not here objected to the decision of the suit on the compromise alone Had they done so, we should have been bound to have allowed the objection

We, therefore, only reverse the order of costs, and remand the case for the amount of pleaders' fees to be correctly calculated This will involve a determination of the amount of maintenance to which the defendants Nos 3 and 4 are respectively entitled If there is a dispute necessitating a decision on the merits as to the amount of maintenance to which either defendant is entitled, the pleader of that defendant will be entitled to the full percentage on the amount, if any, claimed, or if no amount is claimed, on the amount awarded. In other cases he will be entitled to one-fourth only We make no order as to the costs of this appeal

*Order reversed and case remanded.*

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[21 Bom 46]

## APPELLATE CIVIL

*The 17th September, 1895*

PRESENT

THE HONOURABLE CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS.

Shankar Raghunath.......... (Original Opponent No. 1) Applicant

*versus*

Vithal Babaji Raghu Badve and another........ (Original Applicant and Opponent No. 2) Opponents*

*Insolvency—Jurisdiction—Civil Procedure Code (Act XIV of 1882), Secs 344—360—Second Class Subordinate Judge's Court invested by the Local Government with insolvency jurisdiction—A debt of a scheduled creditor exceeding Rs 5 000*

Where a person arrested in execution of a decree for money by the Court of a Second Class Subordinate Judge invested under section 360 of the Civil Procedure Code (Act XIV of 1882), with the powers conferred on District Courts by sections 344 [46] to 359, makes an application

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* Application No. 41 of 1895 under the extraordinary jurisdiction.

to the Subordinate Judge's Court under section 344, that Court has power to entertain it and to make the declarations referred to in sections 344 to 359, and the fact that a debt due to a scheduled creditor exceeds Rs. 5,000 does not deprive it of jurisdiction.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur N G. Phadke, First Class Subordinate Judge of Sholapur, reversing the order of Rao Saheb V. V. Phadke, Second Class Subordinate Judge of Pandharpur.

The opponent Vithal Babaji having been arrested in execution of a money decree applied to the Second Class Subordinate Judge of Pandharpur to be declared an insolvent under section 344 of the Civil Procedure Code (Act XIV of 1882). The application being rejected he applied to the High Court under its extraordinary jurisdiction, and that Court reversed the order and remanded the case for fuller inquiry. (See Printed Judgments for 1889, p. 337.)

On the remand the Subordinate Judge found the opponent's insolvency proved and declared him to be an insolvent on the 31st March 1890, and prepared a schedule of his creditors, to two of whom, namely, Balvant Vyankaji and Shankar Raghunath, the Subordinate Judge found Rs. 5,120 and Rs. 10,488-6-2, respectively to be due.

Balvant Vyankaji and the opponent Vithal appealed, the former urging that a smaller sum than was really due had been awarded him, and the latter that larger amounts were found due to Balvant and Shankar than were really due to them. The Appeal Court, however, found that the Subordinate Judge had no jurisdiction under section 24 of the Bombay Civil Courts Act (XIV of 1869) in the matter of the claims of Balvant and Shankar, they being over Rs 5,000 in amount. It, therefore, set aside that part of the order which was appealed from, and directed that the proceedings be transferred to the proper Court.

Shankar Raghunath thereupon applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling on the opponent to show cause why the order of the lower Appeal Court should not be set aside.

[47] *Balaji A. Bhagavat* appeared for the Applicant in support of the rule:—The Lower Appellate Court was wrong. The Subordinate Judge had full jurisdiction to deal with the claims of these two creditors. No doubt section 344 of the Civil Procedure Code provides that an application for declaration of insolvency must be made to the District Court, but under section 360 the Local Government is authorized to invest by notification in the the *Government Gazette* any other Court with powers in insolvency proceedings. The Subordinate Judge of Pandharpur had been duly invested with such powers See *Bombay Government Gazette*, 1887, part I, page 198, 15th November 1887. The Judge was, therefore, wrong in holding that the Subordinate Judge had no jurisdiction.

*Ghanasham N. Nadkarni* appeared for the Opponents to show cause:—Under section 24 of the Civil Courts' Jurisdiction Act a Subordinate Judge of Second Class is empowered to take cognizance of claims which are less than Rs. 5 000. Even in insolvency proceedings the order which the Judge passes has the force of a decree: consequently such a decree passed by a Second Class Subordinate Judge would be without jurisdiction.

*Per Curiam*:—As the Court of the Second Class Subordinate Judge of Pandharpur has been invested under section 360 of the Code of Civil Procedure (Act XIV of 1882) by the Local Government with the powers conferred on District Courts by sections 344 to 359, and as the applicant in this case was arrested in execution of a decree for money passed by that Court, his application under section 344 was rightly made to that Court, and that Court had

power to entertain it and make the declarations and orders referred to in sections 344 to 359. It had jurisdiction to make the order that it did in the present case under section 352, and the Lower Appellate Court was wrong in setting it aside on the ground that it was made without jurisdiction.

We make the rule absolute, and return the appeals to the Appellate Court for disposal on the merits. Costs of this application to be costs in the appeals.

*Rule made absolute.*

NOTES.

[This was followed in (1909) 23 All., 56.]

## [48] APPELLATE CIVIL.

*The 18th September, 1895.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Sayad Husseinmian Dadumian and another............(Original Defendants) Appellants

*versus*

The Collector of Kaira........ ...Respondent.*

*Trustees—Charity—Public charity—Suit for removal of trustees of a public charity and for account—Jurisdiction—District Court—Civil Procedure Code (Act XIV of 1882), Sec. 539.*

A suit to remove the trustees of a public charity, and to compel them to account and to make good the losses sustained by the charity in consequence of their default, is a suit which falls within the scope of section 539 of the Code of Civil Procedure (Act XIV of 1882), and must, therefore, be instituted in a District Court, and not in a Subordinate Judge's Court.

APPEALS from the decision of Dayaram Gidumal, Joint Judge of Ahmedabad, in Suit No. 19 of 1891.

This was a suit filed by the Collector of Kaira under section 539 of the Code of Civil Procedure (Act XIV of 1882).

The suit was instituted with the sanction of the local Government, which by a resolution of the Judicial Department, No. 1522, dated 13th March 1891, directed the Collector "to move the District Court to appoint new trustees for the administration of the trust funds and to settle a scheme for their management."

The plaint stated that a Jain widow Maneckbai, of Kapadvanj, died in 1876 possessed of considerable moveable and immoveable property; that she left a will by which she created several public religious and charitable trusts; that in 1886, defendants Nos. 1 and 2 were appointed administrators of her estate under Regulation VIII of 1827; that some of the trusts were such as could not be satisfactorily carried out by defendant No. 1, who was a Mahomedan, and that, in view of section 22 of Act XX of 1863, the appointment of the defendant No. 2, who was Nazir of the Subordinate Judge's Court at Kapadvanj, was objectionable. The plaintiff, therefore, prayed that the defendants Nos. 1 and 2 should be removed and new trustees appointed; that a scheme

* Appeals Nos. 68 and 108 of 1894.

of administration should be settled by and under the directions [49] of the Court; and such other relief granted as the Court might deem fit.

Defendant No. 1 did not contest the suit; he expressed his willingness to abide by the Court's orders.

Defendant No. 2 asked to be made a plaintiff and made serious allegations of misappropriation not only against defendant No. 1 but against the former administrators of the estate, Nihalchand (since deceased) and Chhotalal, and also against Amratbai, the mother and legal representative of Nihalchand. He asked that these persons should be added as defendants and made to account for the trust funds in their hands.

The Court accordingly added Amratbai and Chhotalal as defendants Nos. 3 and 4, respectively.

The Joint Judge found that defendants Nos. 1 and 2 were unfit to administer the religious and charitable trusts created by Maneckbai's will; that the former trustees Nihalchand and Chhotalal had been guilty of gross negligence and had committed several breaches of trust, for which they were responsible to the trust estate. He, therefore, passed a decree directing defendants Nos. 1 and 2 to be removed, and new trustees appointed in their stead. He framed a scheme for the future administration of the trust, and ordered defendants Nos. 3 and 4 to render an account of the trust funds in their hands and make good the losses sustained by the charity in consequence of their default.

Against this decree defendants Nos. 1 and 3 made a joint appeal (No. 68 of 1894) to the High Court.

Defendant No. 4 preferred a separate appeal (No. 103 of 1894) to the High Court.

*Scott* (with him *Govardhan M. Tripati*), for Appellants in Appeal No 68 of 1894.

*Gokaldas K. Parekh*, for Appellant in Appeal No. 103 of 1894.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Respondent in both appeals.

At the hearing of the appeals a preliminary objection was raised by appellants' counsel in Appeal No. 68 of 1894, that the District Court had no jurisdiction to entertain a suit, like the present, for [50] the removal of the trustees of a public charity, and for requiring them to account for the moneys expended by them, and make good the losses caused by their default, as these reliefs were outside the scope of section 539 of the Code of Civil Procedure.

The arguments of counsel and the authorities cited at the hearing are set forth in the judgment of the Court.

**Jardine, J** :—The appellants' counsel in Appeal No. 68 of 1894, before discussing, the grounds of appeal which relate to the findings of fact, sought judgment on the preliminary question of jurisdiction, his contention being that, as the relief sought for and granted involved the removal of the trustees, and required them not only to account for the moneys disbursed by them, but to make good the losses sustained by the charities in consequence of their default, the suit was not maintainable in the District Court, as these reliefs did not fall within the provisions of section 539 of the Civil Procedure Code. It was urged that section 539 was based upon Sir S. Romilly's Act, and only contemplated suits seeking the particular forms of relief described in clauses (*a*) to (*e*), which do not include the prayer for the removal of trustees hostilely disposed, and for compelling them to account and refund.

There seems to be some ground for holding that at one time this view found favour with the High Court of Madras—*Narasimha* v. *Ayyan*, I. L. R. 12 Mad., [illegible]

157—and the Calcutta High Court—*Jan Ali* v. *Ram Nath*, I L R, 8 Cal, 32 Both these Courts, however, have since then decided that (to quote the words of WEIR, J.) "section 539 was intended by the Legislature not to serve the limited purposes provided for by the English statute, but to consolidate and embody in one definite provision the procedure to be followed in British India in suits relating to public charitable endowments, other than those provided for by Act XX of 1863" This latter Act relates to temple or religious endowments, and is not in force in this Presidency except in North Kanara

The leading case on the subject is *Subbayya* v *Krishna*, I L R, 14 Mad., 186, where Mr. Justice MUTTUSWAMI AYYAR and Mr Justice BEST differed in [61] their views about the scope of this section, and the point was referred to a third Judge, who heard it in company with the referring Judges, and the whole case was argued over again Mr Justice AYYAR dissented from the views of WEIR and BEST, JJ., and the well considered judgments then recorded exhaust both sides of the question in all its details The point more immediately decided in that case was whether the section conferred power on the District Court to remove the defaulting trustees, and it was held that this power was conferred, as, though not mentioned expressly, it was implied in the general words which empowered that Court to grant further and other relief The principle of this ruling will equally cover the relief in the matter of account taking which is ancillary to the particular relief specified in clauses (c) and (e) This decision of the Madras High Court was approved by the Calcutta High Court and followed in *Mohiuddin* v *Sayiduddin*, I L R, 20 Cal, 810 The prayer in that case, being for the removal of trustees, was disallowed, not on the ground of want of jurisdiction, but on the ground of fact that the plaintiffs had failed to prove that the trustees had committed breaches of trust. In *Sajedur Raja* v. *Baidyanath*, I L R., 20 Cal, 397, a suit brought in the Subordinate Judge's Court for the removal of trustees, and for cancelling certain alienations made by them, was held to have been not properly instituted in that Court, as, under section 539 it should have been filed in the District Court.

In this Presidency, the Madras ruling was expressly followed by Mr Justice PARSONS in *Tricumdass* v. *Khimji* I L R, 16 Bom, 626 In his judgment he observed that a suit brought by two trustees requiring their co trustees to be removed and to give an account of their management of the trust fell within the purview of section 539, this relief being included in the further and other relief mentioned in the section This was also the principle of the decision in the Chinchwad Devasthan case (*Chintaman* v *Dhondo*, I L R, 15 Bom 612), where, in a suit brought under section 539, hereditary trustees of a devasthan were removed for gross mismanagement and breaches of trust in respect of devasthan property. The decree of this Court confirmed the order of the District Judge [62] directing the removal of the old trustees, and further ordered the lower Court to take an account of the property mismanaged by one of the old trustees since he entered upon the management of the same In *In re Kahandas Narrandas*, I L R, 5 Bom, 154, it was decided that the principles of English equity jurisprudence governed the form of relief to be granted by the Courts in respect of Hindu charitable trusts, and in an earlier case it was held that if a trustee remained passive and took no steps to see the trust carried into execution, he was liable for losses caused by the breach of trust on the part of his co-trustee—*Bai Jadav* v. *Tribhuvandas*, 9 Bom H. C Rep, 333.

It will be thus seen that there is now no room for the contention that because to all appearances the wording of section 539 seems to have been modelled upon Sir S. Romilly's Act, therefore the relief that could be granted under section 539 must be confined to the forms of relief which fall within the

scope of that statute. The section may have been at first suggested by that statute, but there are important variations in the Indian enactment, both in the form of procedure and the scope of the relief intended. Under the authority of the cases cited above, we feel satisfied that the contention in regard to the want of jurisdiction, raised by the appellant's counsel, must be overruled. The prayers for the removal of the trustees, and for requiring them to give an account, fall within the scope of section 539 as distinctly as the appointment of new trustees and the settling a scheme for the management of the charities. The suit could not have been instituted in its present form in the Subordinate Judge's Court.

We accordingly overrule this preliminary objection.

NOTES.

[1. The further stage of the case is reported in 21 Bom., 257.

2. Among the changes introduced in the C.P C., 1908, sec. 92, are the following :— (i) the suit may be contentious or not; (ii) it may be for the removal of a trustee; (iii) it may be to direct accounts and inquiries; (iv) the section excludes every other suit except those under the Religious Endowments Act, 1863.

The second of these is in accordance with the decisions in (1897) 24 Cal., 418; (1905) 2 C L J, 460; (1896) 21 Bom., 45; 556; (1896) 22 Bom., 493; (1899) 24 Bom., 45; (1897) 20 All., 46; (1899) 21 All., 200; (1907) P.R., 78; *contra* (1891) 17 Mad., 462. See also (1905) 2 C.L.J., 431; (1906) 33 Cal., 789.]

## [83] APPELLATE CIVIL.

*The 18th September, 1895.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Dharmaya Sangappa............(Original Petitioner) Appellant

*versus*

Sayana Malapa and others............(Original Opponents) Respondents.*

*Succession Certificate Act (VII of 1889), Sec. 7, Cl. 1—Certificate—Court bound to decide the right to the certificate—Practice—Procedure.*

Under clause 3, section 7, of the Succession Certificate Act VII of 1889, the District Court must decide in a summary way an application for a succession certificate even if the question at issue between applicant and opponent be as to the *status* of the family to which deceased belonged.

APPEAL from the decision of W. H. Crowe, District Judge of Poona, in Miscellaneous Application No. 56 of 1893, under Act VII of 1889.

One Narsingaya Sangapa died at Pachora, in the Khandesh District, leaving a fixed deposit amounting to Rs. 1,768 in the Bank of Bombay at Poona within the jurisdiction of the District Court of Poona, and leaving a widow Savitribai, a daughter-in-law Lakshmibai, a nephew named Sayana Malapa and a brother named Dharmaya Sangappa.

Dharmaya Sangappa applied to the District Court of Poona under the Succession Certificate Act (VII of 1889), praying for a certificate to enable him to recover the sum of Rs. 1,768 from the Bank of Bombay, alleging that he and the deceased were members of an undivided family.

Savitribai, Lakshmibai and Sayana opposed this application, contending that the applicant and the deceased Narsingaya were not joint but separate and that the applicant had no claim whatever to the money deposited in the Bank.

* Appeal, No. 151 of 1894.

The District Judge of Poona refused the application, recording the following judgment:—

"The question at issue is as to the *status* of the family. The evidence points to some sort of division, but without expressing any opinion on that point, and as the debt to be collected is merely a fixed deposit in the Bank of Bombay amounting to Rs. 1,768, I think it may safely be left there until one party or other proves their title to it in the ordinary way by suit in the Civil Court. I refuse the application."

[54] From this decision the applicant preferred an appeal to the High Court.

*Shivram Vithal Bhandarkar*, for the Appellant.

*Mahadeo B. Chaubal*, for Lakshmibai *alias* Achama, Respondent No. 3.

The following authorities were cited during argument —Act VII of 1889, section 7, clause 3, section 20; *Bai Mahali* v *Kalidas Fakirchand*, P. J., 1891, p 13; *Kalidas Fakirchand* v *Bai Mahali* I. L. R, 16 Bom, 712, *Dave Liladhar* v *Kashiram* v. *Bai Parvati*, I L R, 18 Bom, 608, *Jamsedji Kavasji* v *Motibai*, 2 B. H. C. Rep., 375; *Umed Dullichand* v *Bai Ujali*, P J, 1885, p. 200; *Rupchand* v. *Jasoda*, P. J., 1894, p. 345, *Sivamma* v *Subbamma*, I. L. R., 17 Mad, 477, *Jagmohandas* v. *Allu Maria*, I. L. R, 19 Bom, 338.

**Jardine, J.**:—Act XXVII of 1860, section 3, has been interpreted in *Jamsedji Kavasji* v. *Motibai*, 2 B. H. C. Rep., 375, and *Umed Dullichand* v *Bai Ujali*, P. J, 1885, p. 200 As interpretations of Act VII of 1889, section 7, we may refer to *Rupchand* v. *Jasoda*, P. J, 1894, p. 345, and *Sivamma* v. *Subbamma*, I. L. R, 17 Mad, 477 Although clause 3 of that section appears new as enactment, and in cases of difficulty and intricacy enables the Court to grant a certificate to the person having *primâ facie* the best title thereto, clause 1 says "the Court shall proceed to decide in a summary manner the right to the certificate." We think, therefore, that the District Judge erred in refusing the jurisdiction on the reasons he gives

It has been urged that the order is justified under section 20 by the opponent Lakshmibai's statement that her husband, now deceased, once got an order for a certificate under this Act and that he never applied for the certificate. We do not think section 20 applies here. Whether *Jagmohandas* v. *Allu Maria*, I. L R., 19 Bom, 338, applies to the case is, in our opinion, a matter for the District Court to decide

The Court sets aside the order and remands the cause to the District Court for a new order to be made. Costs to be costs in the cause.

*Order reversed and case remanded.*

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NOTES.

[It is intended that such proceedings should be of a summary character —(1901) 5 C.W.N., 494.]

## [55] APPELLATE CIVIL.

*The 19th September, 1895.*

PRESENT

THE HONOURABLE CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Venkatesh Narasinha Narayanpethkar ...........(Original Defendant No 4) Appellant

*versus*

Govindrao bin Shekoji and another ...........(Original Plaintiff) Respondent.*

*Vatan Act (Bom Act III of 1874), Sec 10†—Redemption suit—Decree for possession—Possession obtained by plaintiff under decree—Decree reversed in appeal—Collector's certificate under the Vatan Act (Bom. Act III of 1874).*

Where an erroneous decree of the District Court is reversed by the High Court and the decree of the original Court restored, the successful party has a right to be replaced in the same position as if the District Court had not made an erroneous decree. If in obtaining this right he is restored to possession of vatan land such a restoration does not fall within the scope of section 10, Bombay Act III of 1874 —*Richapa v. Amingovda* I L R, 5 Bom, 283.

REFERENCE by L G Deshmukh, Acting Collector of Sholapur, in the matter of a certificate issued by him under section 10 of the Vatan Act (Bom. Act III of 1874)

In a redemption suit, the Subordinate Judge passed a decree directing the plaintiff to redeem the mortgaged property on payment of Rs 992 3 9 to the defendant On appeal by plaintiff the Judge reversed the decree and ordered that plaintiff should be put in possession without any such payment, but simply on payment of costs In execution of that decree, the plaintiff recovered possession

[56] On second appeal by the defendant, the High Court reversed the decree of the District Judge and restoring that of the Subordinate Judge awarded to the defendant absolute possession on failure of plaintiff to pay Rs 992 3-9 within six months from the 1st May 1894.

The plaintiff having failed to pay the amount within the specified time, the defendant applied to the Subordinate Judge to be restored to possession in execution of the High Court's decree The property in dispute being patilki vatan, the plaintiff applied to the Collector for a certificate under section 10 of

* Civil Reference No. 8 of 1895.

† Section 10 of the Vatan Act (Bom Act III of 1874)—

10.—When it shall appear to the Collector that by virtue of, or in execution of, a decree or order of any British Court any vatan, or any part thereof, or any of the profits thereof, recorded as such in the revenue records or registered under this Act and assigned under Section 23, as remuneration of an officiator, has or have after the date of this Act coming into force, passed or may pass without the sanction of Government into the ownership or beneficial possession of any person other than the officiator for the time being; or that any such vatan or any part thereof, or any of the profits thereof not so assigned has or have so passed or may pass into the ownership or beneficial possession of any person not a vatandar of the same vatan, the Court shall, on receipt of a certificate under the hand and seal of the Collector, stating that the property to which the decree or order relates is a vatan or part of a vatan, or that such property constitutes the profits or part of the profits of a vatan, or is assigned as the remuneration of an officiator, and is therefore inalienable, remove any attachment or other process then pending against the said vatan, or any part thereof, or any of the profits thereof, and set aside any sale or order of sale or transfer thereof, and shall cancel the decree or order complained of, so far as it concerns the said vatan, or any part thereof, or any of the profits thereof.

the Vatan Act (Bombay Act III of 1874). The Collector issued the certificate and forwarded it to the High Court.

*Narayan Ganesh Chandavarkar*, for the Appellant (Original Defendant No. 4):—The defendant (mortgagee) is entitled to get back possession in spite of the Collector's certificate, he having been deprived of the possession in pursuance of the District Judge's decree which was reversed by the High Court. The High Court restored the decree of the first Court, and the defendant has now a right to restitution—*Rachapa* v. *Amingovda*, I L R, 5 Bom, 283, at p. 293; *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah*, I L R, 14 Cal., 484; *Rohni Singh* v. *J. Hodding*, I. L. R, 21 Cal., 340, *Viraraghava* v. *Venkata*, I. L. R, 16 Mad., 287.

Section 10 of the Vatan Act (Bombay Act III of 1874) does not apply to transfers or alienations made before the Act came into force. In the present case, the mortgage with possession was made in the year 1871.

*Mahadeo B. Chaubal*, for Respondent (Plaintiff) —It seems that possession of defendant's assignor Krishna commenced under a previous decree (No 1169 of 1875) on the 16th November 1875 Therefore this was an alienation after the Vatan Act (Bombay Act III of 1874) came into force, and the Collector's certificate is legal and binding.

**Farran, C J** :—The Collector is under a misapprehension as to the facts of this case. The plaintiff sued for redemption The District Judge reversing the decree of the Subordinate Judge [57] (which ordered the plaintiff to recover possession of the property mortgaged upon payment of Rs. 992 3 9 and costs) directed the plaintiff to be put in possession without such payment, simply on payment of costs. In execution of that decree, the plaintiff, on payment of costs, was put in possession of the land.

The High Court reversed the decree of the District Court and restored that of the Subordinate Judge This carried with it the right of the defendant to be replaced in the same position as if the District Court had not passed an erroneous decree, and such is the position to which he now asks to be restored *quantum valeat* The Full Bench ruling in *Rachappa* v. *Amingovda*, I L. R, 5 Bom., 283, shows that such a restoration does not fall within the scope of section 10 of Bombay Act III of 1874, and that the defendant notwithstanding the Collector's certificate is entitled to be restored to possession.

It would seem that the defendant No 4's predecessor in title (Krishnapa, deceased defendant No. 1) obtained possession of the property in question under the decree in Suit No. 1169 of 1875 If that be so, the Collector may be able to get that decree set aside by the Court which passed it and to have the plaintiff restored to possession; but the facts are not fully before us. So we give no opinion on that part of the case.

We accordingly return the certificate to the Collector with a copy of this judgment. The plaintiff to pay the costs of this reference.

*Order accordingly.*

## [88] APPELLATE CIVIL.

*The 19th September, 1895.*

PRESENT:

THE HONOURABLE CHIEF JUSTICE FARRAN, AND MR. JUSTICE PARSONS.

Balaji Shamji Naik and another............(Original Plaintiffs) Appellants

*versus*

Moroba Naik and another........... (Original Defendants) Respondents.*

*Civil Procedure Code (Act XIV of 1882), Sec. 283—Decree for the recovery of a share in a vatan—Execution—Attachment—Order releasing a portion from attachment—Suit filed to set aside the order—Temporary cessation of the execution proceedings.*

Where a decree has not been adjusted or otherwise satisfied and is still operative, a temporary cessation of the execution proceedings under it does not deprive the execution creditor of his rights to sue to set aside an order made under section 283 of the Civil Procedure Code (Act XIV of 1882), releasing part of the property from attachment, and to have it declared that such part or some fraction of such part is liable to attachment.

APPEAL from the decision of Rao Bahadur V. V. Vagle, First Class Subordinate Judge of Ratnagiri.

The plaintiff alleged that they and the defendants were the joint owner of a moiety of a sardesai vatan allowance derived from villages in certain talukas in the Ratnagiri District; that they had sued the defendants for their share (Suit No. 260 of 1888) and obtained a decree, and in execution had caused the moiety of the allowance to be attached in order to recover their share. The defendant No 1, however, had applied (Miscellaneous Application No. 95 of 1891) for the removal of the attachment from his share which he falsely stated to be a four-annas share, and the Court had granted his application.

The plaintiff, therefore, now brought this suit to set aside the order removing the attachment from a four-annas share of the vatan and praying for a declaration that the share of the first defendant was only two annas and four pies therein.

Defendant No. 1 contended that the plaintiff's remedy (if any) was in the execution proceedings in the former suit (No. 260 of 1888); that they had allowed those proceedings to drop, and that they had no cause of action for this new suit.

The Subordinate Judge dismissed the suit. The following is an extract from his judgment:—

[89] "It is, I think, immaterial for the purposes of this suit to see whether the decree in question has been fully satisfied or not. The plaintiffs' vakil's admission that he has allowed the execution proceedings which occasioned the miscellaneous order complained of and this suit to set it aside, to drop, and that with these proceedings the attachment laid by his clients on the allowance in suit was also allowed to fall to the ground, is enough for the disposal of this case. It is well settled by the decisions of the Calcutta and Bombay High Court (see *Umesh Chunder Roy* v. *Raj Bullubh Sen*, I. L. R., 8 Cal., 279; *Kashinath* v. *Ramchandra*, I. L. R., 7 Bom., 408; *Ebrahimbhai* v. *Kabulbhai*, I. L R., 13 Bom., 72), that when the attachment, on which the summary order complained of is to operate, fails, the person against whom that order was passed, has no cause of action left."

* Appeal No. 177 of 1894.

The plaintiffs appealed.

*Vasudeo G. Bhandarkar*, appeared for the Appellants (Plaintiffs):—The decisions relied on by the Judge are not applicable to the facts of the present case. This suit was instituted while the proceedings in execution of our decree in the former suit were subsisting. Therefore, the Judge was wrong in holding that this suit was not maintainable, because we allowed the execution proceedings to be dropped. Though we have allowed the proceedings in execution to drop, we may apply again for execution, as the decree has not yet been satisfied. Under section 283 of the Civil Procedure Code (Act XIV of 1882), and article 11, Schedule II of the Limitation Act (XV of 1877), we have a right to bring a suit within a year from the date of the order in the miscellaneous proceedings to set aside that order, but if we allow the order to stand, we shall be debarred from again attaching the allowance.

There was no appearance for the Respondents (Defendants).

**Farran, C. J.**:—The cases relied on by the Subordinate Judge and those noted below * do not govern the present case. The Subordinate Judge has not found that the decree of the 31st **[60]** March 1890 (No. 260 of 1888) has been adjusted or otherwise satisfied. Assuming it to be still operative, we think that the decree dismissing this suit cannot be supported on the ground that the plaintiffs have withdrawn their execution darkhast for the present.

The defendant No. 1 has obtained an order releasing the four-annas share in the vatan from attachment. That order operates as a decree in favour of the defendants unless set aside by suit. The plaintiffs are permitted by section 283 of the Civil Procedure Code (Act XIV of 1882) to file a suit within a year to set that order aside and to have it declared that the four-annas share or some part of it is liable to attachment. A temporary cessation of the execution proceedings by the plaintiffs does not deprive them of the right to continue their suit If they continue and succeed in it, they can then renew the execution proceedings and re-attach the interest (if any) which they shall have been declared in the suit entitled to attach. If they are not allowed to maintain this suit, the order removing the attachment will be an absolute bar to their ever again attaching the property—*Sardhari Lal* v. *Ambika Pershad*, I. L. R., 15 Cal., p. 521.

Decree reversed and suit remanded for disposal on the merits. Costs to be costs in the cause.

*Decree reversed.*

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* *Umesh Chunder Roy* v. *Raj Bullubh Sen*, I. L. R., 8 Cal , 279; *Kashinath* v. *Ramchandra*, I. L. R , 7 Bom., 408; *Ebrahimbhai* v. *Kabulbhai*, I. L. R., 13 Bom., 72; *Gopal Purshotam* v. *Bai Divali*, I. L. R., 18 Bom., 241.

[21 Bom 60]

## APPELLATE CIVIL

*The 26th September, 1895*

PRESENT

THE HONOURABLE CHIEF JUSTICE FARRAN, AND MR JUSTICE PARSONS

Ragho bin Bhavana Nhavi by his assignee Shitaram Bhikaji Barve ... Plaintiff

*versus*

Narayan ... Defendant *

*Transfer of Property Act (IV of 1882), Sec 132—36 and 37 Vict, C 66, Sec 25—Assignment of debt—Notice to debtor—Suit by assignee—Service of the writ*

Under section 132 of the Transfer of Property Act (IV of 1882) the assignee of a debt is under no obligation to give notice of the assignment to the debtor All that is required is that the debtor shall become aware of it and it is sufficient if he becomes aware of it on being served with a writ in a suit by the assignee

[61] *Lala Jugdeo Sahai* v *Brij Behari Lal*, I L R, 12 Cal, 505, *Subbammal* v *Venkatarama*, I L R, 10 Mad 289 and *Kalka Prasad* v *Chandan Singh* I L R, 10 All, 20 followed

REFERENCE from Rao Saheb G D Deshmukh Subordinate Judge of Chiplun in the Ratnagiri District, under section 617 of the Civil Procedure Code (Act XIV of 1882)

The reference was as follows —

"The defendant on the 22nd of April 1893 passed a money-bond for Rs 24 4 0 to one Ragho bin Bhavana Nhavi, the debt with interest at four pies per rupee per month being made payable one year after

"The obligee of the bond, Ragho bin Bhavana Nhavi thereupon on the 22nd of June 1895 assigned to the plaintiff by a verbal agreement his right to recover the said debt of Rs 24-4 0 and interest Rs 13 6 2 from the defendant.

"The plaintiff therefore, has brought the present suit as assignee of the debt to recover the principal Rs 24 4 0 and interest Rs 13 6 2 from the defendant"

The suit being a Small Cause suit, in which any order passed by the Subordinate Judge would be final, he referred the following question on which he entertained doubt —

"Whether a notice to the debtor of such transfer is necessary as contemplated by sections 131 and 132 of the Transfer of Property Act (IV of 1882) before the debt can be enforced by a suit, it having been proved that the debtor is not a party to or otherwise aware of such transfer?"

The opinion of the Subordinate Judge was in the affirmative.

*Sitanath G Annkya (amicus curiæ)* appeared for the Plaintiff —We submit that a separate notice is not necessary The mere filing of the suit is a sufficient notice of the assignment Section 131 of the Transfer of Property Act provides that the debtor should be made aware of the assignment It does not lay down that a notice should be given in any particular form or at any particular time Further, under section 132 it was not necessary for us to give notice, our assignor ought to have given it, and if [62] he failed to do so, his failure should

* Civil Reference No 16 of 1895.

not operate to our prejudice—*Walker* v. *Bradford Old Bank*, 12 Q. B. D., 511; *Lala Jugdeo Sahai* v. *Brij Behari Lal*, I. L. R., 12 Cal., 505; *Subbammal* v. *Venkatarama*, I.L.R., 10 Mad., 289; *Kalka Prasad* v. *Chandan Singh*, I.L.R., 10 All., 20.

*Vishnu K. Bhatavdekar* (*amicus curiæ*) appeared for the Defendant:—The cases relied on show that no previous notice of the transfer is necessary, but the language of section 131 of the Act is quite explicit. It requires that express notice of the transfer should be given. The mere filing of the suit or the service of summons is not such a notice. In cases of ejectment express notice is required to be given to the tenant by the landlord. In such cases express notice has been held to mean notice before suit. Therefore by analogy we submit that when a debt is transferred, express notice—that is, notice before suit—of the transfer should be given to the debtor.

**Farran, C. J.**:—It is clear that the assignment when executed creates a right in the assignee which the assignor is not entitled to defeat. Such assignment has, however, no operation against the debtor until he has become aware of it or has had express notice of it given to him in the manner required by the Act. Until then he can deal safely with the original creditor. The assignment which he does not know of, cannot affect him. Before the passing of the Transfer of Property Act, it was the assignee upon whom it was incumbent for his own protection to give notice of his assignment to the debtor There was no particular reason why the assignor should give it. We cannot help thinking that there has been a slip made in section 132 in throwing *upon the person making the transfer* the obligation of giving express notice to the debtor. The English Act 36 and 37 Vict. c. 66, sec 25, only requires that express notice in writing shall be given. It does not enact who is to give it It may be given either by assignee or assignor It may even be given after the death of the assignor—*Walker* v *Bradford Old Bank*, 12 Q. B. D, 511. But however this may be (and the attention of the Legislature may well be directed to the point), we must construe the Act as it stands No provision is made in it for the assignee giving [63] notice in any particular way. All that is required is that the debtor shall become aware of the transfer. When he become aware of it, it is binding upon him. Accordingly, if the assignee the moment before suit makes the debtor aware of the transfer, the latter must give effect to it. It follows that when the debtor is by the writ made aware of the transfer, it becomes binding on him. There is doubtless this difficulty that at the moment when the suit is brought, the cause of action of the assignee against the debtor may be said not to be actually complete: that it is the service of the writ itself which completes it. It would, however, we think, be taking too technical a view of the position of the parties to give effect to this objection. The plaintiff's right to the debt is complete at the date of suit. We think that we ought to follow the rulings of *Lala Jugdeo Sahai* v *Brij Behari Lal*, I. L. R, 12 Cal., 505, which has itself been followed by the other High Courts—*Subbammal* v *Venkatarama*, I.L.R., 10 Mad., 289, and *Kalka Prasad* v. *Chandan Singh*, I L.R., 10 All., 20.

*Order accordingly.*

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**NOTES.**

[The Transfer of Property Act, 1882 sec 130 (as substituted in 1900) provides *inter alia*, "The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not." This is followed by a proviso which states the effect of want of notice and sec. 131 provides for giving notice.]

[21 Bom. 63]

## APPELLATE CIVIL.

*The 30th September, 1895.*

PRESENT:

THE HONOURABLE CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Mohan............Plaintiff

*versus*

Tukaram and another............Defendants.*

*Dekkhan Agriculturists' Relief Act (Act XVII of 1879), Secs. 3, 12, 47 and 74—Arbitration—Award—Civil Procedure Code (Act XIV of 1882), Secs. 518-521, 522—A private award to which agriculturist debtors are parties—Filing of the award in Court.*

A Civil Court can file a private award to which agriculturist debtors are parties without adjusting the accounts under the Dekkhan Agriculturists Relief Act (Bombay Act XVII of 1879).

*Gangadhar* v. *Mahadu*, I. L. R., 8 Bom., 20, followed.

REFERENCE by Khan Saheb Ezra Reuben, Subordinate Judge of Kopargaon in the Ahmednagar District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

[64] The reference was made in the following terms:—

"One Mohan valad Girdhari Marwadi, of Kopargaon, advanced a loan of Rs. 70 to one Tukaram valad Ladkuji and Linguji valad Ladkuji, both agriculturists of Kopargaon, on the 15th August 1894, the latter agreeing to give him in exchange one khandy of wheat. Default having been made, the parties of their own accord referred the matter to arbitrators, who were, however, not conciliators appointed under the Dekkhan Agriculturists' Relief Act.

"They framed an award on the 13th June 1895, to the effect that the debtor should pay Rs. 95 to Mohan, and future interest on Rs. 95 at 18 per cent. per annum from the date of the award until payment.

"Mohan having applied to the Court to have the award filed under section 525 of the Civil Procedure Code, the other parties to the award appeared, and stated before the Court that they had no objection to urge against the filing of the award.

"It will be seen that the application for filing the award is not accompanied by a conciliator's certificate. But this point is settled by the ruling in *Gangadhar Sakharam* v. *Mahadu Santaji*. This case would appear to show, by analogy, that awards of *savkars* and agriculturists should be filed as they are without going into the history of the accounts. But this question is not directly decided in the case quoted, and as I entertain doubts on the point, the question that I have to refer for an authoritative decision is:—

"'Whether a private award to which agriculturist debtors are parties, can be filed by Civil Courts without adjusting the accounts under the Dekkhan Agriculturists' Relief Act?'"

The opinion of the Subordinate Judge on the question was in the negative on the following grounds:—

"The object of the Dekkhan Agriculturists' Relief Act is the protection of the interest of agriculturists, and this would be completely defeated if an

* Civil Reference No. 17 of 1895.

opportunity to escape the risk attendant upon entering into the history of the accounts were given to *savkars* by filing awards as they are.

[65] "I submit that such a result could never have been contemplated by the Legislature and ought not to be allowed.

"Even in the case of arbitrators or conciliators appointed by Government, the *kabulayats* or agreements, which they bring about between parties, cannot be filed without carefully scrutinizing them, and unless the agreements are found to be not only legal but equitable. *Vide* section 44 of the Dekkhan Agriculturists' Relief Act.

"While, then, the Legislature has placed so much control over the proceedings of the conciliators, it cannot be supposed that the awards framed by private arbitrators were intended to be differently treated. This would open a wide door for fraud and for escaping the responsibilities enjoined on *savkars* by the Relief Act.

* * * * * *

"In support of my views I take the liberty to quote below from the remarks of the Honourable Mr. Justice RANADE (at the time Special Subordinate Judge under the Dekkhan Agriculturists' Relief Act) in reference to the case reported in the Indian Law Reports, 8 Bom., 20 * * 'If such applications to file private award were entertained by the Civil Courts, they would *pro tanto* defeat the main purpose of this protective legislation. * * Besides, though the application to file an award is not a suit, the award when filed has the force of a decree. The precautions deemed necessary to secure responsible work and prevent fraud presuppose that the general law is controlled by the special law. * *'

"Before concluding I may add that under the present award in question for the advance of Rs. 70, the debtors are made liable to pay Rs. 95, which includes interest at the (in my opinion) 'unreasonable' rate of 43 per cent. per annum. Besides the amount of interest is converted by the award into principal, and future interest at 18 per cent. per annum is allowed on the aggregate amount.

"This, I submit, is not in accord with the provisions of section 13 (*d*) and section 71 A of the Dekkhan Agriculturists' Relief Act.

[66] "I have further to state that the order filing the award is final and unappealable. Hence this reference * *."

*Shivram V. Bhandarkar* (*amicus curiæ*), for the Plaintiff:—There is nothing in the Dekkhan Agriculturists' Relief Act to prevent an award made on a reference by parties outside the Court being filed in Court and a decree framed in the terms of the award. Section 45 of the Act authorizes the Court to file such an award, and it is not necessary to enter into the previous history of the transaction. Section 15 of the Relief Act, which allowed the Court to refer a dispute to arbitration, has been repealed by Act VI of 1895. Section 12 of the Act requires the Court to file an award and to pass a decree in its terms. The award is not a suit in which alone the Court can inquire into the previous history of the transaction. Section 47 of the Act lays down that no suit will lie without a certificate from a conciliator. But this provision would not apply to awards to be filed in Court. Even the Civil Procedure Code does not contemplate that filing an award is filing a suit. It only says that the application for filing an award should be treated as a suit. The words *as a suit* are important, the application is not a suit when it is filed. It is not necessary to produce a conciliator's certificate in connection with a reference

and an award made outside the Court—*Gangadhar Sakharam* v. *Mahadu Santaji*, I. L. R., 8 Bom., 20.

*Vishnu K. Bhatavdekar* (*amicus curiæ*), for the Defendant :—The award should not be filed, because even in the view of the Judge it is iniquitous. There being no provision in the Dekkhan Agriculturists' Relief Act in connection with the filing of an award made out of Court, sections 525 and 526 of the Civil Procedure Code apply. Section 12 of the Relief Act relates to arbitration after suit. Section 526 of the Civil Procedure Code lays down that the award should be filed, provided it does not militate against certain conditions. Section 44 of the Relief Act would apply by analogy to a matter of this sort.

[FARRAN, C. J. .– The real point is whether this is a suit.]

We contend that section 12 of the Act would apply if it is a suit. If it be not a suit, then section 44 of the Act would apply by analogy.

[67] [FARRAN, C. J.:—An express provision of law cannot be applied by analogy.]

The ruling in *Vasudev* v. *Narayan Jagannath*, 9 Bom. H. C. Rep., 289, shows that the proceedings in filing an award are of the nature of a suit. Thus the proceedings being of the nature of the suit, all incidents of a suit are applicable to the proceedings Formal adjudication on an award is spoken of as a decree, and decree as defined in the Civil Procedure Code is the adjudication of a suit or appeal. The policy of the Act also should be taken into consideration— Maxwell on Statutes, p. 333.

*Shivram V Bhandarkar*, in reply:—A decree passed in terms of an award is not a decree passed after adjudication The Court-fee paid on an application to file an award is not the Court-fee of a suit. A decree passed on an award being not a decree passed after adjudication, is not a decree within the definition given in the Civil Procedure Code.

**Farran, C. J.**:—Our acknowledgments are due to the pleaders who as *amici curiæ* have afforded us their assistance upon this reference.

The question upon which our opinion is requested is whether a private award to which agriculturist debtors are parties can be filed by Civil Courts without adjusting the account under the Dekkhan Agriculturists' Relief Act ?

The answer to it depends upon whether an application to file an award under section 525 of the Code of Civil Procedure is a suit within the meaning of sections 3, 12 or 47 of the Dekkhan Agriculturists' Relief Act. If it is not, section 74 of the Act entails upon the Court the duty of dealing with the application in accordance with the provisions of the Civil Procedure Code. If it is a suit, the provisions of section 12 of the Act come into play, and the Court must follow the directions contained in that section when the award is submitted to it.

Now it is only by an extension of the usual meaning of the term that an application to file an award can be regarded as a suit. The Code of Civil Procedure does not treat it as a suit, though it directs it to be numbered and registered as one. It [68] does not make the provisions of the Code which are applicable to suits apply to it, but treats it in the same manner as an award on an order of reference made by the Court itself. Upon such an application no summons is issued, no hearing takes place, but if the special provisions contained in section 518—521 are inapplicable to it, judgment is passed in accordance with its terms (section 522). It is in truth an application to have legal operation given to a legal decision already arrived at *by a judge chosen* by the parties. If from the express wording of the Act or by necessary or reasonable implication from its provisions it appeared to be the intention of the

Legislature to treat an application to file an award as a suit, we should be bound to give the necessary extension to the latter term and to treat an application to file an award as falling within its extended meaning. That is clear law—Maxwell, page 84 Now it is admitted that there are no *express* words in the Act to show that a "suit" is used throughout it in other than its ordinary sense It is, however, contended that it is apparent from the general scope of its provisions that it must have been the intention of the Legislature to bring awards, like all monetary engagements which agriculturists enter into, under the scrutiny of, and to render them subject to correction by, the Court That does not appear to us to be so We rather infer from the provisions of the Act that it was not so intended When the parties go before a conciliator, and in pursuance of his advice a reference to arbitration takes place and an award is made, effect is given to the award without scrutiny (section 47) Where the parties are before the Court and agree to refer the dispute to arbitrators, effect must be given to their agreement (section 12), upon which the usual results are evidently, we think, intended to follow if an award is made It must be filed under section 522 of the Civil Procedure Code This right of the parties to refer to arbitration is still preserved though the power of compulsory reference by the Court is now taken away (Act VI of 1895, sec 3) If the Legislature has thus thought fit to preserve the full effects of an award in the case of a reference to arbitrators made after proceedings begun, there is, we think, no reason for presuming that it had a contrary intention in the case of a reference and award prior to such proceedings [69] We think that we ought to follow the ruling in *Gangadhar* v *Mahadu*, I L R, 8 Bom, p 20, and hold that the award should be filed without inquiry under section 12 It must be remembered that the Judge before filing such an award can upon objection by the debtor inquire into the matters specified in section 521 of the Code and if he is in doubt as to its *bona fides* or freedom from fraud, can refer the parties to a regular suit, where the whole matter can be re-opened under section 12

*Order accordingly.*

NOTES.

[ See also (1911) 13 Bom L R, 352 35 Bom, 310 ]

[ 21 Bom 69 ]

## ORIGINAL CIVIL

*The 23rd June, 1896*

PRESENT

MR JUSTICE FULTON

Gokulbhoy Mulchand. . . .. Plaintiff

*versus*

Tullockchand Harnath and another . . . .. Defendants *

*Registration—Suit to compel registration—Discretion of registrar in acceptance of document for registration under Section 24 of the Registration Act—Registrable document with another document annexed, the latter if presented by itself being beyond time—Registration Act (III of 1877) Secs 24, 73, 75 and 77*

A registrable document which had been executed by the plaintiff on the one part and by the defendant Tullockchand and one Motichand on the other part, was accepted for registration by the sub registrar of Bombay after four months from the date of execution under section 24 of the Registration Act (III of 1877) Motichand subsequently admitted execution, and the document was registered as against him but the defendant Tullockchand objected to its registration and the registrar refused to register it The plaintiff then brought this suit under section 77 of the Registration Act praying for an order directing the registration of the document The defendant contended that the document ought not to have been accepted for registration without inquiry as to whether the failure to present it within four months had been caused by urgent necessity or unavoidable accident and at the hearing of the case counsel for the defendants proposed to ask the registrar's clerk in his examination whether any such inquiry was made

*Held* following *Durga Singh* v *Mathura Das* I L R 6 All 460, that the question should be disallowed the Court having no jurisdiction to enquire into the exercise of the registrar's discretion under section 24 of the Registration Act

The defendants executed and delivered two documents A and B to the plaintiff A being an agreement of equitable mortgage and B an agreement that they would [70] register A and do all things necessary therefor and in case they failed to do so to pay whatever the plaintiff could claim under A if it had been registered The plaintiff obtained an order for the registration of A but failed to present it for registration within thirty days after such order as required by section 75 of the Registration Act, and when he did present it, registration was consequently refused He subsequently lodged document B for registration with A as an annexure to it and it was accepted on payment of a penalty under section 24 of the Registration Act The registrar, however, refused to register B on the grounds (1) that without A there would be nothing to show to what property B referred, and (2) to register A as an annexure to B would be contrary to the provisions of section 75, which limited the time for registration to thirty days The plaintiff then brought this suit under section 77 praying for an order for the registration of B with its accompaniment A within thirty days from the date of decree

*Held*, that B being a registrable document of which execution had been admitted and it having been presented within time and accepted under section 24 of the Registration Act ought to be registered, the document A being copied out as an annexure Decree accordingly.

*Quære* as to the effect such registration might have on A and whether it would render it efficacious as a registered document

* Suit, No. 251 of 1896.

SUIT under section 77 of the Registration Act (III of 1877) to compel registration. The plaintiff prayed for a direction that a certain document (Exhibit B) with its accompaniment (Exhibit A), both of which were annexed to the plaint, should be registered in the office of the sub-registrar within thirty days of the passing of the decree.

Exhibit A was dated the 11th January 1895, and was an agreement of equitable mortgage of certain lands for Rs. 50,000 to the plaintiff signed by the first defendant for himself and as attorney for his father (defendant No. 2), and by one Motichand Harnath.

Exhibit B, which was also signed by the first defendant for himself and as attorney for his father (defendant No. 2) and by the said Motichand Harnathji, was in the following form.—

"We, Harnathji Rupaji of Marwar and Tullockchand Harnathji and Motichand Harnathji of Bombay, agree with you Gokulbhoy Mulchand of Bombay that we will register the accompanying document as required by the Indian Registration Act, 1877, and shall do all acts and things necessary or expedient therefor, and, in case we fail to do so, we shall pay whatever you can claim under the accompanying document if the same had been registered.—Dated 11th January 1895."

Subsequently to the execution of those documents the plaintiff lodged Exhibit A alone for registration, and after some difficulty [71] in obtaining the necessary admission of execution from the defendants and Motichand he obtained an order from the registrar for its registration. He, however, failed to present it again to the sub-registrar for registration within thirty days after that order (see section 75 of the Registration Act), and the sub-registrar accordingly refused to register it when it was presented.

On the 9th September 1895, plaintiff lodged document B with A as an annexure to it in the office of the sub registrar to be registered, and the sub-registrar, being authorised to exercise the powers of the registrar in that behalf (*Government Gazette*, 1887, Part I, p 980) accepted B for registration on payment of a penalty under section 24 of the Registration Act III of 1877. After several attempts to procure the attendance of the executing parties before the sub-registrar the plaintiff finally got Motichand Harnath to admit execution of document B before the sub-registrar, and it was registered as against him on 6th January 1896 The first defendant Tullockchand appeared on the 7th January 1896, before the sub-registrar, but declined to admit execution, and registration was, therefore, refused as against him on the 8th January 1896.

The plaintiff appealed on 25th January 1896, to the registrar under section 73 of the Registration Act III of 1877 against this refusal The first defendant in answer to a summons issued by the registrar appeared with his solicitor before the registrar on 25th February 1896, and admitted execution of document B, but raised objections to its registration, and on the 9th April 1896, the registrar refused to register it.

The following were the reasons entered by the registrar for his refusal to register document B:—

"The agreement is of the same date and refers to the same property as the mortgage. Under these circumstances is the agreement sufficiently distinct from the mortgage to constitute a separate document? I find the following objections to consider the agreement a separate document:—

"1. If the mortgage is treated a separate document there is in the agreement no evidence to show to what property the agreement refers.

"2. If the mortgage is recorded in the registration book as an annexure to the agreement, such record will constitute a registration of the mortgage.

[72] "3. If by this means the mortgage is registered, it will make of no force the stipulation contained in section 75 of the Registration Act that the period of presentation for registration shall be limited to 30 days."

The suit was heard as a short cause.

*Macpherson*, for Plaintiff.—The registrar was wrong in his refusal. He was afraid that we should by registering B evade the consequences of the non-registration of A. It was not his business to consider the consequences of his order or what the effect of the registration of B might be on A. His duty was only to consider whether we were entitled to have B registered. Further, the object of the Registration Act is to prevent fraud. As it is admitted here that the parties not only intended but agreed to register A, there can be nothing contrary to the spirit of the Act in allowing A to be registered through B, if that is the consequence of the registration of B. As to the object of the Registration Act, see *Alexander Mitchell v. Mathura Das*, I.L.R. 8 All., 6; s.c. L.R., 12 Ind. Ap., 150.

*Starling* for Defendants.—Neither document can be registered. Tullockchand by admitting execution of A before the registrar has done all that he was bound to do by document B. The plaintiff has only himself to blame that owing to his not presenting A within thirty days of the registrar's order he cannot now get it registered. B cannot be registered because it was not presented for registration within four months of its execution. The sub-registrar never considered whether its non-presentation was due to urgent necessity or unavoidable accident when he accepted it. He did not even pass any order accepting it for registration. We say he was bound to pass a definite order. But even if he had passed such an order, he had no jurisdiction to admit the document after the four months without proof of urgent necessity or unavoidable accident.

During the examination for the defendant of a witness who had been head clerk to the sub-registrar in September 1895, Starling proposed to ask him whether any inquiry was made as to urgent necessity or unavoidable accident which caused the document not to be presented within four months, but on the objection of Macpherson, who cited *Durga Singh v. Mathura Das*, I.L.R. 6 All. 160, the Court disallowed the question.

**[73] Fulton J.**—On the 11th January 1895 the defendant Tullockchand Harnath executed two documents, one marked A to secure repayment of Rs. 50,000 charged by mortgage on certain immoveable property, and the other marked B being an agreement to register the accompanying document A, and in case of failure to do so to pay the amount secured by A.

For certain reasons A was never registered as against the defendant Tullockchand Harnath. Document B was presented for registration after the expiry of four months from the date of execution but within the period of eight months, and was accepted for registration under section 24 of the Act by the sub-registrar of Bombay, who under section 7 of the Registration Act, has been authorised to perform all the duties of the registrar except that of hearing appeals. On the admission of execution by Motichand Harnath, B was registered as against him, but registration was refused against Tullockchand Harnath, as though he did appear before the sub-registrar he refused to admit execution. Application was then made in due time to the registrar under section 73 to have the document registered, but on the 9th April the application was rejected for the reasons stated in the registrar's order.

This suit has now been filed under section 77 of the Registration Act and a decree is sought directing the document to be registered.

The defendants in their reply allege that the first defendant was induced by fraud to execute the documents, (2) that the sub-registrar acted without authority of the law in accepting, under section 24, the documents for registration,

without making any enquiry as to whether the failure to present them within four months was on account of urgent necessity or unavoidable accident, and (3) that for the reasons stated in the registrar s order, he was right in refusing registration The first of these objections was not argued by Mr Starling and was clearly irrelevant in the present suit On the second point Mr Starling proposed to ask a witness whether before accepting B for registration, the sub-registrar had made any enquiry as to the cause of the non presentation of the document within four [74] months being unavoidable accident or urgent necessity But on Mr Macpherson s objection to the question and referring to *Durga Singh* v *Mathura Das* I L R 6 All 460 I disallowed it I think I may safely follow the Allahabad High Court in holding that I have no jurisdiction to enquire into the exercise of the registrar s discretion under section 24 The section does not prescribe any enquiry The registrar must doubtless be informed of the fact of unavoidable accident or urgent necessity to enable him to exercise the discretion vested in him by law but it is for him to decide whether he will accept the mere statement of the applicant as sufficient or make enquiry with a view to verify that statement In the present case the written statement shows that the plaintiff when applying to the registrar to accept the document for registration did allege that he had failed to present it within time on account of urgent necessity or unavoidable accident and supposing that the registrar thought proper to accept this statement as sufficient, it is not I think open to the Court to say that he acted without authority He may have acted hastily or injudiciously or perhaps he may have known enough about the plaintiff and the circumstances which had caused the delay entirely to justify him in accepting the plaintiff s statement without demur supposing that he did so accept it but in either case I do not see how it can be said that he acted *ultra vires* The case might possibly be otherwise if it were shewn that a fraud had been committed but this is not alleged As he was both registrar and sub registrar he has not thought it necessary to record any direction to himself to accept the document for registration but his acceptance of the time and the fact of his registering it as against the second defendant show that he had accepted it

On the third issue I find that B being a registrable document of which execution has been admitted and having been presented within time and accepted under section 24 ought to be registered A will be annexed to it by the use of the word accompanying in the agreement being copied out as an annexure What effect this may have on A and whether it will render it efficacious as a registered document are not points which I am now [75] called upon to consider I direct that B with A as an annexure to be registered if duly presented for registration within thirty days after this date The defendant Tullockchand will pay the plaintiff s costs

Attorneys for Plaintiff Messrs *Hiralal and Markanji*

Attorneys for Defendants Messrs *Bicknell Merwanji and Motilal*

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NOTES

[See (1897) 21 Bom 724 which gives the judgment of the appellate Court in this matter ]

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[21 Bom 75]

# TESTAMENTARY JURISDICTION

*The 10th July, 1896.*

PRESENT

SIR CHARLES FARRAN, KT, CHIEF JUSTICE, AND MR JUSTICE STRACHEY

Dayabhai Tapidas . . (Original Applicant) Appellant

*versus*

Damodardas Tapidas . (Original Opponent) Respondent *

*Probate— Costs of obtaining probate—Fund liable*

The appellant cited the respondent who was the executor of one Tulsidas Varajdas, to bring in and prove his testator's will The Division Court (STARLING, J) ordered the respondent to lodge the will in Court and to take out probate, but directed that the appellant should pay half the costs of obtaining probate On appeal

*Held* (varying the order of STARLING J as to costs) that the fund primarily liable to the costs of probate was the residuary estate and part of the residuary estate being as yet undistributed it should in the first instance be applied to this purpose, and after that the appellant and respondent should contribute in equal shares

APPEAL from the order of STARLING J (I L R, 20 Bom, 227)

In this case the appellant (applicant) had cited the respondent who was the executor of one Tulsidas Varajdas deceased to bring in and prove his testator's will

The case was heard before STARLING, J (I L R, 20 Bom, 227), who directed the respondent Damodar to lodge the said will in Court and to take out probate In giving judgment his Lordship said

'Dayabhai having quarrelled with Damodar wants to make Damodar pay out of his own pocket all the cost of obtaining probate and then to have the gratification of bringing the estate into Court I do not think he should have this double gratification as I am doubtful whether there is any necessity for probate except for the purpose of enabling one brother to compel the other to render an account of the estate and his application thereof to the Court If he wants probate taken out he must pay one half the costs including probate duty

[76] ' The order I shall therefore make is that on Dayabhai paying to Damodar or his attorneys half the estimated costs of applying for and obtaining probate (including probate duty) such estimate to be settled if necessary by the Taxing Master but without prejudice to Dayabhai's right to have the same debited against the estate Damodar do, as soon as practicable thereafter apply for and take out probate of the will of Tulsidas Varajdas, deceased Each party to bear his own costs of this citation and order '

The applicant Dayabhai appealed on the following grounds (*inter alia*) —

(1) That the learned Judge was wrong in not ordering the respondent to take out probate without making any condition that the appellant should pay to the respondent one half of the estimated costs of applying for and obtaining probate including probate duty

(2) That the learned Judge ought in any event, not to have made the appellant pay any thing more than half the costs that remained to be provided for after taking into account the moneys forming portion of the residue of the said estate of Tulsidas Varajdas in the hands of the respondent of which estate it was admitted that one lakh of rupees and the accumulations and accretions of the income and profits of the said one lakh of rupees for several years remained in the respondent's hands

(3) That the costs of taking out probate should be ordered to be borne by the respondent as executor out of the moneys in his hands of the said estate, and if the said estate should

* Appeal, No 901

prove insufficient, that then only should the appellant be required to contribute to the costs in a proper proceeding for the purpose

*Macpherson* appeared for the Appellant

*Scott*, for the Respondent

**Farran, C J**:—Neither of the parties has appealed from the first part of the order made by the Division Court So we have not to consider that matter. The only point, before us, is as to the source from which the costs of obtaining probate are to be provided

The fund primarily liable is ordinarily the residuary estate Part of the residuary estate in this case, *viz*, the interest on a lakh of rupees appears to be as yet undivided between the brothers This sum we think, should in the first instance be applied to the costs and expenses of obtaining probate After that each brother must contribute in equal shares The order of the Division Court will be varied accordingly

The following order was made —

This Appellate Court doth vary the said order dated the fourteenth day of September 1895, and in lieu thereof doth order that the said respondent do forthwith get [77] the said will transmitted from the office of the Testamentary Registrar of this Honourable Court where it has been lodged pursuant to the said order to the office of the Chief Translator for translation and that he do apply for probate thereof within two days after obtaining the translation of the said will from the Translator's office And this Appellate Court doth further order that the residue undistributed in the hands of the said respondent as executor of the said will (the accumulations of interest on the sum of rupees one lakh set apart to meet the bequest mentioned in clause sixteen of the said will appearing for the purposes of this order to be the only undistributed residue) be without prejudice to the rights of any one who may be hereafter adopted under the said clause 16 of the said will applied in the first instance in and towards payment of the costs and expenses of applying for and obtaining the probate of the said will including the probate duty and that in the event of such undistributed residue being insufficient the appellant and respondent do pay such deficiency in equal shares after the probate duty is ascertained and at the time it is payable by the respondent

Attorneys for the Appellant —Messrs *Chitnis Motilal and Malvi*

Attorneys for the Respondent —Messrs *Thakurdas Dharamsi* and *Cama.*

[ 21 Bom 77 ]

## MATRIMONIAL COURT

*The 24th July, 1896*

PRESENT

MR JUSTICE STRACHEY AND MR JUSTICE TYABJI

A (the wife) Plaintiff

*versus*

(the husband) Defendant *

*Husband and wife—Divorce Suit for nullity of marriage —Suit by wife against husband—Costs of wife— Alimony Maintenance— Suit between Mahomedans Mahomedan law*

The English law which makes the husband in divorce proceedings liable *primâ facie* to the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans

* Suit No 88 of 1893 Appeal No 895

**A wife sued her husband for dissolution of marriage (both parties being Mahomedans) on the ground of his impotency and malformation An interlocutory order was made by the Court adjourning the further hearing of the suit for one year, in order that the parties might resume cohabitation for that period The husband desired to carry out the order of the Court and was anxious that his wife should live with him, she, however, refused to do so and only paid occasional visits to his house The suit was subsequently dismissed with costs The wife appealed and subsequently applied for alimony until the disposal of the appeal.**

*Held* that having regard to the conduct of the wife she was not entitled to alimony By Mahomedan law a husband's duty to maintain his wife is conditional upon her **[78]** obedience, and he is not bound to maintain her if she disobeys him by refusing to live with him or otherwise

RULE to show cause against order for costs and alimony

This was a rule taken out by the plaintiff, a Mahomedan lady, in a suit brought by her for dissolution of her marriage with the defendant on account of his impotency and malformation The suit was heard by FARRAN, J, and dismissed with costs

The plaintiff filed an appeal against the decision and on the 2nd July 1896, she obtained a rule calling upon the respondent (defendant) to show cause why he should not be ordered to pay her (the appellant's) costs of the said suit and appeal already incurred, and why he should not pay or give security for her costs of the appeal to be subsequently incurred, and why he should not be ordered to pay alimony until the disposal of the appeal or the further order of the Court

Affidavits were filed by the parties the allegations in them material to this report appear from the judgment

*Macpherson* for the Respondent (Defendant) showed cause against the rule At Mahomedan law a woman living apart from her husband in disobedience is a rebellious wife or 'Nashiza' and is not entitled to any maintenance Baillie's Digest p 458 If the plaintiff in this case were a European, she would not be entitled either to alimony or maintenance This is a suit which is not provided for in any statute and it is therefore governed by the Civil Procedure Code (Act XIV of 1882), section 220 The costs are thus in the discretion of the Court, as is the case in England —Browne on Divorce, p 341 The rule as to wife's costs is given at p 315 of Browne on Divorce, Rules 158, 159 The same rule obtains in suits for nullity—*Ibid*, p. 353 *M—— v. C,——* L R, 2 P and D, 414 The application must be before the hearing or trial

As to alimony Browne on Divorce, p 228, *Madan* v *Madan*, 37 L J. (P and M) 10 We say the absolute discretion possessed by the Courts in **[79]** England is possessed by this Court, and that the Court will not exercise that discretion in favour of the plaintiff in this case

*Lang* (Advocate General), for the Appellant (Plaintiff) in support of the rule —The English rule as to costs applies to the case It is clear that if plaintiff were a European she would be entitled to what she asks There is no reason why she should not have the benefit of the rule because she is a Mahomedan The rule in England does not now depend on husband and wife being one person in law, or on the interest the husband acquires by marriage in his wife's property *Mayhew* v *Mayhew*, I L R, 19 Bom, 293 It depends on public policy and is as applicable to a Mahomedan as to an English woman

The reason of the rule is that the Court will not allow any risk of a wife suffering injustice Rule No. 159 only relates to the order for *paying* costs

and has nothing to do with giving security for them. In this case the affidavits show the plaintiff has spent all her money on costs.—*Allen* v *Allen*, (1894) P 134.

As to alimony, the assertion that she is a rebellious wife is answered by the assertion that he is an impotent husband. A wife is entitled to alimony during a suit for nullity—Browne on Divorce, p 217.

**Strachey, J** —This is a rule obtained by a Mahomedan wife, who is an appellant in an appeal now pending from a decree dismissing her suit for the dissolution of her marriage calling upon the respondent to show cause why he should not be ordered to pay the appellant's costs of the suit and appeal already incurred, and why he should not pay or give security for the appellant's costs of the appeal to be hereafter incurred and why he should not be ordered to pay to the appellant alimony until the disposal of the appeal or the further order of the Court.

The respondent has shown cause on several grounds, such as that the appellant has independent means of her own, and that the application is made too late and is not *bona fide*. In the view which I take of the case I need not consider these matters, because there is one short ground on which I think the rule must be discharged, and that is that the principle upon [80] which it is supported has in my opinion no application to cases of this kind. I shall deal separately with the question of costs and that of alimony.

As to the former question, there is no doubt that section 220 of the Code of Civil Procedure (Act XIV of 1882) gives the Court the fullest discretion. The question is whether in the exercise of that discretion we ought to order the respondent to pay or secure the appellant's costs of the suit and the pending appeal. The general rule is no doubt that a litigant must provide for his or her own costs, and the mere inability of the appellant to do this can be no reason for ordering the respondent to provide for them. That being the general rule, what is the ground on which we are asked to make an exception in favour of this particular appellant and to order the respondent to provide for her costs? We are asked to do so solely on the ground of a rule which is applied by the Divorce Court in England in dealing with matrimonial causes between English people. That rule is, speaking generally, that, subject to the discretion of the Court, the husband in divorce proceedings is *primâ facie* liable to provide for the wife's costs, except where she is possessed of sufficient separate property—*Jones* v *Jones* L R 2 P and D 333; *Robertson* v *Robertson*, 6 P D 119; *Butler* v *Butler* 15 P D 126; *Allen* v *Allen* (1894) P 134.

The question is whether we ought to apply that rule to divorce proceedings between Mahomedans in this Court. The rule may be considered in two aspects, first with reference to its origin and secondly with reference to the grounds upon which it is now maintained. As to its origin there can be no doubt that it was founded, as stated in *Ivity* v *Ivity*, I L R 5 Cal, 357, see p 362, upon the right which by the Common Law the husband acquired upon marriage to the whole of his wife's personal property and the income of her real property—*Robertson* v *Robertson* (at p 122). It was thought unjust that the wife, who by her marriage gave up all her property to her husband, should be destitute of the means of conducting her case against him. But that doctrine of the Common Law is totally different from the Mahomedan law, according to which the wife does not upon marriage lose any of her rights [81] of property, so that, so far as the origin and foundation of the rule in England are concerned, it has obviously no application to suits for divorce between Mahomedans.

Next as to the grounds on which the rule in England is now based. Although it originated, as I have said, in the old doctrine of the Common Law, there is authority for the view that it has survived that doctrine which, since the Married Women's Property Act, 1882, has virtually ceased to exist. In *Mayhew* v. *Mayhew*, I. L. R., 19 Bom., 293, FARRAN, J., differing from the judgment in *Proby* v. *Proby*, held that whatever may have been the origin of the rule, it was now a rule of public policy, the reason for its continuance being that it is not just that a wife should be without the means of putting her case fairly before the Court. He further observed that the passing of the Act of 1882 had not produced any alteration of rule 158 of the rules and regulations of the Divorce Court, which still continued to govern the practice of the Court in England —*Allen* v. *Allen*, (1894) P. 134. Without disputing the correctness of this view, I observe that it does not appear, from the report of the case just mentioned, whether the parties were married before or after the Act of 1882, and that in *Otway* v. *Otway*, 13 P. D., 141, see pp. 155, 156, COTTON, L J., with the concurrence of his colleagues said that if a case came before the Court where a married woman had been married after the Act of 1882, it would be a very serious question for consideration how far they ought to follow the old rule, or what decision they ought to give. Such a case does not appear to have since arisen I will assume, however, that the rule would even in cases of marriage since the Act of 1882 be maintained in England as a rule of public policy. The Advocate-General for the appellant contends that this principle of public policy is equally applicable to matrimonial causes in India between Mahomedans, in which the wife is without sufficient property of her own. There is no precedent for the introduction of such a principle into cases between Mahomedans. It appears to me that if we were now, for reasons of supposed public policy, to apply that rule to Mahomedans, we should [82] virtually be legislating, and legislating on extremely doubtful grounds. It is by no means obvious to my mind that it would be right, or in accordance with public policy, to impose this obligation on Mahomedan husbands. The decision in *Mayhew* v. *Mayhew* is fully consistent with this view. That case differs essentially from the present in being a suit for divorce between Europeans or Eurasians, governed by the Indian Divorce Act, IV of 1869, and in applying rule 158 of the English Divorce Court, the Chief Justice expressly acted under section 7 of that Act, which provides that, subject to the provisions of the Act, the Court shall, in all suits and proceedings thereunder, act and give relief on principles and rules as nearly as may be conformable to those on which the Divorce Court in England for the time being acts and gives relief. He did not apply rule 158, because as a matter of discretion and on grounds of public policy he thought that it ought to govern the practice of Indian Courts, but because by legislative enactment he was bound to apply that rule to cases under the Indian Divorce Act. The cases of *Fowle* v. *Fowle*, I. L. R., 4 Cal., 260, *Natali* v. *Natali*, I L. R, 9 Mad, 12, and *Thomson* v. *Thomson*, I. L. R., 14 Cal., 580, are distinguishable on the same ground. The present is not a case to which the Indian Divorce Act applies, and rule 158 could only be extended to it by what, in my opinion, would be virtually a piece of legislation on our part.

For these reasons I think that no sufficient ground has been shown for departing from the usual practice that a litigant has to provide for his own costs, and that the rule so far as it relates to the question of costs must be discharged.

Next as regards the question of alimony, that must, in my opinion, be dealt with exclusively in accordance with the Mahomedan law relating to the maintenance of a wife by her husband. According to that law, the husband's

duty to maintain his wife is conditional upon her obedience, and he is not bound to maintain her if she disobeys him by refusing to live with him or otherwise—Baillie, p. 438. In this case an interlocutory order was made by the Chief Justice, by which in accordance with the [83] Mahomedan Law governing suits of this description brought by the wife, he adjourned the further hearing of the suit for one year in order that the parties might rusume cohabitation for that period. That order was made on the 26th July 1894. I am satisfied by the affidavits that while the respondent did all in his power to carry out that order, and was anxious that the appellant should live with him, she on the contrary refused to do so and only paid occasional visits to his house, staying for a night or so at a time from the 6th March to 23rd June 1895, returning on each occasion to her mother's house Upon the authorities I am clearly of opinion that in such circumstances a Mahomedan husband is not bound to give his wife separate maintenance and that the appellant is, therefore, not entitled to alimony. The result is that the rule must be discharged with costs, to be enforced only against the separate property of the appellant.

B. Tyabji, J.:—I am also of the same opinion and think that the rule must be discharged. There is no precedent, so far as I am aware, of any Mahomedan lady having obtained funds from her husband for her costs of litigation against him or security for such costs, and I am not disposed to create any precedent of that sort The rule which obtains in the Divorce Courts in England is founded upon the doctrine of the English Common Law that all the personal property of a married woman becomes vested in her husband, and that the husband is even entitled to take the income of the immoveable property of his wife. The wife being thus under English law deprived of all means of providing funds for litigation against her husband, it was only equitable that the Courts should compel the husband to furnish her with those means when necessary. But this rule was not of universal application even in England. An exception was made when the wife was shown to be possessed of separate property of her own which owing to the interposition of the Courts of Equity she was allowed to enjoy through the medium of trustees. This being the foundation of the rule obtaining in the English Courts of Divorce, it is at once apparent that it is entirely inapplicable to the case of a Mahomedan lady in India. Under the law of Islam, a woman occupies a very much [84] higher position than an English woman, so far as her rights of property and inheritance are concerned. She is entitled to inherit and to acquire property exactly in the same way as her husband. Her legal status or position as regards her property is in no way changed by her marriage, she has the same power and dominion over her own property after and during her marriage as before her marriage By marriage her husband acquires no interest whatever in his wife's property. In short, the husband and wife are in the eyes of the Mussulman law perfectly distinct and independent—each being entitled to the protection of the law against the other—so far as his or her rights of property are concerned, as if they were perfect strangers.

This being so what possible ground could there be for compelling a Mussulman husband to provide funds or to give security for costs of his wife? It seems to me that there would be just as much reason for doing this as for compelling a Mussulman wife to provide funds for the costs of her husband.

As to the question of policy, while I perfectly admit that the interests of public policy demand, where the rule of the English Common Law prevails, that the husband should furnish security for the costs of his wife, I am absolutely unable to see how that principle can be extended to a Mussalman wife, unless indeed we are to hold that it is in the interests of the public to encourage

wives to start or to continue litigation against their husbands. That would be the only result of compelling husbands to provide security for the costs of their wives in cases where the wives are entitled to enjoy their property quite independently of their husbands. I am of opinion that public policy requires us rather to discourage litigation of this kind than to encourage it and thus to add injury to insult which the unfortunate husband may have to suffer. Even if the English rule was more binding upon us than it really is, I should be prepared to say, *cessante ratione cessat ipsa lex.*

As regards alimony also I am of opinion that, having regard to the conduct of the plaintiff, she is not entitled to the order asked for. She has proved herself to be a disobedient and rebellious wife. The Court of First Instance has already decided that **[85]** she had no just cause of complaint against her husband, and unless and until that decision is reversed, it is impossible to hold that a Mussalman who defying her husband, refusing to live with him and bringing scandalous charges against him, can yet claim to be maintained separately at the expense of her husband I think the rule must be discharged with costs as against the plaintiff's property.

Attorneys for the Appellant —Messrs *Ardesir, Hormusji and Dinsha.*

Attorneys for the Respondent - Messrs *Payne, Gilbert and Sayani.*

**[21 Bom 85]**

APPELLATE CIVIL.

*The 23rd September, 1895.*

PRESENT

CHIEF JUSTICE FARRAN, AND MR. JUSTICE PARSONS.

Ali Saheb.......... (Original Plaintiff) Appellant

*versus*

Shabji and another.......... (Original Defendants) Respondents.*

Damdupat—*Mortgage—Original mortgagor a Hindu Mortgage to a Mahomedan—Hindu mortgagor's interest subsequently purchased by a Mahomedan—Suit by Mahomedan purchaser for redemption—Rule of* damdupat *how far applicable.*

A Hindu mortgaged his property in 1843 to a Mahomedan for Rs. 150 with interest at 12 per cent per annum On 5th April 1880, the Hindu mortgagor's interest was sold to the plaintiff, who was a Mahomedan. In March 1893, the plaintiff sued for redemption, both parties to the suit being Mahomedans

*Held*, that as long as the mortgagor was a Hindu (*i e* until 1880) the rule of *damdupat* applied, and that as soon as the interest doubled the principal, further interest stopped The sum of Rs 300 was, therefore, the full amount of debt for which the land could be charged and liable in the hands of a Hindu debtor. But on the 5th April 1880, the plaintiff (a Mahomedan) became the debtor. The rule of *damdupat* then no longer applied; the stop was removed and interest again began to run. The decree, therefore, ordered the plaintiff to redeem on payment of Rs. 300 (*i e* double the principal Rs. 150) with further interest at Rs. 12 per annum from the date of his purchase (5th April 1880) until payment.

SECOND APPEAL from the decision of C E G. Crawford, District Judge of Ratnagiri, confirming the decree of Rao Saheb Parashram B. Joshi, Second Class Subordinate Judge of Rajapur.

* Second Appeal No. 315 of 1894.

Suit for redemption The property originally belonged to one Bhagvantrao Bajirao Surve, a Hindu who in 1843 mortgaged [86] it with possession to the first defendant who was a Mahomedan for Rs 150 Bhagvantrao, the mortgagor, died, and on the 5th April 1880 the plaintiff purchased at a Court sale his interest in the property On the 1st March 1893, he brought this suit for redemption

The second defendant, who was also a Mahomedan [illegible] that the first defendant had assigned his interest in the property to him in 1843 for Rs 150, and that this sum and a further sum [illegible] interest were now due to him in respect of the mortgage He contended that the rule of *damdupat* did not apply, and that the plaintiff could not redeem without paying off the principal and the whole sum claimed [illegible]

The Subordinate Judge held that both plaintiff and defendant being Mahomedans the rule of *damdupat* did not apply and directed the plaintiff to redeem the property on payment of R [illegible] to the defendant The following is an extract from his judgment

[illegible]

On appeal by plaintiff the Judge confirmed the decree

The plaintiff preferred a second appeal

*Manekshah J Taleyarkhan* [illegible] for Appellant (Plaintiff) The original debtor (the mortgagor) [illegible] Hindu [illegible] *damdupat* [illegible] *Ganpat v Adarji* I L R 3 Bom 312 [illegible] rule of *damdupat* was not applicable [illegible] have been held applicable [illegible] plaintiff [illegible] original mortgagor), who was a Hindu [illegible] *damdupat* would [illegible] April 1880 when [illegible] purchased the interest of the Hindu mortgagor [illegible] Hindu Law Books, [illegible]

[87] *Vasudev G Bhandarkar* for [illegible] Respondent [illegible] The rule *damdupat* is a rule of Hindu Law [illegible] only in which the parties are Hindus [illegible] Hindu *Dadu* [illegible] I L R [illegible] 7 In the present case the original debtor was [illegible] a Hindu but [illegible] a Mahomedan stood in his place The rule of *damdupat* is a special privilege and cannot be transferred *Narayan v Satvaji* 9 Bom H C Rep 83 Stokes' Hindu Law Books p 112

**Parsons, J** Plaintiff a Mahomedan bought in 1880 at a Court sale the right, title and interest of a judgment debtor who was a Hindu and who had mortgaged the property to the defendant No 1 a Mahomedan in 1843 for Rs 150 The mortgage was one with possession the profits were to be taken in lieu of a part of the interest and the remainder Rs 12 a year was to be paid by the mortgagor In point of fact nothing was ever paid

Defendant contends that as plaintiff, the present owner of the equity of redemption, is a Mahomedan, the rule of *damdupat* does not apply, and he is bound to pay the whole amount of interest that is due from 1843 to the date of

redemption. Plaintiff contends that as the original debtor, the mortgagor, was a Hindu the rule of *damdupat* applies throughout.

The Courts below have adopted the defendant's contention. We think this is not quite right. As long as the mortgagor is a Hindu the rule of *damdupat* applies so that as soon as the interest equalled the principal further interest would stop and no more than double the principal could ever be recovered, double the principal therefore is the full amount of debt for which the land could be charged and liable in the hands of a Hindu debtor. A purchase by a Mahomedan would not in our opinion affect the past relationship or increase the amount with which the land was charged at the time of the purchase. Neither would the Mahomedan become personally liable.

When however a Mahomedan becomes the debtor the rule of *damdupat* no longer applies and there is no limit to the amount of interest recoverable; the stop therefore would be [88] removed, interest would at once begin to run, the debt would increase and the land in his hands would be liable for the increased debt.

We must therefore vary the decree by adding that on payment of Rs. 300, with Rs. 12 a year for interest from the 9th April 1890 to date of payment and costs throughout within six months from this date plaintiff recover possession of the land mortgaged and that in default of such payment he be foreclosed.

*Decree varied.*

**NOTES**

[See also (1899) 24 Bom. 111.]

**[21 Bom 88]**

APPELLATE CIVIL.

*The 24th September, 1895.*

PRESENT:

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Dattatraya Keshav and another (Original Defendants Nos. 1 and 2), Applicants

*versus*

Vaman Govind (Original Plaintiff), Opponent.*

*Minor—Suit by minor in Mamlatdar's Court for possession—Mamlatdar's Act (Bombay Act III of 1876)—Civil Procedure Code (Act XIV of 1882).*

A minor may sue by next friend in the Mamlatdar's Court, although the Mamlatdar's Act (Bombay Act III of 1876) is silent as to such a suit.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb S. A. Lathkar, Mamlatdar of Wai, in a possessory suit.

Plaintiff Vaman Govind, a minor, brought the present suit by his next friend Ramchandra Ganesh to recover possession of a certain house at Wai, alleging that one Gangabai had left it to him by her will with the rest of her estate; that on her death in 1891 it came into his possession, and that on the 12th July 1894 the defendants took forcible possession of it by breaking open the locks on its doors.

The defendants denied that Gangabai had made any will, and contended that she had adopted defendant No. 1, who was the son of defendant No. 2, and

* Application No. 99 of 1895 under the extraordinary jurisdiction.

that defendant No. 1 was in possession of the house and the whole estate of Gangabai as her sole heir.

**[89]** The Mamlatdar allowed the claim, holding that Gangabai's will was proved and that the plaintiff had been in possession of the house until he was forcibly dispossessed by the defendants.

The defendants applied under the extraordinary jurisdiction of the High Court, urging (*inter alia*) that the Mamlatdar had no jurisdiction to entertain the suit, as it involved complicated questions of title, and that no suit by a next friend could be maintained in the Mamlatdar's Court on behalf of a minor, the provisions of the Code of Civil Procedure (Act XIV of 1882) being inapplicable to the Mamlatdars' Act (Bom. Act III of 1876).

A *rule nisi* was granted calling on the plaintiff to show cause why the decision of the Mamlatdar should not be set aside.

*Branson* (with *Balaji A. Bhagavat*) appeared for the Applicants (Defendants) in support of the rule. A Mamlatdar can only entertain a possessory suit when it is brought by a person who was actually in possession of the property. A minor cannot be said to be in possession of the property on account of his legal incapacity. Even a mortgagor who is not in possession or a landlord whose property is in the possession of his tenant cannot maintain a possessory suit.—*Khanderao* v. *Narsingrao*, I. L. R. 19 Bom. 289 (*quaere* this *Govinda* v. *Narsingrao*, P. J., 1895, p. 20; I. L. R. 20 Bom. 23). Unless a person is in physical possession he cannot institute a summary suit either under the Mamlatdars' Act (Bom. Act III of 1876) or under the Specific Relief Act (I of 1877).—*Nritto Lall Mitter* v. *Rajendro Narain Deb*, I. L. R., 22 Cal. 562; *Aminudin* v. *Mahamad Jamal*, I. L. R. 15 Bom. 685.

The Mamlatdar has in fact gone into the question of title and has come to the conclusion that the plaintiff is in possession through his next friend. The Mamlatdar had no jurisdiction to do so. Further, the Mamlatdars' Act has not made any provision for the institution of a suit by the next friend of a minor. That provision is made in the Civil Procedure Code (Act XIV of 1882), but it has been held that the provisions of the Code are not applicable to suits under the Mamlatdars' Act.—*Kasan Sahel* v. *Maruti*, I. L. R. 13 Bom., 552.

**[90]** *Inverarity* (with *Narayan G. Chandavarkar*), appeared for the Opponent to show cause.—There is no error in the Mamlatdar's judgment. In order to determine whether the defendant were in possession the Mamlatdar incidentally went into the question of title but he did not decide the suit on the question of title. A minor can sue in the Mamlatdar's Court by his manager or next friend. The Mamlatdars' Act does not say that a suit shall be only instituted by a person who has attained majority. The Calcutta case relied on is not applicable, because the plaintiff there said that he was the representative of his uncle and father, who were alive. The cases of a mortgagor out of possession and of a landlord are also inapplicable, because they cannot be said to be in actual physical possession of the property. In the case of a minor he is in actual possession, but he cannot do certain acts, because the law incapacitates him from doing so.

**Farran, C.J.** - The Mamlatdars' Act, it is true, makes no provision for infants suing in the Mamlatdar's Court. But we see no reason why they should not. An infant is as much entitled to have his possession protected as an adult. The Code of Civil Procedure of 1859 made no provision for infants suing, and yet suits were often brought by infants suing by their next friend when that Code was in force. It is a maxim of English law that an infant can sue by his next friend, and we think that we ought not to restrict a

Mamlatdar's jurisdiction by holding that an infant cannot sue in his Court in the usual way in which infants sue Simpson on Infants page 469, shows that miscellaneous applications made by an infant are always made through their next friend We discharge the rule with costs.

*Rule discharged*

**NOTES**

[This was followed in (1899) 24 Bom 238.]

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## [91] APPELLATE CIVIL

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*The 30th September 1896*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

Rajaram (Original Plaintiff) Appellant

*versus*

Ganesh Hari Kulkarni (Original Defendant) Respondent*

*Ejectment — Proof of title — [illegible] — Finding of lower Court [illegible] question [illegible] question of law and fact — second appeal — High Court's power [illegible] — [illegible] Act (Bom Act III of 1876), Sec 18 — Limitation Act (XV of 1877), Sec 23, Sch II, Art 47 — Dismissal of suit by Mamlatdar — Ejectment suit — Title*

In an ejectment suit [illegible] the plaintiff [illegible] the [illegible] consisted of evidence of [illegible] which the [illegible] the absence of proof [illegible] by the defendant [illegible] the evidence the District Judge held that the plaintiff's title was not proved

*Held* that this finding, which was a mixed [illegible] law and fact [illegible] finding with which the High Court could not interfere [illegible]

[illegible] the facts found by the lower Court [illegible] to be drawn [illegible] certain, the High Court [illegible] drawn by the Lower Appellate Court [illegible] doubtful, it is not [illegible] the lower Court [illegible] Judge with draw the [illegible] evidence of the question to be found upon [illegible] on the other hand [illegible] In either [illegible] High Court [illegible] to come to a different conclusion from the Lower Appellate Court But where the question upon the facts and law [illegible] judge [illegible] jury [illegible] it is not open to the High Court to [illegible] the finding of the Lower Appellate Court

*[illegible]* R [illegible] and *[illegible]* v *Shanmukhappa,* I L R [illegible]

In [illegible] the plaintiff sought [illegible] the defendant from certain land In 1883 [illegible] the plaintiff's tenant Amrit [illegible] in the Mamlatdar's Court, alleging that [illegible] had disturbed his possession by putting [illegible] upon the land and asking to be protected in his enjoyment He did not appear on the day fixed for hearing and his suit was dismissed under section 18 of Act III of 1876 He did not file a suit to set aside this order of dismissal It was contended in the [illegible] by the plaintiff that after three years by the combined operation

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* Second Appeal, No 371 of 1894.

of article 47* and section 28 of the Limitation Act (XV of 1877) the defendant's vendor Sakharam Potnis had lost his title to the land which thus became vested in the plaintiff

*Held* that except as evidence of the plaintiff's title to the land the proceeding in the Mamlatdar's Court in 1883 and his decree did not [illegible] the present suit in ejectment. A such evidence they were before the lower Court

**[92]** SECOND APPEAL from the decision of E M H Fulton District Judge of Satara, reversing the decree of Rao Saheb V G Bhave Joint Subordinate Judge

Suit in ejectment. The land in question was formerly [illegible], but at the date of suit formed part of the defendant's compound. The plaintiff claimed to recover it, alleging that until December 1890 it had been in the possession of his tenant Amrit Parsnis on his behalf, but that the defendant had then wrongfully dispossessed him

The defendant denied that the land was the plaintiff's, and alleged that he had purchased it from one Sakharam Potnis in 1889 to whom it had belonged

The evidence given by the plaintiff to prove his ownership was evidence of acts of user of the land [illegible] by himself but by other persons [illegible] his licensees or as licensees of his predecessor in title

Evidence was also given that in 1883 the defendant's predecessor and vendor Sakharam Potnis had sued the plaintiff's tenant Amrit Parsnis in the Mamlatdar's Court, alleging that Amrit had [illegible] possession by putting sweepings upon the land and asking to be protected in his [illegible]. He did not, however, appear on the day fixed for hearing and his suit was dismissed under section 13 of Act III of 1876. He did not file [illegible] to set aside this order of dismissal. It was contended in the present suit on behalf of the plaintiff that after three years by the combined operation of article 47 and section 28 of the Limitation Act (XV of 1877) Sakharam Potnis (the defendant's vendor) had lost his title (if any) to the land which thus became vested in the plaintiff

The Subordinate Judge found that the plaintiff's title to a portion of the ground was proved, and he awarded the claim to that extent

On appeal by the defendant the Judge reversed the decree and rejected the claim *in toto*

The plaintiff preferred a second appeal

**[93]** *Branson*, with *Mahadeo B Chaubal* for the Appellant (Plaintiff). The Appellate Court has found that the plaintiff has not proved his title to the land. We contend that this finding does not bind this Court in second appeal [illegible] the question is a mixed question of law and fact. The evidence with respect to title is wholly [illegible] and the [illegible] drawn a correct conclusion from it. The various acts of ownership deposed to by witnesses and Narо Amrit's continued possession on our behalf were sufficient in law to entitle us to a decree unless the defendant proved a better title. The defendant admitted our original title. Further the Judge has not considered the

*Art 47 —

| Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|
| By any person bound by an order respecting the possession of property made under the Code of Criminal Procedure, chapter XL, or the Bombay Mamlatdars' Courts Act, 1876, or anyone claiming under such person, to recover the property comprised in such order | Three years | The date of the final order in the case |

evidence of the witness (No. 43) who was examined on commission. Under these circumstances this Court has authority to review the finding —*Lachmeswar Singh* v. *Manowar*, L. R., 19 Ind. Ap., 48, *Ramgopal* v. *Shamskhaton*, L. R., 19 Ind. Ap., 228.

Next we contend that the defendant is now estopped from asserting his title to the property. In 1883 Sakharam Lakshman Potnis, the defendant's vendor, sued Amrit Parasnis, who was in possession on our behalf, in the Mamlatdar's Court to recover possession of the land, alleging that his possession was disturbed by Parasnis, who put rubbish on the land. On the day of hearing, Potnis did not appear and the suit was dismissed for his default. It has been held that when a suit is dismissed by a Mamlatdar for non-appearance of the plaintiff, his order operates as a refusal to grant relief—*Ramchandra* v. *Bhikibai*, I. L. R., 6 Bom., 177, *Chinto* v. *Vishnu*, P. J. for 1883, p. 131. These rulings have been subsequently followed. Potnis ought to have brought a suit to set aside the Mamlatdar's order within three years from its date—article 17, Schedule II of the Limitation Act (XV of 1877). He did not do so and, therefore, the defendant's right to the property is extinguished under section 28 of the Act.

*Mahadeo V. Bhat* for the Respondent (Defendant).

**Farran C. J.** - This is an appeal from the appellate decree of the District Court of Satara dismissing the plaintiff's suit. It was an ejectment suit, in which the plaintiff sought to recover possession of a piece of land formerly unenclosed, but now enclosed [94] so as to form part of the defendant's compound. The District Judge has found that the plaintiff has not proved his title to the land in dispute.

Counsel for the appellant has pressed us to review that finding, contending, upon the authority of *Lachmeswar Singh* v. *Manowar*, L. R., 19 Ind. Ap., 48, and *Ramgopal* v. *Shamskhaton*, L. R., 19 Ind. Ap., 228, that we have jurisdiction to do so, as it is a mixed question of law and fact, and as the District Judge has not, he contends, drawn the correct conclusions from the simple facts found.

It has also been argued before us that certain proceedings before the Mamlatdar taken by Potnis, the predecessor in title of the defendant in 1883, which were not followed up effectually, debar the defendant from defending this suit with success.

The application of the rule deducible from the above and other decisions of the Privy Council is not usually attended with much difficulty. From facts found it is often easy to rule with certainty that a certain legal inference ought or ought not to be drawn. When such a state of facts occurs, the Court in second appeal can and often does correct erroneous conclusions drawn by the Lower Appellate Court. Where, however, the legal inference to be deduced from facts is doubtful, it is not open to this Court in second appeal to interfere with the findings of the lower Court. A test which often presents itself to an English lawyer is this. Would a Judge withdraw the case from a jury on the ground that there was no evidence of the question to be found upon, such as adverse possession or title, to go to them, or would he, on the other hand, on certain facts being established, direct them to find in a particular manner. In either of these cases it would be open to this Court in second appeal to come to a different conclusion from the Lower Appellate Court. But where the question upon the facts and law is one which the Judge would lay before the jury to decide, there it is not open to this Court to consider the propriety of the finding of the Lower Appellate Court.

In some cases doubtless it is difficult to draw the boundary line. In the present the Lower Appellate Court has found that [95] the plaintiff has not established title to the land. The proof of ownership put forward on behalf of the plaintiff was altogether oral and consisted of acts of user over the land on the part of licensees of the plaintiff or of his predecessors in title. From these acts even if unquestioned the District Judge felt himself unable to draw the inference that the land in dispute belonged to the plaintiff. The argument of Mr Branson before us was mainly based upon the assumption that the original title of the plaintiff's ancestors, the Rajas of Satara, to the land in suit was a fact upon which there could be no question, a fact admitted in the case. There is, however, we think no admission to that effect on the part of the defendant. In cross-examination by the plaintiff he, after stating that the land was the ancestral property of his vendors, said "It is said that it was acquired by their ancestors about 100 or 200 years ago from the Maharaja of Satara. It was given, I hear, for building a house and living there, as similar sites were given to other people by the Maharaja for the same purpose." The defendant was here no doubt stating the popular tradition as to the original ownership of building land in Satara, but we cannot regard that as an admission by him of the plaintiff's original title to the land in dispute. The District Judge deals with the point thus: "During the sovereignty of the late Raja he could doubtless dispose as he thought proper of all vacant ground not belonging to any private individual. But the plaintiff cannot claim rights of a similar nature." The District Judge considers that this does not prove the plaintiff's original title to the land. We do not think that he has fallen into an error of law in this respect.

The evidence of user adduced for the plaintiff is to the effect that the Parasnis family who owned a house on the opposite side of the road used the land in question by placing cow dung and grain upon it and fodder and fuel and tethering cattle there. This it is said was done by the permission of the Maharani. The District Judge says that it is unnecessary to question the accuracy of the evidence that Parasnis received permission from the plaintiff's mother to use the ground and did use it. We do not by that expression understand that he found the user and permission as a fact but he considered that as the ground was [96] unenclosed such casual acts of ownership, if they occurred, would not prove title. The presumption which they might give rise to, he considers to be rebutted by the fact that Potnis used a privy on the same land which the defendant now uses and by other acts of ownership which Potnis and his mortgagee exercised over it.

The issue of ownership arising from acts of possession was therefore, a doubtful one. There was evidence both way. The District Judge has found upon it after a careful review of the evidence in a sense unfavourable to the plaintiff. We consider that this finding (a mixed one of law and fact) is a finding with which upon the principles to which we have adverted we cannot interfere. The District Judge has not in his judgment directly alluded to the evidence of the old man, Exhibit 43. That witness proves what is not questioned, that the land to the east of the land in dispute upon which stands the house of Bapu Sutar, belonged to the plaintiff's predecessor, but he also adds that he lived in a *wara* on that land and exercised a right of way over the land in dispute and therefore he says that it belonged to the same owner. This evidence is of the same class as that considered by the District Judge, and adds but little to it. Even if we assume that the District Judge has not taken it into consideration, we think that it is not of sufficient importance to have altered his views, but we do not feel justified in saying that it was not present to his mind though he has not set it out or directly alluded to it.

As to the second point taken before us, no issue was raised with reference to it in the Lower Appellate Court. If we thought that upon the facts found it would be conclusive in favour of the plaintiff we might, however, give effect to it in second appeal; but we do not think that it is so. In or about 1883 the defendant's predecessor Potnis sued Amrit Parasnis in the Mamlatdar's Court, alleging that the latter had disturbed his possession by piling sweepings upon the land in dispute and asked to be protected in his enjoyment of it. He did not appear on the day fixed for the hearing, and the suit was dismissed under section 13 of Act III of 1876 (Bombay). Potnis did not file a suit to set aside this order, and it is contended that after three years he by the combined operation of article 47 and section 28 of Act XV of [97] 1877 lost his title to the land which then became vested in Amrit Parasnis. The cases of *Ramchandra* v *Bhikibai*, I. L. R, 6 Bom., 477, and *Chinto* v. *Vishnu*, P. J. for 1883, p 131, followed in certain unreported cases (Second Appeal No 889 of 1889 and Second Appeal No 951 of 1889) are relied on in support of that contention They show that an order made under section 13 of the Mamlatdars' Act dismissing a suit on the non-appearance of the plaintiff operates as a decision refusing relief to the plaintiff, and that the plaintiff, if he does not sue within three years to set aside such an order, is absolutely bound by it and cannot subsequently obtain redress in respect of the wrong complained of by ordinary suit. There is no finding here as to what occurred after the order of the Mamlatdar dismissing the suit in 1883, but it would appear from the evidence of Potnis before the Bench of Magistrates contradicting his evidence in this suit and of the defendant given in this suit that Amrit Parasnis did not remove the heap of rubbish

The defendant purchased the house of Potnis including the land in dispute in 1889. In 1890 he sued Amrit Parasnis and a servant of the plaintiff in the Mamlatdar's Court in respect of a further placing of rubbish on the land by Amrit Parasnis, and obtained an order, after which Amrit removed not only the further deposit of rubbish but also the original heap. Now, it may be that on the expiration of three years from the order of the Mamlatdar in 1883 Potnis could not have compelled Amrit to remove the heap. Probably he could not have done so. It may also be that he could not then lawfully by proceedings in the Mamlatdar's Court or in a Civil Court have prevented Amrit from placing further rubbish on the land We give no opinion as to that. But we fail to see how this suit, which is not to have it declared that Amrit Parasnis or the plaintiff is entitled to deposit rubbish on the land, but is a suit on title by the plaintiff to eject the defendant, is affected by the decision of the Mamlatdar in 1883, except in so far as the proceedings and decree in his Court in 1883 can be relied on as proof of title in Amrit Parasnis and the plaintiff. For that purpose they were relied on by the Subordinate Judge and were before the District Judge, [98] who no doubt took them into consideration in coming to the decision he has arrived at.

This ground of appeal also fails. We must confirm the decree of the District Court with costs

*Decree confirmed.*

**NOTES.**

[ See also (1903) 28 Bom., 295; (1902) 4 Bom. L. R., 801, (1914) 25 I. C., 286 (Cal.), where there is a full discussion by MOOKERJEE, J., of the meaning of the expression '*construction of law*' with reference to documents.]

[21 Bom. 98]

## APPELLATE CIVIL

*September, 1895.**

PRESENT:

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Pandharinath and another, sons of Pralhad, deceased..........(Original Plaintiffs) Appellants

*versus*

Mahabubkhan and others............(Original Defendants) Respondents.*

*Ejectment—Possession—Mahomedan family—Sons living with father—Decree and execution against father—Subsequent possession by sons—Adverse possession—Civil Procedure Code (Act X of 1877), Sec 263—Limitation.*

One Ajamkhan formerly owned the house and land in dispute He sold it to Gopal, who sold it to the plaintiff. Ajamkhan, however, continued in occupation of the property. In 1879 the plaintiff sued Ajamkhan and Gopal for possession and obtained a decree. On 6th April 1880, in execution of the decree he was put in formal possession by the Court under section 263 of the Civil Procedure Code (Act X of 1877) in the presence of Ajamkhan, who made no objection. At the time of these proceedings, Ajamkhan's sons (the present defendants) were living with him in the house and they continued to do so subsequently. Ajamkhan died in 1885 and his sons continued in possession of the property and cultivated it. On the 4th April 1892, the plaintiff brought this suit to eject them They pleaded that the suit was barred by limitation contending that the execution proceedings in 1880 did not bind them, as they were no parties to that suit.

*Held* that as the present suit would not have been barred against Ajamkhan had he survived, it was not barred against the defendants, whose rights were derived from him. The defendants living with their father had no independent juridical possession of the premises. The father Ajamkhan was the only person in possession. The possession which the plaintiff Pralhad obtained through the Court from Ajamkhan in 1880 operated as well against the defendants (his sons) as against himself

SECOND APPEAL from the decision of T. Hamilton, District Judge of Sholapur, reversing the decree of Khan Saheb Ruttonji Munchurji, Subordinate Judge of Barsi.

Suit in ejectment. The original plaintiff Pralhad bought the house and land in question from one Gopal on the 16th October [99] 1875 It originally belonged to one Ajamkhan, who sold it to Gopal, the plaintiff's vendor.

The plaintiff was unable to obtain possession and accordingly sued Ajamkhan and Gopal for the property in 1879, and on 15th October of that year obtained a decree for possession On 6th April 1880, he was put in formal possession by the Court under section 263 of the then Civil Procedure Code (Act X of 1877) in the presence of Ajamkhan, who made no objection. At the time of these execution proceedings, Ajamkhan's three sons (the present defendants) were living with him in the house, two of them being minors and one of them about twenty-three years of age, and they and the rest of his family continued subsequently to reside in the house with him as they had done previously and to cultivate the land.

Ajamkhan died in 1885. His sons the defendants continued in possession of the property in question and cultivated it.

* Second Appeal No. 318 of 1894.

On the 4th April 1892, the plaintiff brought this suit to eject them. They pleaded that the suit was barred by limitation, contending that the execution proceedings in 1880 did not bind them, as they were not parties to them.

The Subordinate Judge allowed the claim, holding that it was not barred by defendants' adverse possession.

On appeal by the defendants the Judge reversed the decree on the strength of the decision in *Lakshman* v. *Moru*, I. L. R., 16 Bom., 722.

The plaintiff preferred a second appeal.

*Manekshah J. Taleyarkhan*, for the Appellant (Plaintiff):—We took actual possession through the Court and allowed Ajamkhan to remain in possession as our tenant. In any case the suit is not time-barred by defendants' adverse possession, because the period of twelve years had not elapsed from the time we got possession through Court till we filed the present suit. Ajamkhan's sons cannot say that they were in possession of the house in their own right. They were in possession through their father. If Ajamkhan had been alive he would have been bound to give us possession. His sons are also bound to do so. The ruling in *Lakshman* v. *Moru*, I. L. R, 16 Bom., 722, is not applicable, because the parties to that suit **[100]** were Hindus, while the law to be considered in the present case is the Mahomedan law.

*Gangaram B. Kele*, for the Respondents (Defendants).—Under the Mahomedan law the sons get an interest in the property from the time of their birth. Their right to recover a share in the property does not accrue to them by survivorship. The law allows them a specific share in the property as soon as they are born. Therefore we submit that we were in possession of the property, or at least some portions of it, in our own independent right. If our contention is correct, then the plaintiff's claim either wholly or partially is barred by our adverse possession. We were not parties to the decree passed against our father; therefore the delivery of possession to the plaintiff in execution of that decree cannot affect us.

**Farran, C J.**:—It is not disputed that Ajamkhan was the absolute owner of the house and land in dispute. He sold the property to one Gopal, who, in turn, sold it to the plaintiff Pralhad. The conveyance to Pralhad is dated 16th October 1875.

The plaintiff Pralhad being unable to obtain possession under his purchase sued both Ajamkhan and Gopal for the property (Suit No 457 of 1879), and on the 15th October 1879, obtained a decree ordering him to be put in possession of it. On the 6th April 1880, he was accordingly placed in formal possession by the Court's officer under section 263 of the Code of Civil Procedure (Act X of 1877) in the presence of Ajamkhan, who made no objection. Ajamkhan was, however, after this allowed to live in the house with his family as he had been previously doing.

At the time of these execution proceedings Ajamkhan had living with him in the house his three sons, the present defendants, two of whom were then minors. The third, the defendant Mahabubkhan, was a major, being about twenty-three years of age. In July of the same year the plaintiff Pralhad sent his men to plough the land. They were prevented from doing so by the defendant Mahabubkhan. The plaintiff Pralhad then took proceedings against Mahabubkhan before the Magistrate, but ultimately withdrew his complaint. The District Judge has not found as a fact why it was withdrawn.

**[101]** Ajamkhan continued to occupy the premises until his death in 1885. His sons, the defendants, are his heirs. They continued to live in the house and cultivate the land after their father's death. The present suit to eject them

was begun on the 4th April 1892. The only question is, whether it is barred by limitation.

There can be no doubt that as against Ajamkhan the plaintiff Pralhad obtained possession on the 6th April 1880, though Ajamkhan and his family may not have been actually turned out of the house—*Runjit Singh* v. *Bunwari*, I. L. R., 10 Cal., p. 993; *Joggobundhu* v. *Purnanund*, I. L. R., 16 Cal., p. 530, (a Full Bench ruling); *Venkatramanna* v *Viramma*, I. L. R., 10 Mad., p. 17. These were cases of symbolical possession. The present is a stronger case, as the plaintiff was put in actual possession—*Ramchandra* v. *Ravji*, P. J. for 1895, p. 140; I. L. R., 20 Bom., 351. The District Judge has, however, held that these proceedings did not affect the defendants, the sons of Ajamkhan, who were then living in the house as they were not parties to the suit, which resulted in the execution proceedings of the 6th April 1880. We are unable to agree with that ruling. The defendants living with their father had no independent juridical possession of the premises. The father was in the eye of the law the only person in possession. His wife, his sons and his servants would, as to possession, stand in the same category. None of them though occupying the premises can be said to have been in juridical possession of them or indeed in possession of them in any sense of the term. If dispossessed otherwise than by due course of law they could not have been replaced in their occupation by proceedings before the Mamlatdar or under the Specific Relief Act, section 9—*Nritto Lall* v. *Rajendro*, I. L R., 22 Cal., 562. The possession which the plaintiff Pralhad obtained through the Court from Ajamkhan operated as well against his dependents as against himself. The case would be different if the sons had been in independent possession of any part of the premises. They in that case would have been in the position of third parties who would not have been affected by the decree and the formal possession given under it—*Runjit Singh* v. *Bunwari*, I. L. R., 10 Cal., p 993. That is the distinction between the present case and the case of *Laksh*-[102]*man* v. *Moru*, I. L. R., 16 Bom., 722, relied on by the District Judge. The son in that case, who was a Hindu, was in actual and apparently in juridical possession of the land of which he took the crop. The judgment-debtor, the father, was not in possession. It was, therefore, held that the symbolical possession taken by the plaintiff did not affect the son, who was not a party to the proceedings. The facts, though they have an apparent resemblance to, are really different from those in the present case.

As the suit would not have been barred against Ajamkhan had he survived, it is not barred against his sons and heirs whose rights are derived from him. We reverse the decree of the Lower Appellate Court and restore that of the Subordinate Judge with costs on the defendant No. 1 in this and the Lower Appellate Court.

*Decree reversed.*

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[21 Bom. 102]

## APPELLATE CIVIL.

*The 2nd October, 1895.*

PRESENT:

CHIEF JUSTICE FARRAN, AND MR. JUSTICE PARSONS.

Malapa Sidapa Desai............(Original Defendant No. 1) Appellant
*versus*
Devi Naik............(Original Plaintiff) Respondent.*

*Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Secs. 365 and 366—Regulation VIII of 1827, Secs. 7, 9 and 10—Act XIX of 1841, Sec 9—Act VII of 1874, Sec 18—Death of appellant—Administrator of the property of the deceased placed on the record—Abatement of appeal.*

An administrator appointed under section 10 of Regulation VIII of 1827 does not by such appointment become the legal representative of the deceased, or entitled to continue an appeal filed by him.

APPEAL from the decision of Rao Bahadur G. V. Bhanap, First Class Subordinate Judge of Belgaum

In this case the plaintiff obtained a decree in the lower Court. The first defendant (appellant) who was a minor and was represented by his guardian *ad litem* A. P. Vardraj, the Nazir of the District Court of Belgaum, appealed against the decree. On the 7th March 1894, while the appeal was pending the appellant (defendant No. 1) died.

[103] On the 4th September 1894, A P Vardraj, the Nazir of the District Court, applied to be placed on the record as the legal representative of the deceased, as he had been appointed administrator of his property under section 10 of Regulation VIII of 1827. The Court passed an *ex-parte* order on the 14th September 1894, granting the application

The appeal now came on for hearing in the High Court.

A preliminary objection was taken for the respondent (plaintiff) that the Nazir had been improperly placed on the record as the legal representative of the deceased appellant, that there was no proper representative on the record, and that the appeal must, therefore, abate under section 366 of the Civil Procedure Code (Act XIV of 1882)

*P. M. Mehta* with *Vasudev G. Bhandarkar* for the Respondent (Plaintiff).—The question is whether an administrator appointed under section 10 of Regulation VIII of 1827 is the legal representative of the deceased appellant and entitled as such to be placed on the record and continue the appeal under sections 365 and 582 of the Civil Procedure Code. Section 10 of the Regulation has made provision for the appointment of a person to take possession of the property of the deceased until the proper heir comes forward. But that person cannot sue or defend a suit for the deceased. The explanation to section 366 of the Civil Procedure Code shows that the mere appointment of an administrator cannot make him the legal representative of the deceased, but when he gets possession of the property of the deceased, he can be treated as his legal representative liable in respect of such property.

[PARSONS, J., referred to *Shripat Ramchandra* v. *Vithoji valad Malharji*, 4 Bom. H. C. Rep., A. C. J., 178.]

* Appeal No. 64 of 1893.

*Inverarity*, with *Manekshah J. Taleyarkhan* for the Appellant (Defendant) :—The administrator is responsible for the property of the deceased until the heirs appear. It is his duty to recover property in the hands of other persons. He could have filed a suit, and if so, he can conduct an appeal. The order allowing the administrator to be made a party is equivalent to his being [104] appointed to conduct a suit as provided by section 367 of the Civil Procedure Code. *Mir Ibrahim* v. *Ziaulnissa*, I. L. R., 12 Bom., 150, shows that the administrator represents the estate and he is the proper person to sue. The ruling indicates that an administrator is supposed to be given the same powers which he could get under section 7 of the Regulation, which provides that a person holding a certificate of heirship can sue and obtain judgment. The analogous cases of curators and receivers should be followed.

*P. M. Mehta*, in reply :—Section 7 of the Regulation provides for a certificate of heirship and empowers the holder of the certificate to sue. But section 10 relates to the appointment of an administrator, and does not authorize him to sue. The analogy of receivers and curators does not hold, because they are expressly authorized to bring and defend suits. The appeal must, therefore, abate under section 366 of the Civil Procedure Code.

**Parsons, J.** :—The appellant died on the 7th March 1894. On the 4th September 1894, A. P. Vardraj, the Nazir of the District Court of Belgaum, asked to be placed on the record as the legal representative of the deceased, as he had been appointed administrator of his property under section 10 of Regulation VIII of 1827. An *ex-parte* order was made on the 14th September 1894, granting the application.

It is now objected that as under section 365 of the Civil Procedure Code (Act XIV of 1882) no application has been made by any person who was the real legal representative of the deceased to have his name entered on the record in place of the deceased appellant, the appeal must abate under section 366. It seems to us that the objection must prevail. Section 10 of Regulation VIII of 1827 appears to contemplate the appointment of a person to take charge of property of which the Judge is actually in possession by means of his officers, so that it can at once be delivered over to the administrator and afterwards to successful claimants. It does not contemplate the necessity of any suit being brought either to obtain or to maintain possession, and it gives no power to sue to the administrator. The grant of such a power seems necessary. Accordingly where [105] suits have to be brought we find that express power to sue is given as in section 7 of this regulation and in section 9 of Act XIX of 1841 and in section 18 of Act VII of 1874. By appointment the administrator does not become in any way the representative of the deceased person. He is merely the custodian of the property in existence and in hand for a time until the rightful owner appears or the property is sold under clause 1 of the section. The decision in *Mir Ibrahim* v. *Ziaulnissa*, I. L. R., 12 Bom., 150, is only a ruling that as long as an administrator appointed under section 9 is in existence, alleged heirs cannot sue. The opinion expressed that the authority given to the administrator under section 9 must be understood to be the same as under section 7 is an *obiter dictum*, and we do not consider it applicable to the case of an administrator appointed under section 10.

Under the provisions of section 366 of the Code of Civil Procedure we must, therefore, pass an order that the appeal abate and award the respondents the costs incurred in defending this appeal to be recovered from the estate of the deceased appellant.

*Order that the appeal abate.*

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[21 Bom. 105]

## APPELLATE CIVIL.

*The 2nd October, 1895.*

PRESENT:

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Chenava............(Original Defendant No. 2) Appellant

*versus*

Basangavda............(Original Plaintiff) Respondent.*

*Hindu law—Adoption—Lingayats—Adoption in* dwyamushyayana *form—Divided brothers.*

Amongst Lingayats the *dwyamushyayana* form of adoption is not obsolete. The adoption can take place in cases in which brothers are divided as well as where they are joint.

SECOND APPEAL from the decision of J. L. Johnston, District Judge of Dharwar, confirming the decree of Rao Saheb M. N. Nadgir, Second Class Subordinate Judge of Hubli.

The plaintiff and defendants were Lingayats. The plaintiff sued to recover possession of certain lands and houses, alleging that [106] his uncle Gulangavda, the divided brother of his father, had been the owner of the property. Gulangavda had adopted the plaintiff as his son and passed a *waraspatra* in his favour, giving up to him all his property, including the right to serve as patel. The plaintiff stated that he had thus become owner of the property which was during his minority managed on his behalf by defendant No. 1, Gulangavda's widow, and that on attaining majority he had requested her to make it over to him, but she in collusion with the other defendants refused to do so.

Defendant No. 1 denied the plaintiff's adoption by Gulangavda and contended that she had no knowledge of the execution of the *waraspatra* by her husband, that the *waraspatra* could not be acted on for want of consideration, and that the plaintiff had not acquired any title under it.

Defendant No. 2, Chenava, the daughter of defendant No. 1, put in no written statement.

At the trial plaintiff's pleader stated that the plaintiff had been adopted as *dwyamushyayana* son, and that he based his claim on the *waraspatra* also.

The Subordinate Judge found that the plaintiff's adoption by deceased Gulangavda as *dwyamushyayana* son was proved, that the *waraspatra* sued on was proved, and that the plaintiff had acquired ownership of the property in suit. He, therefore, allowed the claim.

On appeal by defendant No. 2 the Judge confirmed the decree.

Defendant No. 2 preferred a second appeal.

*Shivram V. Bhandarkar*, for the Appellant (Defendant No. 2):—Three points arise in the present case: First, whether the adoption was made in the *dwyamushyayana* form as such.

[FARRAN, C. J.:—Both the lower Courts have found as a fact that the adoption was made in that form. The question, therefore, cannot be re-opened in second appeal.]

Secondly, whether the adoption is valid, the plaintiff being the only son of a divided brother; and, thirdly, whether such form of adoption is valid in this age.

* Second Appeal No. 327 of 1894.

[107] There is also a *waraspatra* executed in plaintiff's favour; but if the plaintiff's status as the adopted son fails, then he would not get anything under the *waraspatra*, because it was executed in his favour in his capacity as adopted son.

[FARRAN, C. J., referred to *Basava* v. *Lingangauda*, I.L.R., 19 Bom., 428.]

In that case a custom as to this kind of adoption was set up, while in the present case the plaintiff does not rely on custom. *Dwyamushyayana* adoption can take place only when the brothers are united, and there must be an express stipulation at the time of the adoption that the adopted boy is to be the son of the two brothers—West and Buhler, page 1134. But when the brothers are divided, then, we submit, that even with such express stipulation no *dwyamushyayana* adoption can take place. If two brothers are undivided, and one of them has got a son, then that son has the chance of succeeding to the estate of his sonless uncle, but if the brothers be divided, the chance is very remote. The son of the other brother may subsequently come in as a reversioner, but not directly as an heir. We submit that this is the principle on which *dwyamushyayana* adoption is allowed.

Next we contend that this kind of adoption has become obsolete, and is not now recognized—*Srimati Uma Deyi* v. *Gokoolanund*, L. R, 5 I. App., 40; *Nilmadhub* v. *Bishumber*, 13 M. I. App., 85 at p. 101, Mandlik's Vyavahara Mayukha, p. 506.

*Narayan G Chandavakar*, for Respondent (Plaintiff) :—*Nilmadhub* v. *Bishumber*, 13 M. I App., 85 at p. 101, supports our case. See also West and Bühler, p. 898.

[FARRAN, C. J., referred to *Vasudevan* v. *The Secretary of State*, I. L. R., 11 Mad., 167.]

The adoption in the *dwyamushyayana* form would be good even in the case of divided brothers, because they can re-unite.

**Farran, C. J.**: -The plaintiff as the adopted son of Gulangavda, deceased, brought this suit to recover certain lands and houses at Hubli from Marilingava, the widow, and Shenava, the daughter of Gulangavda. The parties are Lingayats.

[108] Gulangavda, who was married and had a daughter, was divided from his brother Kenchangavda. The plaintiff was the only son of the latter. His allegation was that he had been adopted as *dwyamushyayana* son by his deceased uncle Gulangavda, and that he was, therefore, entitled to the property left by Gulangavda. Both the lower Courts have found the adoption of the plaintiff in this form to be proved. Such a finding of fact is binding in second appeal, and there is, besides, no reason for questioning its correctness.

Before us it is contended that the plaintiff's adoption made in the *dwyamushyayana* form is ineffectual on the grounds (1) that such adoptions are now obsolete and consequently invalid, (2) that they cannot take place between divided brothers, *i. e.*, that a sonless Hindu cannot adopt the only son of his divided brother by the *dwyamushyayana* form.

It was also urged that the adoption was not at the time of the ceremony pronounced to be in this form; but the evidence does not support the latter contention.

We feel unable to hold as a proposition of law that *dwyamushyayana* form of adoption of a son is invalid on the ground that it is obsolete. We are not, of course, referring to the *dwyamushyayana* son described in the Mitakshara, Chapter I, section X, who is not recognised in Kaliyuga age (West and Bühler, 3rd edition, page 879), but to the son adopted to fill a position analogous to that

which such a son occupied at the time when he was recognised as one of the twelve classes of sons. The argument of the appellant's pleader is based chiefly on a passage in Mr. Mandlik's Translation of the Vyavahara Mayukha in which, commenting on the passages in that work (Chapter IV, sec. 5, pl. 21-25) relating to the *dwyamushyàyana* form of adoption he says (p. 506): "The result is that the conclusion arrived at by the Madras Sadar Court appears to me to be correct, namely, that the *dwyamushyayana* form of adoption is not recognised in this age. At any rate, whatever may be the theory, it is so in practice."

Adoptions in this form are doubtless rare, probably because, as pointed out by RANADE, J., in *Basava* v.*Lingangauda*, I L.R., 19 Bom., at p. 455, this form **[109]** of adoption has not as great religious efficacy as the *dattaka* form. That learned Judge, however, recognises the form as still existing " though generally, if not altogether, obsolete in this Presidency." JARDINE J., in the same case, after referring to the principal text-books and decisions upon the subject, says (page 467): " On consideration of these authorities I am not inclined to hold that the *dwyamushyayana* son is obsolete in this age in the southern parts of the Bombay Presidency." Mr. Juctice RANADE refers to one instance (page 453) as clearly proved by the evidence which he was considering of an adoption in this form ; and that evidence was consistent with there having been others (page 454). There is a considerable body of authority in favour of its present existence. Steel's Law and Custom points to it as not unknown--47, 384, 45, 183. In West and Buhler (page 898) the learned authors say that " from personal inquiries it appears that he (the *dwyamushyayana* son) is not at all unusual in the southern districts of Bombay." On the Malabar Coast it was proved in *Vasudevan* v. *The Secretary of State*, I. L. R., 11 Mad., 157, to be the ordinary form recognised there. Mr Mayne (section 160) says that the weight of authority in opposition to the statement (that it is obsolete) seems to be overwhelming. The authorities which he refers to, bear out his view. The slokas cited by him from the Dattaka Mimansa and the Dattaka Chandrika are recognised by the Privy Council in *Srimati Uma* v. *Gokoolanund*, L. R., 5 I. A., 40, as declaring the law upon this subject (page 50). That, however, was a Bengal case, but these treatises are current in Bombay. As, therefore, this form of adoption is permitted by the shastras and is recognised by current Hindu treatises, there is, we think, no reason why it should not be recognised by the Courts of law in this Presidency. There is, in our opinion, no legal impediment to its taking place where in places in which it is not unknown parties resort to it.

As to the second ground urged by the appellant, we have not been able to find any authority in support of it. This kind of adoption appears to be allowed as well in the case of a divided as of an undivided brother. The reason why it is more common in the former case, we have already referred to.

**[110]** To assure the effect of the adoption in this case the deceased executed a *waraspatra* in the plaintiff's favour. We do not regard that as indicating on his part a belief in the inadequacy of the former rite.

We confirm the decree with costs.

*Decree confirmed.*

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**NOTES.**

[ As regards *dwayamushyayana* adoption see also (1901) 25 Bom., 537.]

[21 Bom 110]

## APPELLATE CIVIL

*The 8th October 1896*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE.

Desai Ranchhoddas Vithaldas and others (Original Defendants) Appellants

*versus*

Rawal Nathubhai Kesabhai and others (Original Plaintiffs) Respondents.*

*Hindu law—Widow—Daughter—Custom proof of—Exclusion of women from succession—Gohel Girassias—High Court Second appeal—Interference in second appeal with findings of fact based on wrong views of law—Limitation*

Hathibhai a Gohel Girassia died in or about 1866 leaving a widow Motiba and a daughter Baiba and possessed of certain lands Motiba died in 1887 In 1890 the plaintiffs who were divided collaterals of Hathibhai sued to recover the lands alleging that they succeeded thereto on the death of Hathibhai widows and daughters being excluded from inheritance according to the custom among the Gohel Girassias The lower Courts found that the lands were never in plaintiffs possession that Motiba held them till December 1882, since which time defendants Nos 1—3 held them in their enjoyment as purchasers from her, that the custom proved excluded daughters but not widows from inheritance and that the claim was within time having been made within twelve years of the death of Motiba On second appeal to the High Court

*Held* (1) that the alleged custom excluding daughters was not proved

(2) that the plaintiffs should not have been allowed to shift the basis of their claim from an alleged custom which excluded both widows and daughters to one which only excluded daughters

(3) that since limitation must be applied to the plaintiffs claim as they made it and tried to prove it, Motiba's possession was adverse to them and being for more than twelve years barred the suit

If the decree appealed against is based on wrong views of the law of evidence or on a misconception of the canon which the Privy Council and the High Court have defined as to how a special custom should be proved the High Court will interfere in second appeal

111] *Basava v Lingangauda* I L R 19 Bom 428 *Bhagvandas v Rajmal* 10 Bom H C Rep 241 *Shidhojirav v Naikojirav* 10 Bom H C Rep 234 and *Nilkisto v Beerchunder* 12 Moo I Ap 523 referred to

SECOND APPEAL from the decision of Dayaram Gidumal Acting Joint Judge of Ahmedabad

One Hathibhai, a Gohel Girassia died intestate in or about 1866 at Chitra, leaving a widow named Motiba and a daughter Baiba him surviving At the time of his death he was possessed of a certain garden and a field which were the subject matter of this suit

In 1882 the widow Motiba sold this garden and field to the defendants Nos 1—5 In 1887 she died

The plaintiffs were descendants in the third and fourth degree from the brother of Hathibhai's paternal grandfather and were divided in interest from Hathibhai In 1890 they brought this suit to set aside the sale to the defendants, alleging that by custom they were entitled to Hathibhai's property at his death

* Second Appeal No. 426 of 1894

to the exclusion of his widow and daughter, that they had obtained possession of the property after Hathibhai's death, and that the sale by Motiba was void

The defendants denied the alleged custom and alleged that after Hathibhai's death Motiba had rightful possession of the property and that she had sold it in order to pay her husband's debts

The Subordinate Judge held that on the death of Motiba the plaintiffs by the custom of the Gohel Girassias were entitled to succeed as heirs of Hathibhai to the exclusion of his daughter Baiba He, therefore, allowed the plaintiffs' claim

On appeal the Acting Joint Judge of Ahmedabad confirmed the decree of the Subordinate Judge He observed —

" The plaint set up a custom among the Gohel Girassias excluding females from succession, and the plaintiffs witnesses gave instances in which widows and daughters had not succeeded It was admitted here before me by Mr Vaijru who appeared for the plaintiffs, that the evidence regarding the exclusion of widows was conflicting Even those witnesses who asserted their exclusion had to admit that they were entitled to maintenance and to the marriage expenses of their daughters whilst others admitted that the widows of certain separated Girassias had enjoyed their property All the witnesses however agreed that there was no case in which a daughter had [112] inherited her father's property. The evidence on this point is consistent and has not been rebutted, and I agree with the Subordinate Judge that this custom is proved * * * Coming to the third point (of limitation), it was argued here that as the plaintiff set up a right to succeed to Hathibhai the possession of Hathibhai's widow was adverse for more than twelve years and the suit was, therefore barred In the lower Court however there was an express issue framed as to whether the plaintiffs were Hathibhai's heirs after the death of Motiba and this issue was decided in their favour It is admitted that the suit is within time if the period of limitation is calculated from the date of Motiba's death It is true that the plaintiffs set up a custom excluding even Motiba from the succession But looking to the fact that an express issue was framed, by which practically this contention was waived and the fact that the custom actually found proved gave a right to the plaintiffs to succeed only on Motiba's death I cannot hold that the suit is time barred "

Against this decision defendants preferred a second appeal to the High Court

*Branson* (with him *Govardhanram M Tripathi*) for Appellants (Defendants) —Plaintiffs set up a custom excluding women generally as heirs They were not able to prove this broad allegation They ought not to have been allowed by the lower Courts to shift the basis of their claim from the alleged custom, which excluded both widows and daughters, to one which only excludes daughters *Leathes* v *Newitt*, 4 Price, 355 at p 370 A part only of a custom cannot be proved The allegation as to a custom must succeed as a whole or fail entirely. A family custom to be held binding must be distinctly proved — *Patel Vandravan Jekisan* v *Patel Manilal Chunilal*, I L R, 16 Bom, 470, *Raiji Vinayakrav Jaganath Shankarsett* v *Lakshmibai*, I L R, 11 Bom, 381 The plaintiffs here have not proved any single instance in which the daughter of a deceased Gohel Girassia claimed against his separated kinsmen, and her claim was disallowed In the absence of such evidence the lower Courts were bound to presume that the rules of Hindu law applied, and that Baiba, the daughter of Hathibhai, was his heiress at Motiba's death.

Plaintiffs cannot, then, succeed in this suit as reversioners, because at the death of the daughter they may not be alive The defendants were entitled to plead a *jus tertii*—*Chandrabhai* v *Sangapa*, P J, 1875, p 312 The lower Courts have accepted as proof of custom what is no proof according to law. The High Court is [113] not bound by findings based on such insufficient evidence. It can interfere in second appeal see *Luchmeshwar* v *Manowar*, L. R, 19 I. A., 8, and *Ramgopal* v. *Shamskhaton*, L R, 19 I A, 228. As regards limitation,

the case put forward by the plaintiffs is that they were in possession, and not the widow. As a matter of fact it has been found by both the lower Courts that it was the widow who was in possession and not the plaintiffs; that is, her possession, according to the plaintiffs' own case, was adverse to them.

*P. M. Mehta* (with him *Sitanath Gopinath Ajinkya*), for Respondents (Plaintiffs) :—A distinct issue as to the custom was raised and decided at the trial, and it was not alleged by the defendants in the lower Court of appeal that they were prejudiced by the form of the issue The fact that the daughter has not come forward to claim the property after Motiba's death, shows beyond the possibility of doubt that she knew the custom was against her Otherwise she would have claimed.

As to limitation, the District Judge holds and with good reasons, that the claim is not time-barred.

**Jardine, J.** : –The lands in suit belonged to a Gohel Girassia named Hathibhai who died on some date unascertained by either of the Courts below, but which was before the execution of the deed of sale on the 20th December 1882, by Motiba, his widow, to the defendants Nos 1 to 5. The plaint says he died in Samvat 1919: the Subordinate Judge writing on April 30th, 1891, says he died twenty-five years before.

The plaintiffs are descendants in the third and fourth degree from the brothers of Hathibhai's paternal grandfather. They were divided in interest from Hathibhai. It is admitted that Hathibhai left a widow, Motiba, him surviving The plaintiffs denied or ignored the fact that he also left a daughter named Baiba: but on issue raised, the fact was proved and she appeared as a witness By the Hindu law, the plaintiffs are not entitled to succeed as heirs to the exclusion of the widow and the daughter They say that the widow died on the 26th November 1887 Their plaint alleges what was found to be unproved, that they took possession in Samvat 1919 on Hathibhai's death, and that [114] they supplied Motiba with food and raiment. This was part of their case, as they pleaded a custom which excluded the widow of a divided brother as well as daughter. As to this part of the plea, the judgment of the Subordinate Judge, Rao Sheb Wadilal T. Parikh, is halting He observes that proof of possession by the plaintiffs upon Hathibhai's death to the exclusion of Motiba would go a long way to prove this part of the custom Then he finds against them, as to the alleged possession, a matter of fact not so perplexing as one of special custom. Then he observes. "It may be said that even if Motiba was excluded by the custom, her possession was not disturbed till her death, and the custom was not exercised against her Her enjoyment of the property was, of course, like that of an ordinary Hindu widow and she could not be empowered to a greater extent " It is not easy to form an opinion whether the Subordinate Judge believed there was a custom to exclude widows or not. All that he has to say about limitation and adverse possession is contained in the following sentence.—"Motiba died in Samvat 1944 and, therefore, the claim is certainly not time-barred.

The Subordinate Judge found distinctly on the evidence that there is a custom which excludes a daughter from inheriting her father's property. This is on an issue of a vague and dangerous kind which widens the area and favours shifting of ground, *viz.*:

"Is it proved that according to Hindu law and custom, the plaintiffs were the heirs of the deceased Hathibhai at the time of the death of his widow Motiba?"

The plaintiffs were nevertheless allowed to support the case stated in their plaint that the custom excluded all women and widows as well as daughters.

In appeal the Joint Judge, Mr Dayaram Gidumal, raised the issue of custom and found as follows —

'The plaint set up a custom among the Gohel Girassias excluding females from succession, and the plaintiffs witnesses gave instances in which widows and daughters had not succeeded It was admitted here before me by Mr Varajrai, who appeared for the plaintiffs, that the evidence regarding the exclusion of widows was conflicting Even those witnesses who asserted their exclusion had to admit that they were entitled to maintenance and to the marriage expenses of their daughters while others admitted that the widows of certain separated Girassias had enjoyed their property All the [115] witnesses, however, agreed that there was no case in which a daughter had inherited her father's property The evidence on this point is consistent and has not been rebutted and I agree with the Subordinate Judge that this custom is proved

He deals as follows upon the issue of limitation —

It was argued here that as the plaintiffs set up a right to succeed to Hathibhai, the possession of Hathibhai's widow was adverse for more than twelve years, and the suit was, therefore barred In the lower Court however there was an express issue framed as to whether the plaintiffs were Hathibhai's heirs after the death of Motiba and this issue was decided in their favour It is admitted that the suit is within time if the period of limitation is calculated from the date of Motiba's death It is true that the plaintiffs set up a custom excluding even Motiba from the succession But looking to the fact that an express issue was framed by which practically this contention was waived and the fact that the custom actually found proved gave a right to the plaintiff to succeed only on Motiba's death I cannot hold that the suit is time barred'

The Joint Judge errs, in our opinion, in presuming that the plaintiffs waived their claim, *viz*, that, 1st, they were entitled to succeed as owners, and, 2nd, actually did so succeed to the exclusion of Motiba on the death of Hathibhai Most of the Subordinate Judge's judgment consists of a discussion of the evidence they insisted on bringing to prove these two points

Mr Branson for the appellants defendants argues that the Courts below have erred in letting the plaintiffs shift the basis of their claim from an alleged custom which excludes both widows and daughters to one which does not exclude any woman relative, but daughters— *Leathes* v *Newitt*, 4 Price at p 376. As the plaintiffs can succeed only on the strength of their own title, he urges that the Courts below should have recognized the title to be in Baiba at Hindu law, *Chandrabhat* v *Sangapa* P J for 1875, p 312 a *jus tertii*, and that this error has resulted from their accepting as proof of custom what is not proof thereof in the eye of the law which mistakes are such as this Court in second appeal can correct *Lachmeshwar* v *Manowar*, L R, 19 I A, 48, and *Ramgopal* v *Shamskhaton* L R 19 I A, 228 We are of opinion that, if the decree appealed against is based on wrong views of the law of evidence or on misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, this Court ought to interfere in second appeal

[116] The Joint Judge does not examine any single instance of the alleged custom We must, therefore, inquire what the evidence is The Subordinate Judge finds the custom proved by witnesses 35 38, 51, 52, 66, 67, 83 and 84, who, he says, are in favour of it He notes that the defendants tendered no rebutting evidence That makes no matter, says Mr Branson, there was nothing for them to rebut Neither Court has tested what the witnesses say as this Court did in each instance in *Basava* v *Lingangauda*, I L R, 19 Bom, 428, nor applied the canons See pp 458 and 473 Witness 35 like most of them excludes widows He swore Baiba was dead and that Motiba was only found

in maintenance His meagre remarks about daughters are not worth consideration The same remarks apply to witness 38, who was not asked about daughters Neither was witness 51 Witness 52 deposed to the death of Baiba and the maintenance of Motiba He spoke as to what happened if a Girassia died childless Witness 66 stated in the abstract the proposition of the plaint, and named three instances in his family But in none of these was there a farkhat The same remarks apply to witness 67 Witness 83 speaks to the customs in the neighbouring State of Bhavnagar Witness 84 speaks to two instances affecting daughters they are not in point unless the brethren were divided the witness in cross examination admitted he knew little about that essential fact the parties who are alive have not been called The only evidence thus appears to be that of witnesses 66 and 84 There is no documentary evidence whatever nor anything to show that the exclusion of daughters in favour of divided brethren has ever received recognition from the revenue officers or the Courts of justice No person who has excluded the daughter when she happened to be the heiress at Hindu law has been called The case therefore, resembles *Bhagvandas v Rajmal* 10 Bom H C Rep 241 See for the canons p 260 and for the authorities p 261, where it is held that proof of only three instances could not be regarded as proof of an ancient, still less of an immemorial custom The course of practice upon which the custom rests must not be left in doubt but must be proved with [117] certainty — *Shidhojirav v Naikojirav* 10 Bom H C Rep 228 The argument, that no instance of a daughter succeeding has been proved is under the circumstances of no great weight The issue ought to have been whether the plaintiffs can prove the existence of a special custom among Gohel Girassias that a collateral male relation of the father deceased succeeds to his property, they being separated in interests at Hindu law where the heiress at Hindu law entitled to the possession is a daughter The *onus* is on the plaintiff for where a custom is proved to exist it supersedes the general law, which however still regulates all beyond the custom —*Neelkisto* v *Beerchunder* 12 M I A, at p 542 Non user though relevant to matters of procedure—1 Coke on Litt 81 b— is not valid argument here The defendants might have difficulty in getting any relevant instances they are only concerned with the case of a divided brother dying with no nearer heir than a daughter In like manner no general statements nor cases among undivided brethren avail the plaintiffs neither do those where the evidence is not clear 1st that there had been a separation in interests between the succeeding male collateral and the deceased, 2nd that there was no heir nearer than the daughter 3rd that the family was one of Gohel Girassias This very case ought to have made the Courts below extremely careful to test the evidence by the usual canons as the attempt of the plaintiffs to convince those Courts of the custom by bringing witnesses to prove not only that widows are always excluded but that this widow Motiba had actually been excluded failed so completely These Courts should further have noticed the endeavour to avoid all proof of the custom about daughters by raising doubts about Baiba being alive For these reasons we find that the custom to exclude daughters was not proved

We must also hold that the adverse possession of the widow Motiba bars this suit The plaintiffs, as we have seen struggled by every means in their power to make the Subordinate Judge believe that Motiba was, in pursuance of the alleged custom excluded from the property and found in maintenance The possession found to exist in her case as a fact must therefore, have been adverse to the plaintiffs The limitation must be [118] applied to their claim as they made it and tried to prove it not to a different set of pretensions

which they would not have raised if the evidence they brought had not been disbelieved by the Subordinate Judge

The Court, therefore, reverses the decrees of the Courts below and dismisses the suit costs throughout on the plaintiffs

*Decree reversed and suit dismissed*

NOTES

[See also (1910) 4 S L R 88]

[21 Bom 118]

APPELLATE CIVIL

*The 5th October, 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

Rahimkhan and another (Original Defendants) Appellants

*versus*

Fatu Bibi Binte Saheb Khan (Original Plaintiff) Respondent*

*Bombay Act V of 1886, Sec 2†— Retrospective effect—Vatan—Vatan becoming the property of widow and daughter—Heirs*

Section 2 of Bombay Act V of 1886 is not retrospective

A vatan having devolved on the widow and daughter of a deceased Mahomedan as his heirs and each having become owner of her share in it in so far as a vatan can be held in ownership,

*Held* that on the death of the widow in 1890 leaving no qualified male heirs the daughter was entitled to succeed as her heir

SECOND APPEAL from the decision of L G Fernandez, First Class Subordinate Judge of Thana with Appellate Powers modifying the decree of Rao Saheb Manekl l G Ganlerri Subordinate Judge of Panvel

The plaintiff sued as the heiress of her father Saheb Khan and mother Aishabibi to establish her right to a moiety of a vatan alleging that the entire vatan had belonged to her father Saheb Khan and the first defendant in equal shares that Saheb Khan received Rs 233 5 6 a year, on account of his share, from Government till his death in 1851 that in July 1853, plaintiff and [119] her mother Aishabibi obtained a certificate of heirship to Saheb Khan, that the vatan was entered in the names of Aishabibi and defendant No. 1 that the plaintiff and Aishabibi lived together and enjoyed the vatan till November 1890, when Aishabibi died and that subsequently disputes having arisen as to the entry of the plaintiff's name in lieu of her mother's in the Government record, the Revenue Commissioner directed in the year 1891 that the name of the first defendant should be put in the place of Aishabibi

The defendants contended that Aishabibi's right to the vatan ceased with her death and the defendants then became the owners that both by law and custom a daughter does not acquire a right to the vatan, that the plaintiff never succeeded as the heiress of her father, that the claim was barred by the

* Second Appeal No 408 of 1894

† Section 2 of Bombay Act V of 1886 —

2 Every female member of a vatan family other than the widow of the last male owner, and every person claiming through a female shall be postponed in the order of succession to any vatan or part thereof or interest therein devolving by inheritance after the date when this Act comes into force to every male member of the family qualified to inherit such vatan, or part thereof, or interest therein

law of limitation", and that Saheb Khan had other heirs, and the plaintiff was, therefore, not entitled to a moiety of the vatan

The Subordinate Judge held that a part of the vatan which had already vested in the plaintiff as Saheb Khan's heir in 1851 under the Mahomedan law was enjoyed by her and her mother as tenants in common, and that, therefore, the disability imposed by section 2 of Bombay Act V of 1886 on a female's right to inherit a vatan did not affect her with respect to that part, and that she was not entitled to inherit Aishabibi's share in the vatan by reason of the above-mentioned section He, therefore, allowed the claim to the extent of $\frac{4165}{8107}$th share in Saheb Khan's moiety

On cross appeals by the parties the Judge modified the decree and allowed the claim in full, holding that the plaintiff had proved her right to the moiety of the vatan, that on her father's death she as his heir, enjoyed her share of the vatan, and that Aishabibi enjoyed the rest of it in her own right and adversely to the other heirs of Saheb Khan that section 2 of Act V of 1886 did not disqualify the plaintiff from inheriting Aishabibi's share in the vatan and that the defendants were not the qualified male heirs of Aishabibi

The defendants preferred a second appeal

*P M Mehta* with *Gangaram B Rele*, for the Appellants (Defendants) — The Judge has taken a wrong view of the law In [120] the first place, we contend that the plaintiff is not entitled to succeed to the vatan at all, because after her father Saheb Khan's death, Aishabibi as his widow was the proper and sole person to succeed to the vatan as the representative (vatandar service then not being commuted), and after her death, which took place in 1890, we were entitled to succeed as members of the vatandar family according to the existing state of law The plaintiff has left the vatandar family by her marriage, and if she succeeds in this suit the object of the Legislature in not allowing a vatan to pass out of the vatandar family will be defeated

Even supposing that the plaintiff has got an indefeasible right to that portion of the vatan which she acquired as the heir of her father still she cannot contend that she is entitled to succeed to Aishabibi's share At the time of Aishabibi's death, Bombay Act V of 1886 was in force, and section 2 of that Act debars any female from succeeding to the vatan except the widow of the last male holder

*Inverarity* (with *Vanekshah J Taleyarkhan*), for the Respondent (Plaintiff) —The older Vatan Acts did not absolutely prohibit a female from succeeding to the vatan When the plaintiff's father Saheb Khan died the plaintiff succeeded to a portion of the vatan in her right as heir She having acquired a share as heir to her father so far back as 1851 has now become the absolute owner of that share The same remarks apply to Aishabibi's share She had become absolute owner of her share in 1890 when she died, and section 2 of Act V of 1886 could not have deprived her of property of which she had become owner before the Act came into force Further, the section is not retrospective *Bai Hariganga v Tulsidas*, P J 1887, p 69 Aishabibi having become absolute owner, her qualified heirs will be entitled to succeed to the property The defendants are not Aishabibi's heirs They are the descendants of Saheb Khan's paternal cousins They may be the qualified heirs of Saheb Khan but certainly not of Aishabibi, who has left no other heir except the plaintiff

**Farran, C J.** —Section 2 of Act V of 1886 (Bombay) is in terms made not retrospective, and the Act has been so construed [121] in *Bai Hariganga v Tulsidas*, P J, for 1887, p 69 On the death of Saheb Khan in 1851 the vatan under the old law devolved on Aisha and the plaintiff, his heirs according to Mahomedan law, and each became the owner of her share of the property in

so far as a vatan can be held in ownership. When the Act came into force it found Aisha the owner of her share of the vatan, and section 2 did not operate to cut down her ownership

On her death her heirs were entitled to succeed, males probably in preference to females, but we need not consider that. The defendants are not the qualified heirs of Aisha, and, therefore, cannot succeed. It is argued that they are qualified heirs in the original vatan family, but that does not constitute them qualified heirs to succeed to Aisha We confirm the decree, with costs.

*Decree confirmed.*

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[21 Bom 121]

## APPELLATE CIVIL

*The 10th October, 1895.*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

Parshotam Lakhmiram. ..........Plaintiff

*versus*

Pema Harji and others . ..... ..Defendants *

*Small Cause Court—Suit not cognizable against some of the defendants—Jurisdiction*

A suit is not cognizable by a Small Cause Court unless it is cognizable by it as against all the defendants

REFERENCE by Khan Saheb J E Modi, Subordinate Judge of Anklesvar, under section 646 A of the Civil Procedure Code (Act XIV of 1882)

The plaintiff, who was a Brahmin and who belonged to a class of hereditary priests of the Barbhuja caste at Anklesvar, brought a suit against the defendants to recover from them Rs 23 9 6 on account of his fees &c, as hereditary priest, alleging that the defendants Nos 1 and 2 uncle and nephews, were members of the Barbhuja caste, that defendants Nos 4 and 5 were rival priests, that defendant No 3 was an agent of defendants Nos 4 and 5, and that on the death of the mother of defendant No 1 in 1891, the [122] death-bed offerings, fees and presents of subsequent days, amounting to the above-mentioned sum, were given to defendant No 3

A question having arisen as to whether the Subordinate Judge could take cognizance of the suit against defendants Nos 1 and 2 in his Small Cause jurisdiction, though there was no doubt that he could do so against defendants Nos 3, 4 and 5, the suit as against them being one for money had and received by them for plaintiff's use, he submitted the following questions —

"1. Whether a suit by a Hindu hereditary office-holder against an intruder or disturbance of office, or else for money had and received, can lie in the Small Cause Court?"

"2 If yes, what should be done about the defendants in this suit who are sued for not giving those fees?"

The Subordinate Judge was of opinion that if he could not try the suit against defendants Nos 1 and 2 in his Small Cause jurisdiction, he could entertain it as against all the defendants in his ordinary jurisdiction.

*N M. Samarth (amicus curiæ)*, for the Plaintiff.

* Civil Reference, No. 18 of 1895.

*Vasudeo R. Joglekar* (*amicus curiæ*) for the Defendants.

**Farran, C. J.**—As the suit against defendants Nos. 1 and 2 is not cognizable by a Small Cause Court, the whole suit is not cognizable by a Small Cause Court, and the Subordinate Judge must try it in his original jurisdiction. It is unnecessary to answer the first question.

*Order accordingly.*

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[ 21 Bom. 122 ]

APPELLATE CIVIL.

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*The 11th October, 1895.*

PRESENT:

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

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Tukaram............(Original Plaintiff) Appellant

*versus*

Babaji and others............(Original Defendants) Respondents.*

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*Civil Procedure Code (Act XIV of 1882), Sec. 258, as amended by Act VII of 1888—Payment out of Court—Payment not certified to Court—Proof of such payment for the purpose of determining the question of limitation.*

Under section 258 of the Code of Civil Procedure (as amended by Act VII of 1888) as there is no time fixed within which the decree-holder is bound to certify a pay-[123]ment made out of Court, such payment may be certified at any time. And although such payment, until certified, cannot be recognized by a Court executing a decree as a payment or adjustment of the decree, it is still open to the Court to take evidence about the payment in order to determine whether an application for execution is barred by limitation.

*Hurri Pershad* v. *Nasib Singh*, I. L. R., 21 Cal., 542, followed.

SECOND APPEAL from the decision of S. Tagore, District Judge of Satara, in Appeal No. 147 of 1894.

By a consent decree dated 29th July 1884, it was provided that, in consideration of the defendants paying into Court Rs. 600 by yearly instalments of Rs. 50 each, plaintiff should give up his right to the land in dispute which he had agreed to purchase from the defendants, and that if the defendants failed to pay any one of the instalments, the plaintiffs should be entitled to take possession of the land after the expiration of four months from the date of the default.

In 1892 the plaintiff made an application for execution of the decree, alleging that he had been paid out of Court the instalments due up to 1891, that the instalment due in 1892 had not been paid, and that as four months had elapsed since the date of the default he was entitled to recover possession of the property in dispute.

The defendants pleaded that the application was time-barred, that they had not paid the instalments as they fell due, but had paid a lump sum of Rs. 350 in Shake 1807 (1885 A. D.), and that they were willing to pay the balance of Rs 250 which was due.

The Court of First Instance dismissed the application as time-barred, holding that the alleged payments not having been certified to the Court, could not be recognized as payments under the decree, and that, consequently, evidence to prove those payments could not be received.

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* Second Appeal No. 362 of 1895.

The District Court in appeal upheld this decision. The following is an extract from the judgment:—

"The point for decision is whether evidence is admissible to prove the alleged payments out of Court?

"My finding is in the negative.

[124] "Mr. Karandikar (plaintiff-appellant's pleader) refers to *Haji Abdul* v. *Khoja Khaki*, I.L.R., 11 Bom., 34, and *Hurri Pershad* v. *Nasib*, I. L. R., 21 Cal., 542, and other cases, as showing that although under the provisions of section 258, Civil Procedure Code, an uncertified payment made to a decree-holder could not be recognized as a payment or adjustment of the decree, yet it was competent to the decree-holder to prove such payment for the purpose of showing that the execution of the decree was not barred by limitation. It is also urged that the decree-holder is not subject to any limitation, and may certify after any lapse of time, and that the statement in the darkhast itself should be taken as a certificate of the payment.

"I am, however, of opinion that the cases cited are distinguishable from the present, in as much as there is an express provision in the decree in the present case that the payments in question should be made into Court. It is not open to the judgment-creditor applying for execution to extend the terms of the decree or to consent to take satisfaction otherwise than as provided therein. I think, therefore, that the lower Court rightly held that no evidence could be admitted to prove the alleged payment made out of Court. No effect could be given to any such payment under the terms of the decree."

Against this decision the plaintiff preferred a second appeal to the High Court.

*Inverarity* (with him *Balaji A. Bhagvat*), for Appellant.

*Branson* (with him *Ganpat Sadashiv Rao*), for Respondent.

The **judgment** of the Court was delivered by

**Farran, C. J.**:—Under section 258 of the Code of Civil Procedure no time is fixed within which the decree-holder is bound to certify a payment made out of Court, and it has been held that it may be certified at any time (*Haji Abdul Rahman* v. *Khoja Khaki Aruth*, I. L. R., 11 Bom., 34). Nor is any particular form prescribed for the certificate. When, therefore, the decree-holder in the present case mentioned in his application for execution that he had been paid the instalments due in 1891, and that default had occurred in making payment of the instalments due in 1892, and asked for relief on that ground only, we fail to see why the Court did not treat the payments as certified. (*Cf. Bhika Devji Patil* v. *Mahadu valad Satwaji Patil*, P. J. for 1892, p. 430). If it thought it necessary for its own satisfaction, it might have called on the decree-holder to formally certify the payments by a separate application before it proceeded further. The judgment-debtors, however, in the present case did not admit having made the payments certified by plaintiff; they stated that they had paid [125] Rs. 550 in Shake 1807, and pleaded that execution was time-barred. At the same time they expressed their willingness to pay the plaintiff Rs. 250, which sum only they admitted to be due. It was open, we think, on the plea of limitation for the Court to have taken evidence about the payments mentioned by the plaintiff in his darkhast, and to have determined whether the application for execution was time-barred or not. Section 258 provides that such payment shall not be recognised as a payment or adjustment of the decree *by any Court executing the decree*. The italicised words added to the section by Act VII of 1888, section 27, do not appear to us to affect the question. They were added *alio intuitu* and have the effect of removing the doubts caused by the conflict of decisions pointed out in and emphasised by *Haji Abdul Rahiman* v. *Khoja*

*Khaki Aruth*, I. L. R, 11 Bom., 6, as to the Courts which could recognise uncertified payments, but do not alter the meaning of the expression " shall not be recognised *as a payment or adjustment of the decree*." We concur in the ruling of the Calcutta High Court in *Hurri Pershad* v *Nasib Singh*, I. L. R., 21 Cal, 542, which dissents from the ruling of TYRRELL, J., in *Mitthu Lal* v. *Khairati Lal*, I. L. R., 12 All., 569

The decision in *Purmanandas Jivandas* v *Vallabdas Wallaji* I. L. R., 11 Bom., 506, is, therefore, in our judgment still binding as an authority. It is in accordance with the rulings in the other High Courts. We do not think that there is any weight in the opinion of the District Judge that because the decree ordered payment to be made into Court the decree-holder was prohibited from taking payment out of Court We notice that this provision is made in only one place in the decree, *viz*, where it provides for the manner in which payment is to be made by the several judgment-debtors Elsewhere the decree speaks of payment only, and where it gives the decree-holder relief in the case of payment not being made, no restriction is placed on the mode of payment. We must, therefore, reverse the order in execution of the Lower Appellate Court, and remand the application for disposal with reference to the above remarks. Costs to be costs in the cause.

*Order reversed and case sent back.*

**NOTES.**

[This was followed in (1903) 26 All, 36 See, however, (1913) 35 All, 178. In the C.P. C., 1882, sec. 257A the words were, It shall not be recognised as a payment or execution of the decree ' In the C P C, 1908, O 21, r 2 (3), it is enacted, ' A payment or adjustment which has not been certified or *recorded* as aforesaid, shall not be recognised by any Court *executing the decree*.']

## [126] ORIGINAL CIVIL.

*The 18th June, 1896.*

PRESENT

MR. JUSTICE FULTON.

Dobson and Barlow, Limited.........Plaintiffs

*versus*

The Bengal Spinning and Weaving Company .. .. .....Defendants *

*Contract—Jurisdiction—Cause of action—Counter claim—Set-off—Civil Procedure Code (Act XIV of 1882), Sec 111—Practice—Procedure—Costs of preparing a deed—Stamp duty.*

In December 1892, the plaintiffs agreed to supply the defendants with machinery for their mill near Calcutta. The defendants being unable to pay for it in accordance with that agreement entered into a supplementary agreement with the plaintiffs on the 10th August 1894, whereby it was arranged that the plaintiffs should accept shares in the defendants' company and debentures charged on the property in satisfaction of their claim The agreement provided that the defendant company should forthwith execute an indenture of trust in favour of trustees to be named by the plaintiffs for the purpose of securing the said debentures, such indenture to be prepared by the plaintiffs' solicitors together with the debentures at the expense of the company and should be approved by the company's solicitors. It was lastly provided that this agreement should be treated as forming part of and supplemental to the agreement of December 1892 This agreement was signed in Bombay by J. Marshall

* Suit No. 151 of 1896.

on behalf of the plaintiffs. The indenture and debentures were duly prepared by the plaintiffs and approved by the defendants' solicitors in Bombay. The plaintiffs having paid in Bombay the solicitors' bill of costs in respect of the preparation of the indenture and debentures now sued to recover the amount from the defendants under the terms of the above agreement of 1894.

The defendants contended that the Court had no jurisdiction, on the ground that they did not reside or carry on business in Bombay, and that no part of the cause of action arose in Bombay. They also alleged that the plaintiffs had failed to carry out their part of the agreement of 1892, and contended that they were entitled in this suit to claim damages against the plaintiffs and to set them off against the plaintiffs' claim.

*Held*, that the Court had jurisdiction. The agreement of August 1894, was signed in Bombay by the plaintiffs' agent on their behalf, and, therefore, part of the cause of action arose within the jurisdiction. Further, it appeared that it was intended that the payment to be made by the plaintiffs should be made in Bombay, where both the plaintiffs' agent and solicitors resided.

*Held*, also, that the defendants should not be permitted in this suit to claim damages against the plaintiffs for their alleged failure to carry out their part of the contract of 1892. Their counter claim or set-off did not fall under section 111 of the Civil Procedure Code (Act XIV of 1882), as it was not a claim for an ascertained sum of money, and that being so they could not claim as of right to have it investigated in this suit. Nor was there any equitable ground for admitting the [127] counter claim, as it could not be doubted that there would be considerable delay in investigating it, and there was no reason why the plaintiffs should have to wait so long for the money to which they were now legally entitled.

*Held*, also, that the plaintiffs were entitled to include in their claim the stamp duty paid on the trust deed. The agreement contemplated that the defendants should pay all the costs incidental to the execution of the deed.

THE plaintiffs sued to recover Rs 3,073-8-0 with interest from the defendants, being the amount due for the preparation of a certain trust-deed and debentures.

The plaint alleged that by an agreement dated the 10th August 1894, the defendants had (by their agent) agreed to execute an indenture of trust and to issue debentures in payment to the plaintiffs of the amount due to them for machinery to be supplied by them to the defendants. The said indenture and the debentures were to be prepared by the plaintiffs' solicitor at the expense of the defendants, and to be approved by the defendants' solicitors. The plaint further stated that the said indenture and debentures were duly prepared and approved and were executed by the defendants on the 7th December 1895, and the plaintiffs paid the bill, *viz.*, Rs. 1,573-8-0, for the preparation of the said documents and Rs. 1,500 for stamp duty. They now sued the defendants to recover this amount.

It appeared that by a previous agreement of the 28th December 1892, the plaintiffs had agreed to supply the defendants with machinery for their mill near Calcutta. Under this agreement certain machinery had been supplied and partly paid for, but the defendants being unable to continue to pay for it in accordance with the agreement of December 1892, entered into the above agreement of 10th August 1894, which substituted certain new terms with regard to the payment of the balance of the money due. Under this agreement the plaintiffs were to take shares in the defendant company as payment. The agreement contained the following clauses:—

"3rd. In respect of the balance of the purchase-money of £38,500, referred to in the hereinbefore recited agreement, namely, the sum of £30,000, the company shall issue and hand over to the contractors three hundred debentures of pounds one hundred each, bearing interest at the rate of seven per cent. per annum, payable half yearly, and chargeable upon the lands hereditaments and premises of the company, [128] and also on all and singular

the boilers, engines, machinery, tools, fixtures, implements, utensils and plant belonging to or which may hereafter become the property of the said company.

"4th. The said debentures shall be payable at the expiration of three years from 1st day of September 1894, and shall be issued to the contractors on or before such last mentioned date.

"5th The company shall forthwith execute an indenture of trust in favour of two trustees to be named by the said contractors for the purpose of securing the said debentures, such indenture to be prepared by the solicitors for the contractors together with the debentures before referred to at the expense of the company, and shall be approved by the company's solicitors. The said indentures shall contain all usual conditions and stipulations for the better securing the repayment of the said debentures "

The agreement of 10th August 1894, was signed in Bombay by Mr. John Marshall on behalf of the plaintiffs

In the first instance there were two plaintiffs to the suit, *viz*, (1) Dobson and Barlow by their agent Clarence St Paul, and (2) John Marshall A new power of attorney was subsequently sent to Marshall, and St Paul's name was struck out under a Judge's order, and Marshall was substituted as duly constituted agent of the plaintiffs The plaint was then verified by Mr Marshall.

The defendants in their written statement stated that the suit was defective, that it was filed and the plaint affirmed by St Paul, who had no authority to act for the plaintiffs and that Mr John Marshall, who was originally a plaintiff, had not affirmed the plaint on his own behalf, and was not duly authorized to act for the plaintiffs

The defendants also submitted that the Court had no jurisdiction to try the suit, as they did not carry on business in Bombay, and the agreements were executed in Calcutta They also pleaded that the agreement of the 10th August 1894, was part of and supplemental to the agreement of the 28th December 1892, that with reference to these agreements there were many unsettled questions between them and the plaintiffs that they had a claim for damages against the plaintiffs under the agreement of December 1892, for non-delivery of certain machinery within a fixed time and that their claim in respect thereof far exceeded the plaintiffs' claim in this suit, and they craved leave to formulate [129] their claim by way of set off The written statement also contained the following clauses —

"The defendants further say that under the said agreement of the 10th of August 1894, the costs of the preparation of the indenture securing debentures and the debentures themselves was the only expense agreed to be paid by the defendants The defendants say that the sum of Rs. 1,573-8 0 claimed by the plaintiffs in this suit, is made up of various legal charges besides the costs aforesaid which the defendants are not bound to pay The defendants are and always have been willing that the bill of costs if any for the preparation of the said indenture and debentures should be taxed and that the amount found due on such taxation should be set off against the moneys claimable by the defendant from the plaintiffs as aforesaid

"5. The defendants also say that the sum of Rs 1,500 for stamp is not payable by them under the said agreement, and the plaintiffs are not entitled by virtue of the said agreement to demand it of them "

The suit came on as a short cause, and the following issues were raised :—

1 Whether the suit as originally filed was defective by reason of the terms of Mr. St. Paul's power of attorney

2. Whether their power of attorney to Mr Marshall is sufficient to entitle him to maintain this suit?

3. If the second issue is found in the affirmative and the first in the negative, whether the substitution of Mr. Marshall for Mr. St. Paul covers the original defect in the suit.

4. Whether the Court has jurisdiction to try this suit.

5. Whether the defendants are not entitled in this suit to claim damages against the plaintiffs for their failure to carry out their part of the agreement of 1892.

6 Whether under clause 5 of the agreement of 1894 the defendants are liable to pay Rs. 1,500 claimed for stamp.

7. Whether under the said clause 5 the plaintiffs are entitled to recover the sum claimed, or any, and what part thereof.

*Russell* for Plaintiffs:—The plaint was originally filed by St. Paul on behalf of Dobson and Barlow [Civil Procedure Code (Act XIV of 1882), section 37], with Marshall as second plaintiff (Contract Act, section 230). He held a power of attorney to act for them in Bombay during Marshall's absence. But a new power of attorney was on the 26th March 1896, sent to Marshall. We then struck out his name as second plaintiff and substituted him for St. Paul as plaintiffs' agent. This was done under a Judge's order. If not rightly done already, it can be done now – Civil Procedure Code (Act XIV of 1882,) section 53.

[130] As to jurisdiction we have got leave to sue under clause 12 of the Letters Patent, 1865 Under the agreement the payment of the costs under clause 5 was to be made in Bombay where the solicitors reside. The defendants' agents are in Bombay.

As to the third issue, the defendants are not entitled to raise it. Their claim under the deed of 1892 is quite independent of our claim under the deed of 1894. They cannot raise the question by way of set-off. They must file a separate suit. Besides, they have not yet formulated their claim; so we do not know what it is.

*Macpherson* for Defendants.—We say the suit as originally constituted was not maintainable and the power of attorney held by Marshall is not sufficient This Court has no jurisdiction. The defendants do not reside or carry on business in Bombay, and no part of the cause of action arose here. The plaintiffs' claim is founded on clause 5 of the agreement of 1894 which was executed at Calcutta. It does not mention any particular firm of solicitors. The fact that the solicitors who have done the work live in Bombay is accidental and quite immaterial. The defendants were not to pay the money directly to the solicitors They were only bound to recoup the plaintiffs what they might pay, and that is to be done at Calcutta, where the agreement was made.

As to our counter-claim we have a right to make it in this suit. The plaintiffs' claim against us and our claim against them are merely parts of one transaction, the whole of which is provided for by the agreement. The plaintiffs cannot single out one item in that transaction and sue in respect of it alone. We claim that the whole matter shall be dealt with. We have prepared a written statement setting forth our claim.

The claim of the plaintiffs in respect of the stamp is bad. It does not come under clause 5 of the agreement. The stamping of the documents is no part of the preparation. We say the whole claim of the plaintiffs is an overcharge, and the bill in respect of this must be taxed.

*Russell* in reply:—We are quite willing that the bill should be taxed. This has never before been suggested.

[131] **Fulton, J.**:—This is a suit brought by the plaintiffs to recover from the defendants the costs of the preparation of a certain indenture and certain debentures referred to in the fifth clause of an agreement between the parties, dated the 10th August 1894.

The defendants in their written statement made various objections to the suit which sufficiently appear in the following issues raised by Mr. Macpherson. (His Lordship read the issues as above set forth and continued.)

By an agreement dated the 28th December 1892, the plaintiffs, Messrs. Dobson and Barlow, entered into a contract with the Bengal Spinning and Weaving Company for the supply of machinery, which was to be delivered subject to certain conditions, and to be paid for in the manner agreed on. Owing to difficulties arising about payment, a supplementary agreement was entered into between the parties on the 10th August 1894, by which it was arranged that the plaintiffs should accept shares in the company and debentures charged on its property in satisfaction of their claim. The fifth clause then provided as follows:—

"The company shall forthwith execute an indenture of trust in favour of the trustees to be named by the said contractors for the purpose of securing the said debentures, such indenture to be prepared by the solicitors for the contracters together with the debentures before referred to at the expense of the company, and shall be approved by the company's solicitors. The said indenture shall contain all usual conditions and stipulations for the better securing the repayment of the said debentures."

The last clause provided that this agreement should be treated as forming part of, and supplemental to, the agreement of 28th December 1892.

In due course the indenture and debentures were prepared by the plaintiffs' solicitors and approved by the defendants' solicitors in Bombay. The plaintiffs' agent, Mr. Marshall, then wrote to the company's agent asking for the payment of the bill of costs. On the 10th February the company's agent wrote to point out that the bill had not been sent, and to say that if it were in order the plaintiffs might treat the same as a set-off to the defendants' claim against them. On the same day Mr. Marshall wrote back to say [132] that the bill had been sent, and that he could not allow it to be set-off against any claim the company might have against his principals, who had much larger claims against the company.

Mr. Marshall on the 15th April paid the solicitors' bill of costs, the suit having been previously instituted.

In the first instance, the suit was instituted in the name of Messrs. Dobson and Barlow by their agent Mr. Clarence St. Paul and also in the name of Mr. Marshall. Subsequently doubts having arisen as to the validity of Mr. St. Paul's power of attorney, a Judge's order was obtained to strike out the name of Mr. St. Paul and to substitute that of Mr. Marshall as duly constituted attorney of Messrs. Dobson and Barlow, and to make the necessary amendment consequent thereupon in the body of the plaint. The plaint was then re-verified by Mr. Marshall, and his name substituted for that of Mr. St. Paul as attorney for Messrs. Dobson and Barlow, and also erased from its position as second plaintiff.

On the first issue as to the sufficiency of Mr. St. Paul's power of attorney, I do not think it necessary to express any opinion, because in argument it was conceded by Mr. Macpherson that if Mr. Marshall's power of attorney was sufficient, the substitution was authorized by section 53 of the Civil Procedure Code, and I entirely concur in this view. The object of section 53 is clearly to prevent suits being defeated on a merely technical ground.

As to the sufficiency of Mr. Marshall's power of attorney, I cannot see in what way it is defective. There is no prescribed form. The power authorizes him to act for his principals in all matters legal or otherwise, and, therefore,

appears to entitle him to sue for them under section 37 (a) Accordingly I find on the 2nd and 3rd issues in the affirmative.

A subsidiary question arose in argument whether the Judge's order justified the removal of Mr. Marshall's name as second plaintiff. Doubtless in one way that amendment seemed to be a natural consequence of the insertion of his name as attorney for Messrs. Dobson and Barlow, but I do not think it was a necessary consequence, for it is conceivable that an agent, doubtful whether the right of suit belonged to himself or to his principal, might think proper to sue in the alternative in both names. [133] However, as Mr Russell, at the first hearing on the 9th June, while contending that the withdrawal of Mr Marshall's name was in accordance with the order also applied alternatively for its removal under section 32, I direct that it be struck out as on that date, the previous erasure being treated as invalid I do not understand how the addition of Mr. Marshall's name as co-plaintiff can have increased the defendants' costs or affected them in any way whatever, but as the point was pressed in argument I direct that if on taxation it be found that the addition of his name as co-plaintiff really and properly caused any increase in the defendants' costs (over and above those incurred by them in defending the suit of Dobson and Barlow), the same be paid by him.

Turning now to the more material issues, I find on the 4th issue that this Court has jurisdiction, leave having been given under clause 12 of the Letters Patent The agreement of August 1894, was signed in Bombay by Mr. Marshall on behalf of Messrs Dobson and Barlow.

In *Read* v. *Brown*, 22 Q B. D, 128 at p 132, a case under the Mayor's Court Procedure Act (20 and 21 Vict, c 157) the matter is very succinctly dealt with by Lord Justice FRY as follows:—"Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action" Similarly when discussing the jurisdiction of the same Court apart from the Act, Mr Justice BRETT in *Cooke* v *Gill*, L R, 8 C P, 107, said. "Cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse." Now, if the definition contained in these decisions can properly be applied to the term "cause of action" in clause 12 of the Letters Patent, it seems impossible to resist the conclusion that where one of the parties assents to the contract in Bombay, part of the cause of action arises in Bombay, for, if his assent to the contract can be disproved, the whole contract falls to the ground, and with it the right of suit. In Mr. Justice GREEN'S learned judgment in *Mulchand* v. *Suganchand*, I. L. R, 1 Bom, 23, confirmed on appeal by Sir M. WEST-[134]ROPP C J, and SARGENT, J, the weight to be attached to the English interpretation of the term "cause of action" in determining the meaning of the same phrase in clause 12 of the Letters Patent is very fully considered, and there seems to be no reason for holding that in the Letters Patent the term has a different meaning from that put on it in the two cases above referred to In *Dhunjishah* v *A. B. Fforde*, I. L R., 11 Bom., 649, Mr Justice FARRAN pointed out that it was now settled that in the case of an action on a contract, the cause of action within the meaning of clause 12 of the Letters Patent meant the whole cause of action and consisted of the making of the contract and of its breach in the place where it ought to be performed. But if the making of the contract be part of the cause of action, it appears to follow that the act of concurrence of either party which is essential to the contract is itself a part of the cause of action, for without such act of concurrence the contract cannot come into existence. See the extract from the judgment in *Sichel* v. *Borch*, 33 L. J. Ex (N. S.), 179, referred to by Mr. Justice

BITTLESTON in *DeSouza* v *Coles*, 3 Mad H C R., 384 at p 395, and Mr. Justice TELANG in *Rampurtab* v *Premsukh*, I L R, 15 Bom, 93 at p. 101.

The above remarks, if correct, are sufficient to show that part of the cause of action arose in Bombay, but the same conclusion may be arrived at on another ground. For under the circumstances of this case I think it must have been intended that the documents should be prepared in Bombay and paid for there. It has not been suggested that the plaintiffs had any other Indian solicitors than the Bombay solicitors, and the preparation of the documents in Bombay and their approval by the defendants Bombay solicitors seem to have been accepted as matters of course The fair inference, then, appears to be that payment was intended to be made in Bombay, where both the plaintiffs' agent and the solicitors resided Consequently, part of the cause of action arose within the jurisdiction

On the 5th issue whether the defendants are not entitled in this suit to claim damages against the plaintiffs for their failure to carry out their part of the contract of 1892, I am of opinion [135] that the answer must be in the negative. The defendants' claim, so far as I understand, is not one arising under section 111 of the Civil Procedure Code, for it does not seem to be one for an ascertained sum of money legally recoverable from the plaintiffs Whether a claim for an ascertained sum could, notwithstanding the provisions of section 74 of the Contract Act (IX of 1872) have been made under clause 14 of the agreement of 1892, is a matter on which I need express no opinion but if it could have been made, there could I think, be no valid reason for not formulating at the first hearing such a simple claim, considering that the defendants' agents were warned of the probability of this action as long ago as the 10th February

But what I understand is that the defendants asked for time to formulate a counter claim for damages of which their bill sent to Mr Marshall on the 18th January was a part Now I do not doubt that the Court would have jurisdiction to entertain the counter claim Though not expressly provided for in the Civil Procedure Code it has frequently been held that the Courts can entertain counter claims where it would be inequitable to compel the defendant to have recourse to a separate suit (*Clark* v *Ruthnavaloo* 2 Mad H C R 296, *Kishorchand* v *Madhowji* I L R, 4 Bom 407 *Bhagbut* v *Bamdeb* I L R, 11 Cal 557, *Chisholm* v *Gopal Chunder*, I L R 16 Cal 711) So long, however, as the counter claim or set off does not fall under section 111, the defendant cannot claim as of right to have it investigated in the same suit The question whether it is inequitable to compel him to resort to a separate suit, cannot be determined by any general rule but depends on the facts of each case In England the discretionary power is recognized by orders XIX and XXII In this country, though not conferred by Act, the discretion is exercised on general principles of equity *Bhagbat* v *Bamdeb*, I L R, 11 Cal, 557, may be referred to as a case where the Calcutta High Court refused to entertain part of a counter claim which it considered too remote to be mixed up with the original claim *Gray* v. *Webb*, 21 Ch D, 802 is an instance where the Court in England, exercising its discretion under the orders, [136] rejected a counter claim The discretion, it is true, is not an arbitrary power, but must be judicially exercised —*Huggins* v. *Tweed*, 10 Ch D, 359 at p 363

The question, then, comes to this Is it inequitable in the present case to refer the defendants to a separate suit? Mr Macpherson contended that the claim for the costs of the deed was part of the whole contract, and must be treated as one transaction with the rest of the contract But I think the substance of the arrangement must be looked to rather than the form, for the

preparation of the documents was a matter quite distinct from the supply of machinery The agreement about them was a subsidiary one embodied merely for convenience in the same deed It was clearly intended that the costs should be provided forthwith, and the plaintiffs, who are entitled to recover them, should be repaid without delay For convenience they advanced the money, and there seems no reason of expediency or equity which makes it desirable to keep them waiting for repayment until the whole accounts of the contract have been settled The settlements of these accounts depends on evidence unconnected with the evidence in this case, the collection of which must necessarily be a work of time, as part of it, I presume, will come from Calcutta If a claim by the defendants is made, it will, according to Mr Russell's contention, be met by a counter claim of the plaintiffs, and the possibility of their putting in such a replication in the present suit is open to argument At any rate it cannot be doubted that there will be considerable delay in settling the claims for damages, and in the absence of any suggestion that the plaintiffs will not be in a position to pay any damages awarded against them, I do not see why they should have to wait for the money to which they are now legally entitled.

On the 6th issue I find that the defendants must pay the item of Rs 1,500 for stamp duty The term ' prepared ' must have been intended to include the stamping of the document without which it could not be executed I think the only reasonable construction to put on the agreement is that the company were liable to pay all the costs incidental to the execution of the trust-deed, [137] and this must certainly have been the intention, as the supplementary agreement was made for their relief on account of their inability to carry out the terms of the agreement of 1892

On the 7th issue I find that the plaintiffs are entitled to recover Rs 1,500 plus the solicitors' costs for preparing the trust deed and debentures to be ascertained on taxation, and costs, and interest at 6 per cent per annum on the judgment from the date of final order which will be made as soon as the costs are duly reported

The defendants must pay their own costs, except in so far as they may be entitled to recover any from Mr. Marshall

Attorneys for Plaintiffs —Messrs *Crawford, Burder and Co*

Attorneys for Defendants —Messrs *Thakurdas, Dharamsi and Cama*

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**NOTES**

[ See also (1906) 29 Mad , 336 as regards entertaining counter claim ]

[21 Bom 137]

ORIGINAL CIVIL.

The 25th July, 1896.

PRESENT:

MR. JUSTICE B. TYABJI.

In re the Estate of H. G. Meakin, deceased.

Alice Meakin............Petitioner.

*Minor—Guardian—Minor residing in England—Jurisdiction of High Court.*

Where a mother residing at Poona the widow of a deceased European inhabitant of Poona, applied to be appointed guardian of her three minor children (two of whom were residing with her and the third, a girl of the age of sixteen years, was residing in England) and to have certain payments made to her out of the estate of their deceased father on their account, and to have certain powers over their persons given to her and to have the costs of the application paid out of the shares of the said three minor children in the hands of the Administrator General of Bombay, the Court made the order applied for

IN chambers. This was a petition by Alice Meakin, residing at Poona, the widow of Henry George Meakin, European inhabitant of Poona, who died intestate (see I. L. R., 20 Bom., 370) at Carlsbad on 1st June 1895. Letters of administration to his estate were by the consent of all parties interested, granted to the Administrator-General of Bombay.

The petitioner now applied to be appointed guardian of her three minor children and to have certain payments made to her [138] out of the estate on their account, and to have certain powers over their persons given to her, and to have the costs of the application paid out of the shares of the said three minor children in the hands of the Administrator-General.

The Administrator General, on whom notice of the petition was served, did not oppose the order prayed for; but as one of the three minor children, a girl of the age of sixteen years, was described in the petition as residing at Ealing, near London, while the other two minor children were stated to be residing with the petitioner at Poona, the question arose whether the Court had jurisdiction to make the order prayed for

*Russell*, for the Petitioner.- This petition is not headed "In the matter of the Guardian and Wards Act, 1890" on the authority of the case of *Jairam Luxumon and others*, I. L. R, 16, Bom, 634. The jurisdiction of the High Court, as to infants is not limited by the Guardian and Wards Act (see section 3 of that Act), and, consequently, depends still on the Supreme Court Charter, sections 41 and 42, as the powers given by those sections are continued to the High Court by Stat. 24 and 25 Vict., c 124, sec. 9 The High Court accordingly has the same powers with regard to infants that the Court of Chancery in England had over the whole Presidency of Bombay. The petitioner in this case resides in Poona, and Letters of Administration to the estate have been granted in Bombay. Among those powers of the Court of Chancery is one to appoint a guardian for an infant residing abroad. *Vide* Seton on Decrees (5th Ed.), p. 845, and cases there cited.

His Lordship made the order as prayed.

Attorneys for the Petitioner:—Messrs. *Crawford, Burder and Co.*

NOTES.

[See now *Mrs. Besant* v. *Narayaniah* (1914) 38 Mad., 807 P. C.]

## [139] TESTAMENTARY AND INTESTATE JURISDICTION.

*The 30th July, 1896.*

PRESENT:

MR. JUSTICE STRACHEY.

**In the matter of Petition for Probate of Will of Ezekiel Joshua Abraham.**

**Abraham Ezekiel Abraham and another............Petitioners.**

*Probate—Probate duty—Duty payable only on assets in British India at date of death—Court Fees Act (VII of 1870), Sch. I, No. 11—Succession Act (X of 1865), Secs. 242, 244.*

**Probate duty is payable only on assets which at the date of the testator's death are in British India.**

REFERENCE under the Court Fees Act (VII of 1870).

The petitioners stated that the deceased left assets of the estimated value of Rs. 10,06,892-5-8. Of this amount it appeared from the schedule that Rs 4,29,415 5 8 was the estimated value of the property left by the deceased in Bombay, Rs 5,16,477 was the estimated amount of remittances expected from Shanghai in respect of proceeds of opium and twist consigned by the deceased to his son and agent at Shanghai, while the balance of Rs. 61,000 was money remitted from Shanghai by telegraphic transfer after the death of the deceased to certain banks in Bombay and detained by them until production of probate.

The petitioners contended that probate duty could not be charged on either of the two last mentioned sums, as being outside the jurisdiction of the Court at the time of the deceased's death.

The Registrar of the High Court, in its Testamentary and Intestate Jurisdiction, was of opinion, on the other hand, that, having regard to section 244 of the Succession Act (X of 1865) and the Court Fees Act (VII of 1870), Sch I, No. 11, probate duty was payable on the whole amount of Rs 10 06,892-5-8

The question was referred to the Taxing Master under section 5 of the Court Fees Act (VII of 1870), who gave his certificate under the section referring the matter to the Chief Justice, by whose orders it was set down for hearing before STRACHEY, J.

*Macpherson*, for the Petitioners:—Probate duty is payable only on the assets in British India at the time of the testator's death. [140] We set out the whole estate in our petition for probate in consequence of section 244 of the Succession Act (X of 1865) (as amended by Act VI of 1889), which enacts that a petition for probate shall set out "the amount of assets likely to come to the petitioner's hands." Assuming that we were right in so reading the words of section 244, and that they oblige us to set out assets likely to come to our hands, but which were at the time of the testator's death in foreign countries, the question is, whether duty is leviable on these assets under Act VII of 1870, No. 11, Sch. I.

In England, when the jurisdiction of the Probate Court now exercised by the Probate Division of the High Court was transferred to it from the Ecclesiastical Courts, the first provision on the subject was in Stat. 55 Geo. III, c. 184. That statute made duty payable on property "in respect of which probate was granted" These words were always read as including only property which was within the jurisdiction at the time of the testator's death.

This statute was modified by Stat. 22 and 23 Vict., c. 36, and Stat. 27 and 28 Vict., c. 56, but the material words in it were not affected by the modifications. Under those words *Attorney-General* v. *Dimond*, 1 Cr. & Jer., 356, and *Attorney-General* v. *Hope*, 1 Cr. M & R., 530, were decided which support our contention. Those cases and others are collected in Williams on Executors, p. 542, and treated as settling the law. See also *In the goods of Murray*, (1896) P. 65 at p. 70; and see *Attorney-General* v. *Pratt*, L R, 9 Exch., 140; *Laidlay* v. *Lord Advocate*, 15 Ap. Ca., 468, and *Stern* v *The Queen*, (1896) 1 Q. B., 211; *Attorney-General* v. *Lord Sudeley*, (1896) 1 Q B., 354, affirmed by the House of Lords, *Lord Sudeley* v. *Attorney-General*, (1897) A C., 11.

Is the law different in India? We say not. In this case the testator was a Jew, and so, but for the passing of the Succession Act (X of 1865) would have been subject to English law under the Supreme Court Charter. See Henderson on Wills, p. 312

The principle is that Government levies probate duty on all property which cannot be obtained without probate. Probate in section 3 of the Succession Act (X of 1865) means the grant of the whole estate in and out of jurisdiction. This is illustrated [141] by section 179 under which all the property vests in the executors—*Spratt* v. *Harris*, 4 Hagg, 405, and Williams on Executors, p. 300. But we say there is a distinction between the liability of the estate to probate and the power to administer, they are not co-extensive—Williams on Executors, p. 301.

Section 242 of the Succession Act (X of 1865) shows the extent of the operation of probate, and we say that the words in section 244 of that Act added by Act VI of 1889 cannot have been intended to alter the English law. Under the analogous words of the Legacy and Succession Duty Acts in England, which are as wide as the words in section 244 of the Succession Act, it has been held that duty is not payable on the assets in England of a foreign testator dying abroad—*Wallace* v *Attorney General*, L R., 1 Ch Ap., 1, *Thompson* v. *Attorney-General*, 12 Cl. & F, 1; and see the discussion of the subject in Williams on Executors, Vol. 2, p. 1503. If the Registrar's contention is right, we should have to pay duty both here and at Shanghai.

*Lang*, Advocate-General, *contra*:—A code is not to be construed by ascertaining what was the previous law, see *Bank of England* v. *Vagliano*, (1891) Ap. Ca, 107 at pp. 144, 145. The doctrine laid down in that case has been adopted by the Privy Council and applied to a case under the Succession Act—*Norendra Nath* v. *Kamalbasini*, I. L. R., 23 Cal, 563, at p. 571 We say that the English law, whatever it may be, is not material to this case. We also think that the English cases are distinguishable, as the words under which they were decided are different from the words to be construed in this case. What they decide is that probate was only granted in respect of property within the jurisdiction of the Ordinary or afterwards of the Probate Court

The question in this country is what is the property in respect of which the grant is made; not what is the property over which the probate has effect We base our argument on sections 243, 244 of the Succession Act and ask that full meaning should be given to those sections. Here the property "remittances expected from Shanghai" is likely to come to the petitioners' hands and must be accounted for. Section 277 does not affect the case and must be read into section 242 A. Though the [142] words we rely on are new in section 244, yet the original section as to letters of administration (section 246) had the same words.

**Strachey, J.**:—In this case a difference which has arisen between the Registrar and the petitioners for probate of the will of Ezekiel Joshua Abraham,

as to the amount of the court-fee payable on the probate, has been referred to me for decision under section 5 of the Court Fees Act VII of 1870. The question in difference is whether the court-fee is payable upon the total amount of the assets which are stated in the petition to be likely to come to the petitioners' hands, or upon such portion only of those assets as at the time of the testator's death was in British India. The total assets are of the estimated value of Rs. 10,06,892-5-8. Of these, property valued at Rs. 4,29,415-5-8 was within British India and within the jurisdiction of this Court at the time of the testator's death. The residue, valued at Rs. 5,77,477, described in the schedule to the petition as "remittances expected from Shanghai," and consisting of the proceeds of opium and twist consigned by the deceased to Shanghai, was at the date of his death at Shanghai, and is still there, except Rs. 61,000, which, some time after that date, was remitted to Bombay by telegraphic transfers, and is now lying in certain Bombay banks. The Registrar's order is as follows :—" Having regard to section 244 of the Succession Act, requiring that the petition should state the amount of assets which are likely to come to the petitioners' hands, and the Court Fees Act, Schedule I, No. 11, requiring duty at 2 per cent. on the amount of estate in respect of which the probate, &c., is granted, the Registrar cannot exempt any portion of the value of the estate, *viz*., Rs. 10,06,892-5-8, from payment of probate duty." I have to decide whether this view is correct.

The question is whether the total assets, or those assets only which at the date of the testator's death were in British India, are "the property in respect of which the grant of probate is made" within the meaning of Schedule I, No. 11 of the Court Fees Act. To see in respect of what property the grant of probate is made we must look first to the Indian Succession Act (X of 1865), which governs this case. Under that Act, while on the one hand, section 3 read with section 179 shows that a probate granted by [143] this Court gives the executor a right of administration to all the property of the testator which vests in him, wherever situate, on the other hand section 242 shows that it has effect over such property only throughout the whole of British India. Where assets of the testator are at the time of his death in another country, the Indian probate will not enable the executor to recover them, although when in any way he does so they fall within his general right to administer, and although the Court of the foreign country in granting probate or administration for the purpose of their recovery may, as a matter of comity, follow the decision of this Court. What then (to return to the Court Fees Act) is "the property in respect of which the grant of probate is made ?" Is it all the property of the testator, wherever situate at the time of his death, which the executor is likely to recover, and which, if and when recovered, he will be entitled to administer by virtue of the probate ? Or is it only the property situate in British India at the time of the death which the probate not only entitles the executor to administer if and when recovered, but itself enables him to recover ? There is no Indian case in point. In England, however, a closely similar question has often been considered and is now finally settled. The words in the Court Fees Act "property in respect of which the grant of probate is made," or as they stood before the passing of section 13 of Act VII of 1889, "the property in respect of which the probate shall be granted," were substituted for the schedule of the Succession Act, which imposed a fixed stamp duty of Rs. 8 on 'probate or letters of administration.' They were in all probability taken from the English Stamp Act, 1815, Stat. 55 Geo. III, c. 184. Part III of the schedule of that statute contains, among other things, the duties on probates of wills, and makes such duty payable on "the estate and effects for or in respect of which such probate shall be granted." The same

words are repeated in the schedule of the Customs and Inland Revenue Act, 1880, and in section 27 of the Customs and Inland Revenue Act 1881, Stat 44 and 45 Vict, c 12, which regulated the payment of probate duty in England up to the passing of the Finance Act 1894 (Stat 57 and 58 Vict, c 30) In Williams on Executors (9th Ed), p 542 the result of the authorities upon the [144] construction of these words is thus stated —"The law appears to be now settled that by the terms of the Act of Parliament, the amount of the probate duty is to be regulated, not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the will or letters of administration, but by the value of such part as is at the death of the deceased within the jurisdiction of the Court by which the probate or letters of administration are granted Whatever may have been the origin of this jurisdiction, it is clear that it is a limited one, and can be exercised in respect of those effects only which the Ordinary would have had himself to administer in case of intestacy, and which must therefore, be so situated as that he could have disposed of them *in pios usus* The author proceeds to show how these principles have been adopted in several important decisions respecting the liability to probate duty of the personal property of the testator which at the time of his death is in a foreign country, but which after his death is brought into England by his executor The leading cases are the *Attorney General* v *Dimond*, 1 Cr and J 356, and the *Attorney General* v *Hope*, 1 Cr M and R, 530 the latter a decision of the House of Lords These decisions were based upon the limited extent of the powers of the Ordinary, who never granted probate except for goods which were within his jurisdiction at the time of the testator's death In cases of intestacy the Ordinary had originally the right to dispose *in pios usus* of goods left by the deceased within the diocese, in cases of wills, the Ordinary could only grant probate in respect of such goods, and when the deceased left *bona notabilia* within some other diocese than that in which he died the will must have been proved, not before the Ordinary, but before the Metropolitan of the province—Williams, pp 237, 340 This limited jurisdiction of the Spiritual Courts was transferred to the Court of Probate by the Court of Probate Act, 1857, and to the Probate Division of the High Court by the Judicature Act

In another part of Williams on Executors the author says 'All personal property follows the person, and the rights of a person instituted in England representative of a party deceased domiciled in England, are not limited to the personal property in [145] England but extend to such property wherever locally situate'—*Spratt* v *Harris*, 4 Hagg, 405 Again for the purpose of suing in an English Court probate obtained in the proper court here extends to all the personal property of the deceased wherever situate at the time of his death whether in Great Britain or the colonies, or in any country abroad'—*Whyte* v *Rose* 3 Q B, 493 507 'It must not be understood, however, that where a testator dies domiciled in England, leaving assets abroad, the grant of probate here can extend to them For the probate was never granted, except for goods which at the time of the death were within the jurisdiction of the Ordinary who made the grant Though if it should become necessary that the Courts of the foreign country where the assets were situate should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such Courts, by the comity of nations, would probably follow the decision of the Court of Probate in this country, as being the country of the domicil" Again, 'the Courts of the country where the deceased was domiciled will administer the property wherever situate, but if, in the course of the administration, it becomes necessary to take legal proceedings

to reduce the estate into possession, the representative constituted by the Court of the domicil will have to clothe himself with a title from the Court where the property is locally situate, by the comity of nations, however, the foreign Court will, as a matter of course, grant probate ancillary to that granted by the Courts of the domicil"— Williams, pp 300, 302 Mr Macpherson also cited the *Attorney General* v *Pratt* L R, 9 Ex, 140, *Laidlay* v *The Lord Advocate*, 15 Ap Ca, 468, *In the goods of Murray*, (1896) P 65 at pp 70, 71, and *Stein* v *The Queen*, (1896) 1 Q B, 211, as showing that the principle of the *Attorney-General* v *Dimond* and the *Attorney General* v *Hope* is still recognised as law in England.

The latest case on the subject is *Attorney General* v *Lord Sudeley*, (1896) 1 Q B, 354, affirmed by the House of Lords, *Lord Sudeley* v. *Attorney General*, (1897) A C 11, in which the majority of the Court of Appeal reversed the judgment of the Queen's Bench Division, but in which all the [146] Judges in both Courts agreed that no property was liable to probate duty which at the time of the death of the owner was not situate in England In the *Attorney General* v *Pratt* the question was whether probate duty was payable upon the amount of bills of exchange payable six months after sight drawn by a bank in India upon a bank in London in favour of the testator's English bankers, and which, at the time of the testator's death were on the high seas on their way to England It was held by all the Court that the bills represented, but did not constitute, the assets, which were the funds in the hands of the drawees in London, and that these, being at the time of the decease within the jurisdiction, were liable to probate duty It was further held by KELLY, C B, that if the bills themselves constituted the assets, they, not being at the time of the decease within any other jurisdiction and being on their way to England, must be regarded as forming part of the assets in England subject to probate duty. It is to be observed that the funds in that case, like the Rs 61,000 received in Bombay after the testator's death in this case, were in the hands of bankers, who presumably would not have given them up to the executor, except on production of the probate It was not suggested, however, that this was a material circumstance It was assumed that the time to be looked to was the date of the testator's death, and that if at that time the funds had been outside the jurisdiction they would not have become liable to probate duty merely because, when subsequently within the jurisdiction, the English probate was made available for their recovery

In *Laidlay* v *The Lord Advocate*, as pointed out in Williams on Executors (p 512, note) it seems to have been implied, especially by Lord Macnaghten that "the question in each case would seem to be whether an English or a foreign probate is necessary to enable the personal representatives to recover the property on which the duty is claimed" Lord HERSCHELL said (p. 489) "The character of the asset and its local situation cannot be affected by circumstances arising out of a transaction subsequent to the death The question is, where was the asset situate at the time of the death?" In *Attorney General* v. *Lord Sudeley* the Master of the Rolls said (p 360) "It is not every asset [147] of the estate that is to be valued for duty, but only such of the assets of the estate as were at the date of the death of the testator locally within the jurisdiction of the authority which grants the probate This authority was formerly the Ordinary, and is now the Court of Probate The distinction between assets of the estate which are liable to probate duty, and assets of the estate which are not liable to probate duty, though both are assets of the estate, is laid down and the reasons are given for it in 1831 by Lord LYNDHURST, C B, in *Attorney General* v. *Dimond*. The distinction depends upon

the locality of the asset at the time of the testator's death. If the locality is outside the jurisdiction, the asset is called a foreign asset and is not liable." Mr. Macpherson also referred by way of analogy to sections 1, 2 (2), and 20 of the Finance Act, 1894, by which probate duty was superseded by estate duty, but under which, as recently pointed out in the Law Quarterly Review (April, 1896, p. 106) the liability of property to estate duty will often depend upon the principles established by the *Attorney-General* v. *Dimond* and the cases following it: see in particular section 8 of the Act.

There are two recent colonial cases decided by the Privy Council which are important as showing that these principles are not peculiar to the English Court of Probate, but are of general application. In *Blackwood* v. *The Queen*, 8 Ap. Ca. 82, the question was whether under a Victorian Act providing in very general terms for the payment of probate duty on "the personal estate of or to which the deceased was at the time of his death possessed or entitled," personal estate which at that time was outside the colony was liable. It was held by the Privy Council that it was not. Lord HOBHOUSE said that "the reasons which led English Courts to confine probate duty to the property directly affected by the probate, notwithstanding the sweeping general words of the statutes which imposed it, apply in full force to this case." The Courts placed a limitation on these general expressions "because they thought that the Legislature could not intend to levy a tax on the grant of an instrument in respect of property which that instrument did not affect. Their Lordships think that in imposing a duty of this nature, the Victorian Legislature also was [148] contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction" (pp. 97 and 98). Again, "the grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicile. At most, it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction" (p. 92). That decision was followed in *Commissioner of Stamps* v. *Hope*, (1891) Ap. Ca., 476, a case from New South Wales, where the Supreme Court by its charter was authorised to grant probates limited to property within the colony, and where the Stamp Duty Acts authorised duties to be charged "upon all estates, whether real or personal, which belonged to any testator." It was held, following *Blackwood* v. *The Queen*, that the general words "personal estate" must be read as limited to such estate as the grant of probate conferred jurisdiction to administer, and that probate duty was, therefore, not payable on a specialty debt due to the testator, the specialty being at the time of his death outside New South Wales

* * *

This being the principle on which the Courts in England have construed the words "estate and effects for or in respect of which probate shall be granted," in the statutes imposing probate duty, and the principle being, as just shown, of general application, is there any reason why I should not similarly construe the practically identical words of the Court Fees Act? In the first place, if, as is probable, the words of Schedule I, No. 11, of the Court Fees Act were taken from Stat. 55 Geo. III, c. 184, it seems reasonable to presume that the Legislature when enacting them for India knew and approved of the construction which they had received judicially in England. Is probate granted in India in respect of other property than that in respect of which it is granted in England? The jurisdiction of the Ecclesiastical Courts, limited in the manner I have shown, which in England was transferred first to the Court of Probate and afterwards to the Probate Division of the High Court, was in India conferred upon the Supreme Courts, which, by their charters, were made

Courts of ecclesiastical jurisdiction, empowered to administer and execute, [149] within certain limits, and in regard to certain persons, the ecclesiastical law as used and exercised in the diocese of London, so far as local circumstances should admit. See the Charter of the Supreme Court of Bombay, section 47. By the same provision the power of the Supreme Court to grant probates was expressly confined to the wills of persons leaving effects within the limits of the Court's jurisdiction. The like power and authority as that exercised by the Supreme Court in relation to the granting of probates was given to the High Court by its original and amended Letters Patent. Subject to a few modifications not material to the present case, the probate of the Indian Succession Act is substantially a reproduction of that which the Commissioners who framed the Act found in the English law. The rights and functions of an executor, the limitation of the effect of the probate within a particular local area, the necessity of a foreign probate or grant of administration for recovering assets situate within a foreign jurisdiction, the comity which would generally lead the foreign Court to follow the grant of the Court of domicil,—all this is for the most part the same in India as in England. The inference which I draw is that the "sweeping general words" of Schedule I, No. 11, of the Court Fees Act must be limited in the same manner and for the same reasons as the similar words of the English statutes and the equally general words of the Australian statutes, and that, in India also, "the Legislature was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction."

In *In the goods of Murch*, I. L. R., 4 Cal., 795, decided by GARTH, C. J., in 1879, the circumstances were peculiar. The executrix of a testator dying in England proved his will first there and afterwards in the Calcutta High Court, paying duty in each country on the assets there. Some of the goods obtained in England under the English probate were sent to India. The executrix having died, the Administrator-General obtained from the Calcutta Court administration *de bonis non* of the testator's unadministered effects. The question arose whether the assets in the hands of the Administrator-General were liable to duty. Those in respect of which [150] the deceased executrix had already paid Indian probate duty were clearly exempted by section 19c of the Court Fees Act. That section, however, did not apply to the assets obtained from England, as no Indian probate duty had been paid in respect of them; and the taxing officer referred the question to the Court under section 5 of the Act. It was held by GARTH, C. J., that "as the assets in question were within the jurisdiction of this Court at the time of the grant of administration, and the Administrator-General could not have obtained possession of them otherwise than by virtue of the grant, they are clearly liable to the *ad valorem* duty." Upon this several observations arise. In the first place, it was apparently admitted that the Indian probate duty paid by the deceased executrix was rightly limited to the assets in India at the time of the testator's death. It was expressly admitted by the taxing officer, and apparently not doubted by the Court, that the assets subsequently brought from England to India would not have been liable to Indian probate duty in the hands of the executrix, as they were obtained by her, not under the Indian, but under the English probate. If without obtaining probate in England she had contrived to obtain the English assets and send them to India, I suppose that the same conclusion would still hold good, and that the Indian probate would not be considered as granted in respect of them. All this is fully in keeping with the authorities. I must say, however, with the greatest deference to GARTH, C. J., that his

decision as to the grant of administration *de bonis non* to the Administrator-General appears to me extremely doubtful. That was a grant to a new representative of the testator, and was governed by the same rules as if it had been an original grant—Succession Act, sections 229, 230; Coote's Probate Practice, p. 173. I should have thought that if there was one thing established by the authorities, it was that the test of liability to duty is the locality of the assets not at the time of the grant but at the time of the testator's death, and that no change of locality subsequent to that can affect their liability. The second reason on which GARTH, C. J.'s judgment is based seems to me equally at variance with the authorities, for they establish that the question is not whether the executor or administrator can obtain possession of [151] the assets when brought within the jurisdiction otherwise than by virtue of the grant, but whether, at the time of the testator's death, the grant would itself have affected the assets so as to make the assistance of any foreign authority unnecessary for their recovery.

In the present case I do not think there is any substantial distinction between the Rs. 61,000 which, as the Registrar says, are now lying in Bombay banks awaiting the production of the probate, and the remaining remittances which I understand are expected to be sent from Shanghai to the petitioners direct. In neither case would the Indian probate of its own force have enabled the petitioners, at the time of the testator's death, to obtain the assets, if those in possession had withheld them. The Registrar's opinion that the court fee is payable upon the total assets, including those which at the date of the testator's death were at Shanghai, is based upon the words added to section 244 of the Succession Act by section 3 of Act VI of 1889. By the latter section an application for probate must state, in addition to other particulars theretofore required, "the amount of assets which are likely to come to the petitioner's hands." Mr. Macpherson did not deny, and I do not doubt, that these words include assets likely to come to the petitioners' hands from any quarter, and that in like manner section 277 requires an executor to exhibit an inventory and account including all assets whatever which have come to his hands. The Advocate-General, who, on behalf of Government, supported the Registrar's opinion, relied almost entirely on the words added by Act VI of 1889, and did not contend that, prior to that Act, probate duty was payable upon assets which, at the time of the testator's death, were within a foreign jurisdiction. Indeed, I understand that the practice in cases where a testator leaves property both in British India and in England has always been to levy probate duty here only upon the Indian assets, and this can only be on the principle established by the English decisions. The Registrar's doubt is whether that principle is applicable where foreign assets having been brought after the testator's death into British India, are so placed as to be only obtainable by the executor on [152] production of the Indian probate, or where the executor states under section 244 of the Succession Act that the foreign assets are likely to come to his hands.

With the first point I have already dealt. As to the second, the question is whether this amendment of section 244 effected and was intended to effect so radical a change in the nature of a grant of probate, whether the probate, which until 1889 was granted in respect of a portion only of the property, was thenceforth granted in respect of all the property stated to be likely to come to the petitioner's hands, notwithstanding section 242 and the considerations and authorities to which I have referred. I do not think so. I think that section 3 of Act VI of 1889 was enacted for a very different and much more limited purpose. Section 244 as amended must be read in such a way as to make it

consistent with section 242 and the other sections of the Act. It does not, like section 38 of Stat. 55 Geo. III, c. 154, say that the statement is required "in order that the proper and full stamp duty may be paid on such probate." If Act VI of 1889 is considered, it will be seen that almost all the fifteen sections amending the Succession Act and the Probate and Administration Act, 1881, relate to the inventory and accounts which executors and administrators are required to exhibit under Part XXXIV and Chapter VII of these Acts respectively. Under the former law experience showed that, in the absence of any penalties, executors were apt to be careless and inaccurate in furnishing these statements, and hence these provisions were enacted to compel closer attention to their duties in this respect. The object of section 3 in particular, in requiring the executor to state in his application for probate the amount of assets which were likely to come to his hands, was to furnish a basis for testing the accuracy of the subsequent inventory and accounts. Most of the other sections had a similar object. It follows that the intention of the Legislature in requiring the amount of the assets likely to come to the executor's hands to be stated was not to make the property in respect of which the probate is granted anything different from what it had been before the passing of Act VI of 1889. It should be observed that section 62 of the Probate and Administration Act, 1881, corresponding with section 244 of the Succession Act, [153] and section 246 of the latter Act and section 64 of the Act of 1881 relating to applications for letters of administration, had always required the amount of assets likely to come to the petitioner's hands to be stated. If the Registrar's opinion were correct, the anomalous result would follow that before the passing of Act VI of 1889, the words in Schedule I, No. 11 of the Court Fees Act, "the property in respect of which the grant of probate or letters is made," meant one thing in the case of probates granted under the Succession Act, and another thing in the case of letters of administration granted under that Act and both probates and letters of administration granted under Act V of 1881. I infer that the check upon the accuracy of the subsequent inventory and accounts which the words introduced by section 3 of Act VI of 1889 provided, was probably omitted from section 244 of the Succession Act as originally framed through an oversight. I think that the subsequent provision of that check does not affect the applicability to No. 11 of Schedule I of the Court Fees Act of the English decisions upon practically identical words in English statutes *in pari materia*; and that those decisions should, therefore, be applied now as they would have been before 1889.

For these reasons my answer to the reference is that in this case the court fee is payable not upon the whole Rs. 10,06,892-5-8, which are stated in the petition as likely to come to the petitioners' hands, but only upon the property valued at Rs. 4,29,415-5-5, which, at the date of the testator's death, was in British India.

Attorneys for the Petitioners:—Messrs. *Ardeshir, Hormusji and Dinsha.*

Attorney for Government:—Mr. *F. A. Little.*

## [154] APPELLATE CIVIL

*The 10th March 1896*

PRESENT

MR JUSTICE PARSONS AND MR JUSTICE CANDY

Balkrishna Sakharam (Original Defendant) Appellant

*versus*

Moro Krishna Dabholkar (Original Plaintiff) Respondent *

*Landlord and tenant—Co sharers Jaghir Notice to tenant to pay full assessment—Manager acting with the consent of co sharers—Parties—Suit against tenant by manager alone in his own name—Joinder of all co sharers necessary Practice—Procedure*

A co sharer who is managing cannot even with the consent of his co sharer maintain a suit by himself and in his own name to eject a tenant who has failed to comply with a notice calling on him to pay enhanced rent

APPEAL from the decision of S Hammick District Judge of Ahmednagar in Suit No 5 of 1893

The plaintiff who was the jaghirdar of the village of Akolner and to whom a commission had been issued by Government under section 88 clauses (*a*) and (*b*) † of the Land Revenue Code (Bombay Act V of 1879), instituted the present suit in the District Court to recover from the defendant Rs 99 being the balance due to him on account of *kamal akar* (highest rate of assessment) for the three years preceding the suit

The defendant disputed the plaintiff's right to demand the highest rate of assessment, and contended (*inter alia*) that the plaintiff had no right to sue alone, as he had other co sharers in the jaghir village

The Judge allowed the claim holding (*inter alia*) that the plaintiff was entitled to recover the highest rate of assessment and [155] that though the plaintiff had other co owners in the jaghir, he was entitled to sue alone The following is an extract from the judgment —

The plaintiff admits that there are other sharers in the jaghir but he is the holder of a commission issued by Government under section 88 of Bombay Act V of 1879 and I consider that that commission renders the plaintiff competent to [illegible] the suit [illegible] the jaghirdar's claim to recover the revenue [illegible] The same question was similarly decided by Sir W WEDDERBURN in Suit No [illegible] of 187[illegible]

The defendant appealed

*Branson* (with *Ghanasham N Nadkarni*) for the Appellant (Defendant) —The plaintiff is not the sole proprietor of the jaghir There are other co sharers, and the plaintiff cannot sue alone without their consent or without joining them in the suit—*Balaji Bhikaji* v *Gopal bin Raghu* I L R, 3 Bom 23

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* Appeal No 10 of 1894

† Section 88 clauses (*a*) and (*b*) of the Land Revenue Code (Bombay Act V of 1879)—

88 It shall be lawful for the Government at any time to issue a commission to any holder of alienated lands conferring upon him all or any of the following powers in respect of the lands specified in such commission (namely)

(*a*) to demand security for the payment of the land revenue or rent due to him and if the same be not furnished, to take such precautions as the Collector is authorized to take under sections 141 to 143

(*b*) to attach the property of persons making default in the payment of such land revenue or rent as aforesaid

There is no evidence in the case to show that the plaintiff was manager, or that he brought the suit with the consent of the other co-sharers. The mere fact that the powers mentioned in section 88, clauses (*a*) and (*b*), were conferred on the plaintiff would not authorize him to sue alone. The suit must, therefore, fail.

*Inverarity* (with *Purshotam P. Khare*), for the Respondent (Plaintiff):—The plaintiff holds a commission issued to him under section 88 of the Land Revenue Code, and the powers mentioned in clauses (*a*) and (*b*) of that section have been conferred on him. He is, therefore, entitled under section 94* of the Code to bring a suit to re-assess the land or re-settle the revenue to be received from any inferior holder. The decision in *Balaji Bhikaji* v. *Gopal bin Raghu*, I. L. R., 3 Bom., 23, is not applicable to the present case.

*7th August* 1895. PARSONS, J.:—The District Judge finds that there are sharers in the jaghir, and that the plaintiff is not the sole owner, but he thinks that plaintiff can bring this suit to [156] recover the highest rate of assessment (*kamal akar*), because he is the holder of a commission issued by Government under section 88 of Bombay Act V of 1879. It appears that the plaintiff has had conferred on him the powers specified in clauses (*a*) and (*b*) of that section, but we do not see how the conferring of these powers could possibly give him a right to sue alone if otherwise he would have no such right. We think the case must be determined on the principles of law applicable to co-sharers generally, and that the plaintiff would have no right to sue alone, unless, perhaps, to use the words of the decision in *Balaji Bhikaji Pinge* v. *Gopal bin Raghu*, I. L. R., 3 Bom., 23, he was acting by consent of all the co-sharers as the manager of the village. The lower Court has omitted to determine this question of fact.

We, therefore, under section 566 of the Civil Procedure Code (Act XIV of 1882), refer this issue to the lower Court for it to try and find upon:—"Was the plaintiff acting by consent of all the co-sharers as the manager of the village for the years in suit?"

The Judge should take the evidence offered by the parties, if he considers it necessary to enable him to try the issue properly, and certify his finding to this Court within a month of date of receipt.

The case was accordingly sent back for a finding on the above issue, and upon it the Judge found that the plaintiff was acting by consent of all the co-sharers as the manager of the village for the years in suit.

The appellant (defendant) took the following objections to the finding:—

(1) The Judge was wrong in holding that the plaintiff was the manager for the other co-sharers.

(2) The finding was contrary to the weight of the evidence.

The case then came again before the High Court.

*Ghanasham N. Nadkarni*, for the Appellant (Defendant):—We submit that the finding of the Judge does not conclude us at all. We contend that one co-sharer cannot sue even with the consent of the other co-sharers. They must all be made [157] parties. We rely on *Balkrishna* v. *The Municipality of Mahad*, I. L. R., 10 Bom., 32; *Kalidas* v. *Nathu*, I. L. R., 7 Bom., 217; *Gan*

* Section 94 of the Land Revenue Code (Bombay Act V of 1879):—

94. Nothing in the last section shall be deemed to prevent a holder of alienated land from instituting a suit in a Court of competent jurisdiction for the purpose of establishing his claim to re-assess the lands or settle the revenue of any inferior holder paying less than the full sum to payment of which he deems him to be justly liable, or from levying the sum ascertained to be due in accordance with the decree in any such suit in the manner hereinbefore mentioned.

*Savant* v *Narayan, ibid*, 467 *Ramsebuk* v *Ramlall*, I L R, 6 Cal, 815 *Balaji* v *Gopal*, I. L. R, 3 Bom 23, Mayne's Hindu Law, section 274

*Mahadeo V Bhat* for *Purshotam P Khare*, for the Respondent (Plaintiff) — As the tenants have separately paid rent to each co sharer, or agreed to do so, they cannot now raise any objection to the suit As to the rights of co sharers, if their interests are endangered they can object, but in the present case they have all consented The Judge has clearly found, on the issue sent down, that the plaintiff was acting as manager with the consent of all the co-sharers It is not now open to the defendant to raise any objection The cases relied on simply lay down that one co sharer cannot sue for his undivided share, but in this case the plaintiff has 'is manager impliedly sued for the shares of all the co-sharers—*Arunachala* v *Vythialinga* I L R 6 Mad, 27; *Hari* v *Mahadu*, I L R, 20 Bom 435 Mayne's Hindu Law section 274

**Parsons, J** —By the return of the finding of the District Judge on the issue remanded by us on the 7th August 1895 we are in possession of the facts of the case

The plaintiff and his co sharers own the village of Akolner as their jaghir The defendant cultivates land in that village Prior to the years in the suit he has always paid the jaghirdars something less than the full (*kamal*) assessment The plaintiff however, gave him notice that for the years in suit he would have to pay the full assessment and has brought the present suit to enforce his demand The point of law argued before us relates to the power of the plaintiff alone to bring this suit It is found that he was acting by consent of all the co-sharers as manager of the village for the years in suit

In the case of *Balaji* v *Gopal* I L R 3 Bom, 23 the following remark is made by WESTROPP C J If any one of several tenants in common, joint tenants, or co parceners who is not acting by consent of the others as manager of an estate is to be at liberty to enhance rent or eject tenant at his own peculiar pleasure there [158] manifestly would be no safety for tenants and it would be impossible for them to know how to regulate their conduct or whom to regard as their landlord In *Arunachala* v *Vythialinga* I L R 6 Mad, 27, a somewhat similar remark is made as to a suit by the managing member of a family

On these remarks it has been argued that the learned Judges thought that a co sharer who was acting by consent of the others as manager might enhance rent and sue to eject a tenant The remarks however are very guardedly worded and it is clear that the Judges did not mean to lay down any such rule In *Kattusheri Kanna* v *Vallotil Narayanan* I L R 3 Mad 231 it is held that 'unless where by a special provision of law co owners are permitted to sue through some or one of their members all co owners must join in a suit to recover their property Co owners may agree that their property shall be managed and legal proceedings conducted by some or one of their number but they cannot invest such person or persons with a competency to sue in his own name on their behalf, or, if sued, to represent them This decision was followed by this Court in *Balkrishna* v *The Municipality of Mahad*, I L R, 10 Bom, 32 In *Hari* v *Gokaldas* I L R, 12 Bom 158 it is said that "it is plain that the right of a plaintiff to assume the character of manager, and to sue in that character, raises a question of fact and law which varies as the other members of the family are minors or adults whose assent is usually required in important matters, and we think, therefore that the defendant is always entitled, when the objection is taken at an early stage to have the other members of the family, when they are known, placed on the record to insure him against the possibility of the plaintiff's acting without authority,"

To the same effect are the decisions of the Calcutta and Allahabad High Courts. (See *Ramdoyal* v *Junmenjoy*, I. L. R., 14 Cal., 791, at p. 794; *Dwarka Nath Mitter* v *Tara Prosunna Roy*, I. L. R, 17 Cal., 160 at p. 162, *Kandhiya Lal* v. *Chandai*, I. L. R., 7 All., 313; and *Imam-ud-din* v. *Liladhar*, I. L. R., 14 All., 524 at p. 527.)

We must, therefore, treat it as settled law that a co-sharer who is manager even with the consent of his co-sharers cannot **[159]** maintain a suit by himself and in his own name to eject a tenant who has failed to comply with a notice calling on him to pay enhanced rent. We must, therefore, reverse the decree of the lower Court and order plaintiff's suit to be dismissed with costs on him throughout.

*Decree reversed.*

**NOTES**

[ See also (1907) 7 C.L.J., 251 (joint Hindu family); (1900) 24 Bom., 539 (co-sharers in matters under Bombay Land Revenue Code, sec. 216) ]

**[ 21 Bom. 159 ]**

## APPELLATE CIVIL

*The 14th October, 1895.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE CANDY

Fannyamma and another............(Original Defendants Nos. 1 and 3) Appellants

*versus*

Manjava Hebbar and others............(Original Plaintiffs Nos 2, 3 and 4) Respondents.*

*Limitation Act (XV of 1877), Sch. II, Arts 118 and 140- Limitation Act (IX of 1871), Sch. II, Art. 129 - Suit by devisees to recover possession of property devised by will—Prayer to declare alleged adoption invalid.*

A suit by a devisee to recover possession of immoveable property and for a declaration that an alleged adoption (on the strength of which the defendant was in possession) was invalid or never took place not being one merely to obtain a declaration, is governed by article 140† of the Limitation Act (XV of 1877). To such a suit article 118 does not apply, as the prayer for declaration is subservient or auxiliary only to the prayer for possession.

APPEAL from a remand order passed by E. H. Moscardi, District Judge of Kanara.

The plaintiffs alleged that under the will of one Nagabhatta, who died on the 28th July 1880, they were entitled to his immoveable property, all of which was in the possession of the defendants, that on the will being presented for registration in 1880, the first defendant (the widow of Nagabhatta) had declared it to be a forgery, and alleged that in 1879 Nagabhatta had adopted the third defendant.

* Appeal No. 27 of 1895 from order.

† [ Art. 140.—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| By a remainderman, a reversioner (other than a landlord), or a devisee, for possession of immoveable property. | Twelve years... | When his estate falls into possession.] |

The 28th July 1892, was a Court holiday.

On the 29th July 1892, *the plaintiffs brought this suit to recover possession of the property, and praying for a declaration that the alleged adoption was invalid or never in fact took place.

Defendants Nos. 1 and 3 pleaded that defendant No. 3 was the adopted son of Nagabhatta, having been duly adopted by him in [160] June 1879, and that the suit was now barred by limitation, Nagabhatta having died on the 27th July 1880.

The Subordinate Judge held the suit barred by limitation, holding that the suit should have been brought within six years under article 118, Schedule II of the Limitation Act (XV of 1877).

On appeal by the plaintiffs, the Judge reversed the decree and remanded the case for retrial, holding that the suit was one for possession of immoveable property and not simply for a declaration as to the validity of the adoption, and was, therefore, governed by twelve years' limitation.

Defendants Nos. 1 and 3 appealed.

*Shamrav Vithal*, for the Appellants (Defendants Nos. 1 and 3) :—The suit is clearly barred. Article 118 of the Limitation Act (XV of 1877) applies. The adoption of defendant No. 3 was brought to the knowledge of the plaintiffs in the year 1880, when the alleged will of Nagabhatta was presented for registration. The present suit was brought in 1892. He cited *Jagadamba* v. *Dakhina*, L R., 13 I. A., 84 at p 95, I. L R, 13 Cal., 308, *Mohesh* v. *Taruck*, L. R., 20 I. App, 30 at p 37, I L R, 20 Cal, 487 at p 497, *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar*, I. L. R, 22 Cal., 609; *Shekh Sultan* v. *Shekh Ajmodin*, L. R, 22 I. App, 51.

*Narayan G. Chandavarkar*, for the Respondents (Original Plaintiffs) :—This is a suit for possession. The prayer for a declaration as to the adoption is merely auxiliary A series of decisions of the High Courts in India has held that articles 118* and 119† of the Limitation Act are to be applied where suits are merely for a declaration. Where the relief by declaration is merely ancillary and subservient to the main relief sought, these articles have no application—*Padajirav* v. *Ramrav*, I L. R., 13 Bom., 160, *Kalgavda* v. *Lingavda*, P. J. for 1889, p. 86, *Basdeo* v. *Gopal*, I L R., 8 All, 641, *Revubai* v. *Nagapa*, P. J, 1892, p 34.

**Parsons, J.** :—Plaintiffs bring this suit as devisees under the will of one Nagabhatta to obtain possession of certain immoveable property They ask also that the adoption and all other condi [161] tions of title relied on by the defendants may be set aside and their sole right to the property declared.

For all practical purposes, and apart from any technicalities of pleading, this latter prayer is superfluous It is enough that plaintiffs suing for possession should sue on their own title, leaving the defendants to establish their

* [Art. 118 :—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| To obtain a declaration that an alleged adoption is invalid, or never in fact took place. | Six years. | When the alleged adoption becomes known to the plaintiff ] |

† [Art. 119 .—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| To obtain a declaration that an adoption is valid. | Six years. | When the rights of the adopted son as such are interfered with.] |

counter title if they can It is not necessary to their suit for possession that they should obtain a declaration that the adoption alleged by the defendants did not take place or is invalid As observed in *Abdul* v *Kirparam*, P J for 1891, p 79, the declaration is subservient or auxiliary only We must, therefore, treat the suit as one brought to obtain possession of immoveable property

The defendants plead that the will relied on by plaintiffs is a forgery, that the defendant No 3 is the owner of the property, having been adopted by Nagabhatta, and that the suit is time barred

The following facts only need be stated —The will under which plaintiffs claim, is said to have been executed on the 24th July 1880 Nagabhatta died on the 27th or 28th July 1880 The present suit was brought on the 29th July 1892 Defendant No 3 alleges that he was adopted by Nagabhatta in June 1879 The parties respectively knew of their rival claims in 1880

On these facts it is argued that the suit is time barred under article 118 of the Limitation Act (XV of 1877), because, although it asks for a declaration that an alleged adoption is invalid or never in fact took place, it has not been brought within six years from the date when the alleged adoption became known to the plaintiffs It is however, a complete answer to this argument to say that the suit is not one merely to obtain a declaration, but that it is one to obtain possession of immoveable property by a devisee for which article 140 allows twelve years time To such a suit article 118 would not apply That article applies only to declaratory suits, the sole object of which is to obtain a declaration that an alleged adoption is invalid or never in fact took place Suits for possession of property to which another limitation law is applicable are governed by that law even though [162] the validity of an adoption may arise and may have to be determined

No doubt this was not so under the Act of 1871 as interpreted by the Privy Council in the case of *Jagadamba* v *Lakhina*, L R, 13 I A, 84, but the wording of article 118 in the Act of 1877 is different, and we must construe that article according to the express rulings of the Courts here *Basdeo* v *Gopal*, I L R 8 All, 644 *Natthu Singh* v *Gulab Singh* I L R, 17 All,167, *Lala Parbhu Lal* v *J Mylne*, I L R, 14 Cal, 401 *Padajirav* v *Ramrav*, I L R, 13 Bom 160 *Kalgavda* v *Lingavdi* P J for 1889, p 86, *Revubai* v *Nagapa*, P J 1892 p 34 It is idle now to speculate whether from certain expressions used in the cases of *Mohesh* v *Taruck* L R. 20 I A, at p 37, and *Sheikh Sultan* v *Sheikh Ajmodin* L R, 22 I App, 51 the Privy Council will not decide that the Act of 1877 is to be construed in the same way as they constructed the Act of 1871 It is sufficient to say that they have not as yet so decided In the present case either party within six years from 1880 could have sued for a declaration that the claim set up by the other party was bad and his own title good Neither did so Both waited on, and now at the very verge of the twelve years the plaintiffs have brought their suit The principle, therefore, in *Jagadamba's case* hardly applies, for it was open to the defendants to have forced on the settlement of the dispute within a moderate period

For the reason that this suit is not one for a declaration to which article 118 applies, but one for possession to which the twelve years' rule applies, we confirm the order with costs

**Candy J** Plaintiffs say that Nagabhatta died on 28th July 1880 having by his will, dated 24th July 1880, devised his property to plaintiffs. When the will was presented for registration shortly after Nagabhatta's death, plaintiffs were opposed by defendants, who contended that defendant No 3 had been adopted by Nagabhatta in 1879

Since then the parties have been at arm's length. Defendants have been in possession on the strength of the alleged [163] adoption. On 29th July 1892, (the 28th July being a Court holiday), the plaintiffs brought this suit, praying that the alleged adoption be set aside and for possession of the immoveable property devised to them by the will.

It is clear that they cannot succeed in their suit unless they succeed in proving that the alleged adoption is invalid, or never in fact took place. But they claim, as devisees suing for possession of immoveable property, to be allowed twelve years' limitation under article 140 of Act XV of 1877, from the time when their estate fell into possession, i e, the death of the testator Nagabhatta.

The Subordinate Judge, relying on certain remarks of the Privy Council in *Mohesh* v *Taruck*, L R, 20 I A, 30, at p 37 S C I L R, 20 Cal., 487, at p 497, held that plaintiffs were bound to have sued within six years from 1880 under article 118 of Act XV of 1877

On appeal the District Judge set aside this decision, holding that until there is a formal decision of the Bombay High Court or the Privy Council to the contrary, the case of *Vasdeo* v *Gopal*, I. L R, 2 All, 611, must be held to be the best authority regarding the interpretation of the present law, and that claims which involve the determination of the validity or fact of an adoption are not barred by articles 118 119 of the Schedule of Act XV of 1877, *unless they are simply suits for a declaration* of the validity or existence or otherwise of a former adoption

The decision of the Privy Council in the leading case of *Jagadamba* v. *Dakhina*, L R, 13 I A, 84 S C, I L R, 13 Cal, 308, was given in April 1886, with reference to article 129* of Act IX of 1871 After showing that the expression in that article 'set aside an adoption' is and had been for many years applied, in the ordinary language of Indian lawyers, to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature, their Lordships proceeded, page 94 "It is worth observing that in the Limitation Act of 1877, which superseded the Act now [164] under discussion, the language is changed. Article 128 (sic mistake for 118) of the Act of 1877 which corresponds to article 129 of the Act of 1871, so far as regards setting aside adoptions, speaks of a suit 'to obtain a declaration that an alleged adoption is invalid or never in fact took place,' and assigns a different starting point to the time that is to run against it Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions not now before their Lordships Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption' to be one of a loose kind, and that more precision was desirable.

"If, then, the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiffs' counsel

* [Art 129* —

| Description of suit | Period of limitation. | Time when period begins to run. |
|---|---|---|
| To establish or set aside an adoption. | Twelve years | The date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father.] |

were asked, but were not able to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for the possession of the same property It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession"

In August 1886, in *Ganga Sahai* v *Lekhraj Singh*, I L R, 9 All, 253, Mr Justice MAHMOOD (at page 267) referred to the very recent ruling of the Privy Council in *Jagadamba* v *Dakhina*, L R, 13 I A, 84 s c, I. L R, 13 Cal., 308, holding that the ruling was wholly inapplicable to the case before him, both [165] on account of the facts, and also because their Lordships had themselves pointed out the change of law effected by article 118 of the Limitation Act of 1877 (Their Lordships said "Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions not now before their Lordships )

In August 1888, in *Padajirav* v *Ramrav*, I L R, 13 Bom, 160, Sir CHARLES SARGENT, C J, and Mr Justice NANABHAI HARIDAS remarked, at page 165 "Before leaving this part of the case we think it will be useful to notice the view pressed upon us in argument by defendant's counsel, that article 119 of the Act of 1877 was the article applicable to the case, and that taken in connection with the ruling in *Jagadamba Chowdhrani* v *Dakhina Mohun*, L R, 13 I A, 84 s c, I L R 13 Cal, 308, the plaintiff's suit, although one to recover the land, was barred six years after plaintiff came of age That case, however, was decided under article 129 of the Act of 1871, and was held by the Allahabad High Court, and we think rightly, to have no application to sections 118 and 119 of the Act of 1877, which are confined in terms to suits for a declaration—*Ganga Sahai* v *Lekhraj Singh* I L R 9 All, 253 '

In 1889 in *Kalgavda* v *Lingavda*, P J for 1889 p 86 SARGENT, C J, and myself held that article 144 of Act XV of 1877 applied to the case before us, which was a suit brought by an alleged adopted son to recover the property of his deceased adoptive father We relied on the cases of *Padajirav* v *Ramrav* I L R, 13 Bom 160 above noted and *Basdeo* v *Gopal* I L R, 8 All, 644 This last was a case in August 1886, in which OLDFIELD and TYRRELL, JJ, went fully into the question They said (page 645) ' The Privy Council decision in *Jagadamba Chowdhrani* v *Dakhina Mohun*, L R, 13 I A, 84 s c I L R, 13 Cal 308 has no application That decision dealt with the limitation in article 129 of the old Act, IX of 1871 which referred to suits to set aside an adoption, and their Lordships held that the terms 'to set aside an adoption' referred to and included suits which bring the validity of an adoption into question, and applied indiscriminately to suits to have an adoption declared invalid and for possession of land, when the validity of an alleged adoption is brought into question

[166] "But that decision had peculiar reference to the terms in which article 129 was framed The present law of limitation has made an alteration. It contains no such article as 129 On the other hand, we have articles 118 and 119, the former for suits to obtain a declaration that an alleged adoption is invalid or never took place and the latter to obtain a declaration that an adoption is valid, and the period of limitation is reduced to six years, and the

time from which it will run is altered, and the Act provides separately for suits for possession of property by article 141

"There is no ambiguity about article 118 as there was about article 129 of the old law, and it can be held only to refer to suits purely for a declaration that an alleged adoption is invalid, or never, in fact, took place, and where the suit is for possession of property, to which another limitation law is applicable, it will be governed by it, although the question of validity of adoption may arise. As already observed, it is discretionary in a Court to grant relief by declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former

"It is observable that, in the case we have referred to their Lordships of the Privy Council remarked upon the difference between the language of article 129 of Act IX of 1871, which they designate as being of a loose kind, and the precise terms of articles 118 and 119 of Act XV of 1877, which we have described above

In February 1892, in *Revubai* v *Najipa* P J, 1892 p 34 SARGENT, C J, and BIRDWOOD J, said 'We think it right to remark that both Courts were wrong in regarding the suit as one only for a declaration of the validity of the plaintiff's adoption The plaint sought further relief by the plaintiff being put into possession of the property, and such a declaration would be merely ancillary to that relief The question for determination would, therefore, be—whether defendant No 1 has been in adverse possession for twelve years before the suit was brought

[167] In December 1892 Lord SHAND delivered the judgment of the Privy Council in *Mohesh Narain* v *Taruck Nath Moitra* L R, 20 I A 30 It was held that the suit having been brought to recover possession on the ground that the defendant's adoption was invalid was a suit to "set aside an adoption" within the meaning of the Limitation Act 1871, and the suit being thus barred long before the Act of 1877 came into force the plaintiff must fail At page 37 Lord SHAND said

"It was suggested that the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute in which the language used is somewhat different, the suit there referred to, as necessary to save the limitation being described as one "to obtain a declaration that an alleged adoption is invalid or never, in fact took place It seems to be more than doubtful whether, if those were the words of the statute applicable to the case the plaintiff would thereby take any advantage"

It is on these last words that the argument for the present appellants is founded In the case just quoted, their Lordships were satisfied that the defence of limitation had been clearly established on the ground of the long unchallenged adoption of the principal defendant notwithstanding his assertion of the status and right of an adopted son, and his enjoyment with the complete knowledge of the plaintiff, of the advantages which that status gave him Plaintiff's allegation was that the adoptive mother of the principal defendant had been in possession of the property till her death in 1884 and that consequently until that event occurred no cause of action for possession arose But their Lordships held that as the plaintiff's claim (for a declaration of his right and that possession might be given to him of the properties in dispute) obviously involved the setting aside of the defendant's adoption the suit was barred under article 129 of Act IX of 1871, which provided the limitation of twelve years for suits "to set aside or establish an adoption" from "the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive

father," and their Lordships thought it [168] more than doubtful whether plaintiff would have taken any advantage, even if the words of the statute of 1871 had been (as in the Act of 1877) "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place" And such indeed must have been the case, when the fact is regarded that defendant was adopted in 1851 by his adoptive mother on the alleged authority of an *annumati patra* given by her husband, who died in 1850 What advantage could plaintiff have gained by the change in language? He said that the *annumati patra* gave a life estate to the widow, but the High Court found as a fact that the defendant and his adoptive mother had been in actual possession, and the Privy Council held that defendant had enjoyed with the complete knowledge of the plaintiff, the advantages which the status of adopted son gave him

An examination of the case thus shows that the remark of their Lordships is no foundation for upsetting the current of decisions which are founded on the difference of languages in article 129 of the Limitation Act, 1871, and in article 118 of the Limitation Act, 1877 This Court has, after due deliberation, adopted the reasoning of OLDFIELD and TYRRELL JJ, in *Basdeo* v *Gopal*, I L R, 8 All, 644 and we should not now be justified in departing from that reasoning without the distinct authority of the Privy Council

Mr Shamrav, for appellants, referred to the judgment of the Privy Council in *Lachman Lal* v *Kanhaya Lal*, L R, 22 I A, 51, but there is nothing in that judgment which really bears on the point at issue

It appears that recently (February 1895) in the Allahabad High Court, EDGE, C J, and BANERJI J, reiterated the conclusions arrived at in *Basdeo* v *Gopal* I L R, 8 All, 644 pointing out that the same conclusions were to be found in another Allahabad case –*Ghandharap Singh* v *Lachman Singh*, I L R, 10 All, 485, in a Bombay case (the one quoted above), and also in a Calcutta case, *Lala Parbhu Lal* v *J Mylne*, I L R, 14 Cal, 401

It may further be remarked that EDGE, C J, and BANERJI, J in February 1895, did not consider it necessary to refer to the remark in the Privy Council judgment in *Mohesh Narain* v *Taruck Nath Moitra*, L R 20 I A 30.

[169] No doubt there is one passage in the earlier judgment of the Privy Council (*Jagadamba Chowdhrani* v *Dakhina Mohun* L R, 13 I A, 84 at p 95), which must raise some doubts as to whether the present law works equitably I refer especially to the passage — 'The plaintiffs counsel were asked, but were not able to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for the possession of the same property It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession"

In the present case the parties were at arm's length in 1880 Then was the time for the delicate and intricate question involved in defendant's adoption to be brought into dispute It may be said that it was always open to defendant—the alleged adopted son— to file a suit to obtain a declaration that his adoption was valid any time within six years from the date when plaintiffs put forward the alleged will of Nagabhatta and denied defendant's alleged adoption. But for defendant it may fairly be asked, why should he have been

driven into the Court as plaintiff? He was in possession, what need was there for him to take action? As the law is at present interpreted, if the declaration as to the validity or invalidity of an alleged adoption is only ancillary to the claim for possession the suit may possibly be brought more than sixty years after the alleged adoption Take the present case suppose that Nagabhatta had devised the estates to *A* for life and then to the plaintiffs That would have been a legal devise *A* and the plaintiffs being alive at testator's death The plaintiffs' estate would not fall into possession till *A*'s death. [170] That might take place fifty years after Nagabhatta's death and thus plaintiffs after more than sixty years might maintain that the alleged adoption was invalid or never took place

But we have to administer the law as it is We have held that in such a case as the present, article 118 of the Limitation Act does not apply Under these circumstances I agree that we must confirm the order of the District Judge with costs

*Decree confirmed*

**NOTES**

[In Bombay this decision was overruled by (1899) 24 Bom 260 F B and that was followed in (1900) 25 Bom 26 (1913) 37 B m 513 See also (1896) 21 F n 76 424

• The same view is in this decision was however taken in (1907) 30 Mad 08 (1914) P R, 81 (1897) 25 Cal 354 (1900) 27 Cal 242 (1904) 26 All 40 (1902) 24 All 195 several of which purport to follow the Privy Council decisions in (1906) 28 All 727 (1911) 39 Cal, 418 ]

[21 Bom 170]

APPELLATE CIVIL

*The 14th October, 1895*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE

Motilal Lalubhai (Original Defendant) Appellant

*versus*

Ratilal Mahiputram (Original Appellant) Respondent *

*Hindu law —Mayukha—Widow—Widow's power to dispose of moveables bequeathed to her by her husband*

*Held* that a widow in Gujarat under the law of Mayukha had power to bequeath moveable property taken by her under the will of her husband which gave her express power of free disposition

*Gadadhar v Chandrabhagabai* I L R 17 Bom 690 distinguished

*Per* RANADE J —There is a threefold distinction between the moveable and immoveable property between title by bequest and a title by inheritance and a distinction between the Mayukha and Mitakshara which must be borne in mind before the rights of a widow in Gujarat claiming under a will which gave her express powers of free disposition over the residue of moveable property are negatived solely on the authority of the Full Bench decision quoted above If Rewa Bai had made no disposition herself the moveable property in respect of which freedom of disposition had been allowed her would have gone to the reversioner as her husband's heir

CROSS APPEALS from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad, in Suit No 82 of 1893

The plaintiff sued as the reversionary heir of one Girjashankar Govindram to recover property in the hands of the defendant Girjashankar died in 1880,

* Cross Appeals Nos 80 and 166 of 1894

leaving three houses and considerable moveable property. His wife Bai Rewa and two daughters Muli and Pasi survived him.

By his will he gave house No. 3 to his daughters who were to be the owners thereof, and to take possession after his death.

[171] As to houses Nos. 1 and 2, the will directed them

"to be given to my daughters Muli and Pasi, now alive, and to any third daughter I may hereafter have—to all these daughters or to such of them as may *then* (*te vela*) be alive. My wife Rewa shall herself live in these buildings during her life-time and take care of them, and after her death my said daughters are to take the said buildings. After the death of my wife my daughters are my heirs. I give these houses to them by way of inheritance."

The residue of his moveable property the testator gave to his wife with full discretion to deal with it in any way she might think proper

The daughters Muli and Pasi predeceased Rewa, leaving no issue. Rewa died on 25th January 1893, leaving a will, dated December 1892, whereby she bequeathed the whole of the property in her possession to the defendant, who was the husband of her predeceased daughter Muli.*

On Rewa's death the present suit was filed by the plaintiff, who was the nearest kinsman and reversionary heir of Girjashankar to recover his property from the defendant.

Defendant pleaded that he was entitled to the property both under the will of Rewa and of Girjashankar

The Subordinate Judge held that Rewa had no power to dispose of the property by will, and passed a decree for the plaintiff, awarding him possession of the property with the exception of a house which he found to be part of the *stridhan* of Bai Muli.

Both parties appealed to the High Court.

*Ganpat Sadashiv Rao* appeared for the Defendant (Appellant)

*Branson* (with him *Chitnis, Motilal and Malvi*), for Plaintiff (Respondent).

Their Lordships (JARDINE and RANADE, JJ) held, on the terms of the will,

(1) That Muli and Pasi became the owners of house No 3 on Girjashankar's death

(2) That Girjashankar's will omitted to provide for the devolution of houses Nos. 1 and 2 in the event of all the daughters dying before Rewa, who had only a life estate in them, and that on Rewa's death there was an intestacy as to these houses, and they passed to the plaintiff as reversionary heir.

[172] (3) As to the moveables, the Court held that Rewa took an absolute estate in the residue, and that she could dispose of it by will.

The following is an extract from RANADE J.'s judgment with reference to Rewa's power to dispose of the moveable estate:

**Ranade, J.** — * * * The next point relates to the moveable property. The lower Court has held that Bai Rewa's power to dispose by will of the moveable property given to her by her husband's will was as restricted as her power to dispose of immoveable property, and it has accordingly awarded plaintiff's claim in regard to the whole of this large property, excepting a *kanti* of Rs. 500, some small silver ornaments, and old clothes, grain and sundry articles of small value. I am disposed to think that the decision of the lower Court on this point is not correct. It did not apparently consider the very detailed provisions of Girjashankar's will, more especially paragraphs 10, 11 and 12 of clause 11 These paragraphs permit full discretion to Bai Rewa after carrying out the testator's wishes to make use of the residue in such manner as she might think proper for religious and charitable purposes, to make donations, and provide for the maintenance of her daughters and for other purposes.

I do not attach much importance to the word *vagaire* in this place. There is similar freedom allowed to her about the ornaments valued at Rs. 500, and pots, &c, to give away such of them as she might think proper The moveable property is stated to be worth Rs 14,000 in all, out of which the testator directed Rs 800 to be spent on his funeral, Rs 500 on Pasi's marriage, Rs 1,200 for gifts to the daughters, Rs 4,200 in charities, and Rs 425 with ring and *kanti* in gifts to other relations This leaves property worth Rs 7,000 at the complete disposal of Bai Rewa

It appears to me that the testator intended to place no restrictions upon the disposal of the moveable property that might remain with Bai Rewa, after she had carried out the dispositions in his will, which, as stated above exhausted only half the moveable estate This express power in Girjashankar's will would validate Rewa's will so far as it related to the residue of moveable property When such power of alienation is given, the widow can bequeath even immoveable property —*Seth Mul* [173]*chand* v *Bai Mancha* I L R, 7 Bom., 491, *Koonjbehari Dhur* v *Premchand Dutt*, I L R, 5 Cal, 684 The Courts have all along recognized a clear distinction between moveable and immoveable property to which a widow succeeds as heir to her separated husband The authority of *Damodar* v *Purmanandas*, I L R, 7 Bom, 155 which decided that a widow takes absolutely property bequeathed to her by her husband, and may dispose of it by will, has no doubt been shaken by the Full Bench decision in *Gadadhar Bhat* v *Chandrabhagabai*, I L R, 17 Bom, 690 but this last decision referred expressly to the case of property inherited by a widow from her husband, and cannot obviously have been intended to provide for the case of a testamentary bequest with such express powers as those noticed above in the will of Girjashankar The decision of the Judicial Committee on which the ruling in *Gadadhar Bhat* v *Chandrabhagabai*, I L R, 17 Bom, 690, was chiefly based contains words of express reservation. In *Mussumat Thakoor Deyhee* v *Rai Baluk Ram*, 11 Moore's I A 139 at p 175, it is stated that although a widow, according to the Western schools, might have a power of disposing of moveable property inherited from her husband, all schools are agreed that she has no such power in regard to immoveable property, and that immoveable, as well as moveable, property, *if she has not otherwise disposed of it* passes to the heirs of her husband. The words underlined mark the distinction which takes away the present case from the operation of the rule laid down in *Gadadhar Bhat* v *Chandrabhagabai*, I. L R, 17 Bom, 690

Moreover, the case of *Gadadhar Bhat* v *Chandrabhagabai* I L R, 17 Bom, 690, deals with parties subject to the Mitakshara law while the parties to the present suit are admittedly subject to the authority of Mayukha which is more favourable to the removal of all restrictions on woman's property In *Damodar* v *Purmanandas*, I L R, 7 Bom, 155, the parties were Gujarati traders, residents of Bombay, and that ruling only gave effect to a long course of decisions commencing with *Vinayak Anandrav* v *Lakshmibai*, 1 Bom H C. Rep., 117, and coming down to very recent times, *Pechai Bhagvan* v *Bai Lakshmi*, 1 Bom H C Rep, 56, *Mayaram* v *Motiram*, 2 Bom H C Rep, 313, [174] *Chandrabhagabai* v *Kashinath*, 2 B. C Rep, 323, *Lakshmibai* v. *Ganpat*, 4 B H C Rep, 149 at p 162 *Balvantrav* v *Purshotam*, 9 B. H C. Rep, 99 at p 111, *Tuljaram Morarji* v *Mathuradas*, I L R, 5 Bom, 662; *Koonjbehari Dhur* v. *Premchand Dutt* I L R, 5 Cal, 684, *Venkata Rama Rao* v *Venkata Suriya Rao*, I L R 1 Mad 281, and I L R, 2 Mad., 333, *Dalpat Narotam* v. *Bhagvan Khushal*, I L R, 9 Bom., 301, *Bhagirthibai* v *Kahnujirav*

I L R, 11 Bom, 285; *Bai Jamna* v. *Bhaishankar*, I L R., 16 Bom., 233; *Harilal* v *Pranvalavdas*, I L R, 16 Bom, 229 There is thus a threefold distinction, first, between moveable and immoveable property, secondly, between title by bequest and a title by inheritance, and thirdly the distinction between the Mayukha and Mitakshara, which must be borne in mind before the rights of a widow in Gujarat, claiming under a will which gives her express powers of free disposition over the residue of moveable property, are negatived solely on the authority of the Full Bench decision quoted above If Rewa Bai had made no disposition herself, the moveable property, in respect of which freedom of disposition had been allowed to her, would have gone to the reversioner as her husband's heir under the authority of the rulings noticed above But as she has disposed of it by her will, the reservation expressly recognized by the Privy Council decisions comes into play, and to that extent the Full Bench decision does not govern the present case

The Court amends the decree of the Subordinate Judge of the First Class by confirming so much of the decree as awards to the plaintiff as residuary heir of Girjashankar the houses specified in Girjashankar's will, Exhibit 91, as houses Nos 1 and 2 and by reversing so much of the decree as awards to the plaintiff any other of the property claimed The Court now dismisses the suit except as to the above houses Nos 1 and 2 As to the suit and Appeal No 80 of 1894, the plaintiff to get costs throughout on the amount of the claim awarded, and to pay the costs of the defendant throughout on the amount of the claim rejected Costs of Appeal No 166 of 1894 on the plaintiff.

*Decree amended*

## [175] APPELLATE CIVIL

*The 11th October, 1895.*

PRESENT

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS

Nagardas Saubhagyadas . . . . (Original Plaintiff) Appellant

*versus*

Ahmedkhan. .. .... . (Original Defendant) Respondent.*

*Vendor and purchaser—Covenant for title—Breach—Damage—Measure of damages*

A purchaser evicted from his holding is entitled to recover from a vendor who has guaranteed his title the value of the land at the date of the eviction.

Though in ordinary cases a mortgagee when deprived of his security can only recover his mortgage money as the damages for breach of the covenant for quiet enjoyment, yet where the mortgage deed contains a covenant on the part of the mortgagor not to pay off the mortgage for a term of years, the mortgagee is entitled to damages for being deprived of a favourable and long enduring investment

For the purpose of estimating such damages the Court will value the prospective profits as a jury would

APPEAL from the decision of Rao Bahadur Gangadhar V Limaye, First Class Subordinate Judge of Thana

The defendant's grandfather Davudkhan owned certain khars, viz., Mhaisbad, Ghat and Chole

In the year 1833 he mortgaged khar Mhaisbad with possession to plaintiff's grandfather for Rs 701.

* Appeal, No 60 of 1893.

In the years 1834 and 1839 he mortgaged khars Ghat and Chole to the plaintiff's grandfather for Rs. 500 and Rs. 201 respectively with possession.

After these transactions Davudkhan died, leaving him surviving his widow Mamabibi, his son Ismailkhan and his daughter Khatijabibi (defendant's mother).

On the 15th October 1844, Ismailkhan sold the equity of redemption in khar Mhaisbad to the plaintiff's grandfather (the mortgagee) for Rs. 1,601-8-0, which included the amount of the mortgage of 1833. The sale-deed contained the following covenant:—

"If with regard to the above share, any of my kinsmen or anybody else raise a quarrel, I will answer for the same and pay whatever loss you may sustain in any manner on account thereof."

[176] Ismailkhan died in the year 1863, leaving his mother Mamabibi, his sister Khatijabibi, and his widow Fattebibi as his heirs.

On the 25th February 1864, Mamabibi purporting to be the owner executed a further charge on khars Ghat and Chole to the plaintiff's grandfather in consideration of a further sum of Rs. 900 for a period of ninety-nine years. The mortgage-deed provided as follows:—

"I will pay the whole amount, that is, whatever sum may be found due under the terms of the former deed mentioned above, and the khatabaki (balance of account) and Rs 900 in respect of this deed in the month of Vaishakh after a period of 99, in letters ninety-nine, years from this date, and then I will redeem my property. You are not to ask for the amount, nor am I to pay the same, before the fixed period is over. After the fixed period is over, in the year in which I will pay the amount, I will pay the same at the end of the month of Vaishakh, and then I will redeem my property. If any of my kinsmen, &c., or anybody else puts forth his right or claim in the aforesaid property, I will answer for the same by spending my own money; if you sustain loss in any manner, I will make good the same."

Khatijabibi survived Mamabibi. The present defendant was the son of Khatijabibi, and after the death of his mother and grandmother he brought a suit against the present plaintiff in the year 1887 to recover possession of the three khars on proportionate payment of the original advances made on them. The Court allowed him to redeem and recover possession of 5/12th share of khar Mhaisbad and 175/312th share of khars Ghat and Chole.

The plaintiff thereupon in the year 1891 brought the present suit against him as the representative of his uncle Ismailkhan in respect of Mhaisbad khar, and as representative of his grandmother Mamabibi in respect of Ghat and Chole khars, to recover Rs. 8,736-4-8 as compensation for loss sustained by him by reason of his being dispossessed of the khars under the decree for redemption obtained by the defendant.

The defendant pleaded that under the decree obtained by him he recovered possession as heir of Mamabibi and Khatijabibi of the portions of the three khars specified in the decree, and the question of mesne profits was still under investigation; that the claim for damages in respect of khar Mhaisbad was not maintainable, because (1) the plaintiff's grandfather had knowledge when he bought the khar from Ismailkhan in 1844 [177] that there were other heirs of Davudkhan in existence, or at any rate it was incumbent on him to make inquiry and ascertain whether or not his vendor Ismailkhan was the sole owner; (2) because Ismailkhan had no authority to alienate the shares of other heirs; and (3) because the transaction was fraudulently effected with the object of defrauding them of their shares. He further contended that the covenant sued on was only personal and was not binding on Ismailkhan's heirs or his co-sharers, and that he was, therefore, not liable to the damages claimed; that the said covenant, assuming it

to be a covenant of title, was enforceable only to the extent of Ismailkhan's own share and not as regards the entire khar; that if the Court upheld the plaintiff's right to compensation, then the claims in respect thereof was barred by limitation; that the amount claimed was excessive; that the plaintiff could not recover more than a proportionate share of the purchase-money.

As to khars Chole and Ghat, the defendant pleaded that plaintiff's ancestor knew at the time of the further charge by Mamabibi that Khatijabibi owned a share in these khars as heiress to the estates of her father and brother, and he (the plaintiff) could not be allowed to take advantage of the fraudulent act of his ancestor; that the defendant was not liable in damages in respect of the alleged breach of the covenant contained in the mortgage by Mamabibi, because the objections raised to the claim in regard to Mhaisbad were also applicable to the claim based on the aforesaid covenant; that the defendant was entitled to a proportionate deduction in respect of compensation received by plaintiff for the portion of land of Mhaisbad taken for a public road in or about 1869, &c.

The Subordinate Judge found (*inter alia*) that the claim was within time; that the plaintiff was aware of all the facts the knowledge of which the defence alleged debarred him from claiming compensation; that those facts did not estop the plaintiff from enforcing the covenants; that the breach of the covenants sued on being admitted, the plaintiff was entitled to compensation for the loss caused to him by reason thereof, that the measure of damages in regard to the sale of Mhaisbad khar was a propor-[178]tionate share of the purchase-money with interest, but in regard to the mortgage-transaction in respect of the other two khars the plaintiff was not entitled to anything, as he had already recovered an amount in proportion to the area of land lost which yielded him interest in lieu of the profits of that area; and that the damages claimed by the plaintiff with respect to both the transactions were too remote and could not be awarded.

He, therefore, awarded the claim to the extent of Rs. 375-3-4 to be recovered from the estate of Ismailkhan and Mamabibi in the hands of defendant plus interest Rs. 23-7-4, in all Rs. 398-10-8 with interest thereon at 6 per cent. per annum from the date of decree to date of payment or recovery, and rejected the rest of the claim.

The plaintiff appealed.

*Inverarity*, with *Manekshah J. Taleyarkhan*, for Appellant (Plaintiff):—In the suit brought by the present defendant, the Court allowed him to redeem and recover possession from us of 5/12th share of khar Mhaisbad; we are, therefore, entitled to recover damages on account of the loss of that share. The defendant has been allowed 175/312th share in the other properties; he must, therefore, pay damages on account of that share also.

The question is what is the measure of damages for breaches of the kind in suit. We contend that the measure is what is stated in the covenants, namely, the loss we have sustained. Out of the Mhaisbad khar we have been deprived of 36 acres and some gunthas. There is evidence in the case to show that lands corresponding in quality to the land of the khar fetched in Rs. 100 to Rs. 150 per acre Some time ago the Collector purchased from us land from Mhaisbad khar for a public road, and he paid us at the rate of Rs. 100 per acre. Calculating the loss that we have sustained at the above rate, the amount of damages would exceed Rs. 4,000.

With respect to the second breach, we claimed Rs. 4,000 in lump. The annual profits of these properties come to Rs. 215, which we used to receive. We have thus lost an annuity of Rs. 215 for seventy-two years. Mamabibi had

agreed to pay us the loss that we might suffer at the instance of her kinsmen. Even according [179] to English law we would be entitled to the value of the property at the time of the breach— *Rolph* v *Crouch* L R, 3 Exch, 44, Dart on Vendors and Purchasers, p 894

*Macpherson* (Acting Advocate General) with *Narayan G Chandavarkar*, for Respondent (Defendant) —The two transactions must be dealt with separately. The first transaction is the sale of Mhaisbad khar by Ismailkhan In ascertaining the measure of damages the value of the property at the date of the transaction must be taken into consideration and not that at the date of dispossession The sale was effected in 1841 and the dispossession was in November 1891 Between the two dates there was an enormous increase in the value of the land With respect to the fixing of the dates to ascertain damages there is a great dearth of English authorities, but the American authorities are numerous They show that the measure of damages must be taken on the date of the transaction— Mayne on Damages edition of 1894, p 212 *Jenkins* v *Jones*, 9 Q B D, 128

On the date of the mortgage by Mamabibi in 1864 there was a previous charge of Rs 901 Out of this sum the Court in the previous suit held that Rs 200 were not a valid charge, and we were directed to redeem Khatija's share in Davudkhan's and Ismailkhan's estate In Davudkhan's estate her share was 7/26, and in that of Ismailkhan's 7/24 that is both shares together come to 175/312 We were directed to redeem the two fractions on payment of Rs 393 3 0 As to the measure of damages with respect to Mamabibi's covenant of ninety nine years, we contend that the measure of damages is the value of the property on the date of the mortgage Mayne on Damages p 209 *Parbuttee* v *Misser Chimmun* 1 Agra Rep, 82 *Pitambar* v *Ram Surun* 25 W R, Civ R, 7, *Flureau* v *Thornhill*, 2 W Blackstone's Report, p 1078 *Lock* v *Furze*, L R, 1 C P, 441, *Bain* v *Fothergill*, L R, 7 H L, 158

*Inverarity* in reply —The cases cited are not applicable The rule they lay down is applicable to cases of contracts for sale of land It is an exceptional rule with a limited application—Dart on Vendors and Purchasers pp 1077, 1083 There was a [180] covenant in the present case for quiet enjoyment, and English authorities support our contention—*Wace* v *Bickerton*, 3 D G & S, 751 Mayne on Damages, pp 215, 219

**Farran, C J** —This is an appeal from the decree of the First Class Subordinate Judge at Thana The defendant does not dispute his liability to pay damages The only question is upon what basis the damages are to be estimated

The question is of interest The facts are these The defendant's grandfather Davudkhan owned a one fourth share in certain khars named Mhaisbad, Ghat and Chole As nothing turns on his interest in the khars being fractional, we shall, for the sake of convenience speak of "the khars of Davudkhan," indicating thereby his interest in them

In 1833 Davudkhan mortgaged khar Mhaisbad to the plaintiff's ancestor for Rs 701 with possession

In 1834 and 1839 he mortgaged khars Ghat and Chole also to the plaintiff's ancestor for R 500 and 201 respectively with possession

Davudkhan died prior to 1844 leaving as his heirs his widow Mamabibi, his daughter Khatijabibi, and his son Ismailkhan, without having redeemed any of the above mortgages

In 1844 Ismailkhan, purporting to be the owner by a deed of sale bearing date the 15th October in that year sold Davudkhan's Mhaisbad khar to the plaintiff's ancestor for Rs. 1,601 8 0 which included the Rs. 701 secured by

mortgage upon it. The deed after reciting the purchase and sale contained the following covenant by Ismailkhan :—" If with regard to the above share any of my kinsmen or any body else raise a quarrel I will answer for the same and pay whatever loss you may sustain in any manner on account thereof."

Ismailkhan died without issue before 1863, leaving his mother Mamabibi and his sister Khatijabibi as his heirs.

On the 25th February 1864, Mamabibi purporting to be the owner executed a further charge on Davudkhan's Ghat and Chole khars in favour of the plaintiff's ancestor. The deed (Exhibit 43) [181] reciting the former mortgage and a further advance to Mamabibi of Rs. 900 provides that the mortgagee shall continue in possession of the mortgaged premises and carry on the *vahivat* of the same, paying the outgoings and receiving the income in lieu of interest for ninety-nine years from the date of the deed, at the expiration of which time Mamabibi was to redeem the mortgage and take back the land. The deed provides that the mortgagee is not to ask for the mortgage money, nor is the mortgagor to pay the same until the period fixed by the deed is over, and contains the following covenant.—" If any of my kinsmen, &c., or anybody else puts forth his right or claim to the aforesaid property, I (Mamabibi) will answer for the same by spending my own money, and if you sustain loss in any manner, I will make good the same."

Khatijabibi survived Mamabibi. The defendant Ahmedkhan is the son and heir of Khatijabibi.

In 1887 the defendant Ahmedkhan filed a suit (No. 487 of 1887) to redeem and recover possession from the plaintiff of his share in Davudkhan's three khars on payment of a proportionate amount of the original advances. He was allowed to redeem and was awarded possession of 5/12th of the Mhaisbad khar and 175/312th of the Ghat and Chole khars.

The present suit was then filed by the plaintiff upon the covenants which we have referred to, to recover damages from the defendant Ahmedkhan as the representative of Ismailkhan in respect of the 5/12th of Mhaisbad khar and as representative of Mamabibi in respect of the 175/312th of Ghat and Chole khars of which respectively he had been dispossessed. The Subordinate Judge has awarded the plaintiff 5/12th of the purchase-money (Rs. 900-8-0) which Ismailkhan received for the equity of redemption of Mhaisbad, amounting to Rs. 375 3 4, and interest.

The Subordinate Judge has not awarded to the plaintiff any sum in respect of the 175/312th of Ghat and Chole khars, as the plaintiff had received in the former suit a proportionate share of the mortgage money originally advanced on these khars. The further damages claimed in each case he has considered to be too remote and has not allowed

[182] It has been admitted in argument before us that the loss which the plaintiff has sustained in being deprived of 5/12th of Mhaisbad khar from which he has been ejected is the value of that fraction of the khar. This is so—*Jenkins* v *Jones*, 9 Q B D., 128. The respondent contends that the value of this fractional part is to be estimated as of the date of the purchase from Ismailkhan (15th October 1844), of which the purchase-money or price paid for it is the *primâ facie* and only test. The appellant, on the other hand contends that the loss which he has sustained is, and the damages which he is entitled to recover are, the value of that fractional part of the khar at the date of eviction, which he estimates at Rs. 5,421. Whatever that value is, the khar had unquestionably largely increased in value since the date of the sale by Ismailkhan in 1844.

It is stated by BLACKBURN, J., in *Lock* v. *Furze*, L. R., 1 C.P., 441 at p. 454, that the doctrine laid down in *Flureau* v. *Thornhill*, 2 W. Blackstone's Reports, p. 1078, does not apply to the case of an executed contract, and that is stated in Dart's Vendors and Purchasers to be the law (page 1083, 6th Ed.). A careful perusal of the judgments in the case of *Bain* v. *Fothergill*, L. R., 7 H. L., 158, in which the House of Lords recognised the doctrine of *Flureau* v. *Thornhill*, and established it on the broadest basis, satisfies us that it was not intended by their Lordships to extend the doctrine to cases of executed contracts to which it had not been previously applied.

In the present case, there is, moreover, an express covenant on the part of the vendor to pay whatever loss the vendee may sustain in any manner on account of a successful claim to the land.

Now in *Rolph* v. *Crouch*, L. R., 3 Exch., 44, which was the case of a tenant who was evicted from his holding, the Court gave the tenant compensation against his landlord (in addition to the costs of unsuccessfully defending an action by the evictor) for the value of the lease to the tenant (£10 per annum) and also for the value of a conservatory which he had erected on the land. So in *Bunny* v. *Hopkinson*, 27 Beav., 565, it was laid down that the measure of damages in the event of eviction includes the amount expended [183] in converting the land to the purpose for which it was sold, and that the purchaser may recover not merely the value of the land, but also the amount spent in the erection of houses subsequent to his conveyance; and in *Lock* v. *Furze* the Exchequer Chamber were unanimous in holding that the general rule of law laid down in *Robinson* v. *Harman*, 1 Exch., at p. 855, "that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed," was applicable to the case of a tenant who is evicted seeking compensation from his landlord. There the Court, adopting the argument of MELLISH, Q. C., gave the plaintiff the value of the lease which he had lost, calculated at the date of eviction.

This was also the course taken in *Wace* v. *Bickerton*, 3 D. G. and S., 751. It is, therefore, we think, correct to say that, according to the cases decided under English law, a purchaser or tenant evicted from his holding is entitled to recover the value of the land from which he has been evicted, calculated at the date of eviction, from a vendor or landlord who has guaranteed his title. In Dart (Vendors and Purchasers, p. 894) it is said: "In the latter case" (that of a covenant for quiet enjoyment) "it seems difficult to understand why the full value of the property as existing at the time of the breach of covenant should not be recoverable, especially when the property has been professedly bought for the purpose of being improved by building or otherwise."

A different rule has, however, been laid down in America in several States. In Kent's Commentaries (Kent, Vol IV, p. 533, 8th ed.) it is thus stated:—"The measure of damages in actions in these personal covenants is regulated in some degree by the rule on the antient warranty. At common law upon voucher or upon the writ of *Warrantia Chartæ* the demandant recovered of the warrantor or heir other lands of equal value with the lands from which the feoffee was evicted. The value was computed as it existed when the warranty was made, so that though the land had afterwards become of increased value by the discovery of a mine or by buildings or otherwise, yet the warrantor was not to render in value according to the then state of [184] things but as the land was when he made the warranty. And when personal covenants were introduced as a substitute for the remedy on the voucher and warranty the established measure of compensation was not varied or affected. The buyer on the

covenant of seisin recovers back the consideration-money and interest and no more. The interest is to countervail the claim for mesne profits to which the grantee is liable and is and ought to be commensurate in point of time with the legal claim to mesne profits. The grantor has no concern with the subsequent rise or fall of the land by accidental circumstances or with the beneficial improvements made by the purchaser who cannot recover any damages either for the improvements or the increased value. This appears to be the general rule in this country."

The Indian cases to which we have been referred—*Parbuttee* v. *Misser Chimmun*, 1 Agra Rep., p. 82, and *Pitamber* v. *Ram Surun*, 25 Cal. W.R., Civ. R., 7,—do not touch the point which we are now considering. In the former, however, the English rule which establishes that it is the value of the thing of which the covenantee has been deprived and not the price which he has paid which affords the measure of damages, is adopted.

Mr. Mayne in his work on Damages, after referring to the law in New York and several other American States as laid down in the passage from Kent above cited and to the rule in Massachusetts and Connecticut which gives to the evicted owner the value of the land at the time of eviction, states his views of the law thus:—"I conceive that the doctrine laid down by KENT, C. J., is clearly the equitable rule where the improvements arise from causes of an entirely collateral nature, such as the growth of a town, the formation of a railway, or the like. The occupier has had all the benefit of this increased value, so long as it lasted, without paying anything for it. Even supposing that he had sold again after the land had risen in value, and been forced to pay back to his purchaser according to that additional value, still he would be only repaying money which he had actually received and no more." "But," he adds, "the same obvious equity seems by no means to exist when the additional value arises from the outlay of the plaintiff's own capital upon the land."

[185] From the above resume of decided cases and opinions of text writers upon this subject it appears that the strictly logical rule, which has been adopted by the English Courts, is to measure the damages by the value of the land at the date of eviction, while the majority of the American Courts, partially by an extended application of the rule in *Flureau* v. *Thornhill* (*supra*), and partially on the grounds of expediency and of a supposed equity, have limited the damages to the price paid or the value of the land at the date of purchase. KENT, C. J., in *Staats* v. *Ten Eyck's Executors*, 3 Caines., p. 111 (*f*), says: "Upon the sale of lands the purchaser usually examines the title for himself, and in cases of good faith between the parties (and of such cases only I now speak) the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser without the hazard of absolute ruin."

We think that it is not open to us to reduce the real damages arising from the breach of contract on the part of the defendant by the introduction of considerations of expediency, or by an extension of the principle laid down in *Flureau* v. *Thornhill* (*supra*) to a case not within its purview. The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities. In this case the vendor knew of his defective title (as apparently did also the vendee) and yet chose to enter into an absolute covenant. It is well known

that land fluctuates in value This may well be presumed to have been known to the vendee. In many cases the supposed rule of expediency would operate with hardship upon the vendee who, relying on the covenant of his vendor, has laid out money in improving the land We do not speak of buildings erected on the land. They may give rise to different considerations. The equitable principle enacted in sec [186] tion 61 of the Transfer of Property Act will probably prevent the question from arising. The *media via* suggested by Mr. Mayne has no authority to support it It is better for us to tread the beaten path than to search out devious and unexplored ways for relieving vendors from the natural effect of covenants which they are not bound to enter into We must, therefore, decide that the measure of damages is the value of the land at the date of eviction.

The land of which the plaintiff has been deprived consists of 36 acres and a fraction. There is no reliable evidence of its market value Witnesses Nos. 20, 21, 23, 24, 37, 38, 49, 50, 51, 52, 53, 56, 57, 58 and 59 value the land at from Rs 80 to 125 an acre Rs 100 is about the mean of the values given The Collector awarded Rs 100 to Rs 150 for corresponding lands This is supposed to be Rs 15 above market value The estimate of the produce is a fallacious test of the market value, though in many cases it is the only one available We, therefore, take the value to be Rs 100 per acre, or Rs 3,600 in all Of this sum the plaintiff has received Rs 292, which leaves Rs 3,308 still payable

As to the mortgaged land, it is difficult to arrive at the true damages In ordinary cases a mortgagee, when deprived of his security, can only recover his mortgage money as the damages for breach of the covenant for quiet enjoyment. That is the true measure of damages, as he is liable to be paid off by his mortgagor at any time Here the mortgage deed contains a covenant on the part of the mortgagor not to pay off the mortgage for ninety-nine years

The proportionate share of principal due under the original mortgage in respect of the 175/312th part of the Ghat and Cholo khars was paid to the plaintiff at the time of the decree in the suit of 1887 In addition the plaintiff is entitled, we think, to damages for being deprived of a favourable and, for many years, permanent investment Mr Inverarity calculates that the annual sum which in lieu of interest his client was receiving on that amount was Rs 215, and he asks us to calculate his damage on the footing of his client being deprived of that annual sum for seventy-two years In making an estimate of the loss of future [187] profits all circumstances must be taken into account The profits may diminish. There is no certainty as to price Though there is a covenant not to redeem for ninety-nine years, it is not certain that the Court would give full effect to it if a redemption suit were brought to test its validity An extension of the Dekkhan Agriculturists' Relief Act to the district would at once wipe it out The Court in estimating the value of the prospective profits of this mortgage to the plaintiff must value them as a jury would There is no fixed rule We fix them at Rs 1,000

The Court amends the decree of the lower Court by awarding to the plaintiff Rs 4,308 instead of Rs 375 3 4 with interest at 6 per cent from date of the suit to the date of the payment and costs in proportion throughout.

*Decree amended.*

NOTES

[ See also (1907) 32 Bom , 165 (1901) 25 Bom , 593 , (1906) 3 N L R., 80.]

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[21 Bom 187]

# APPELLATE CIVIL

*The 16th October, 1895*

PRESENT

MR JUSTICE PARSONS AND MR JUSTICE CANDY

Bhawanishankar Ravishankar (Original Plaintiff) Appellant

*versus*

The Surat City Municipality (Original Defendants) Respondents *

*Municipality—Bombay District Municipal Act (Bombay Act VI of 1873), Sec 33†—Building—Notice—Building beyond area for which permission is granted Power of Municipality to order alteration or demolition of a building erected without notice or in excess of the permission*

Under the Bombay District Municipal Act where an owner having obtained permission under section 33 to build on one portion of his land builds on another portion without having obtained fresh permission, if such part of his building as is outside the limits for which permission had been granted is built without notice the Municipality can in their discretion order it to be demolished

[188] SECOND APPEAL from the decision of T Hamilton, District Judge of Surat, in Appeal No 75 of 1892

Plaintiff gave notice to the Municipality of Surat that he intended to erect a new building on certain land belonging to him in the city of Surat

On receipt of the notice the Municipality sent their officer to inspect the land The plaintiff pointed out to him the ground on which he wished to build and produced his sanad which specified the limits of his holding The officer measured the area indicated and finding that it tallied with that shown in the sketch plan at the foot of the sanad, reported to the Municipality accordingly

The Municipality upon this report issued the necessary permission, authorizing the plaintiff to build on the ground for which he held the sanad

Plaintiff then built, not only on the land so specified, but also on two plots north and south of that land, outside the area for which the Municipality had

* Second Appeal No 499 of 1894

† Section 33 of the District Municipal Act (Bombay Act VI of 1873) —

33 *Clause* 1 —Before beginning to erect any building or to alter externally or add to any existing building the person intending so to build alter or add shall give to the Municipality notice thereof in writing and shall furnish to them if required to do so a plan showing the levels at which the foundation and lowest floor of such building are proposed to be laid by reference to some level known to the Municipality and all information they may require regarding the limits design and materials of the proposed building and the intended situation and construction of the drains sewers privies and cesspools (if any) to be used in connection therewith

*Clause* 2 —Within one month after receiving such notice the Municipality may, in writing issue such orders not inconsistent with this Act as they think proper with reference to such building If the Municipality fail to issue written orders, whether of approval or otherwise with reference to such building within the said period, the person originally giving notice may proceed to erect the building in question in the manner proposed by him to the Municipality provided that such building be in accordance with the provisions of this Act.

*Clause* 3 —If such building be begun or made without the notice or without affording the information above prescribed or in any manner contrary to the legal orders of the Municipality issued within the period aforesaid or in any other respect contrary to the provisions of this Act the person so building shall be liable to the penalty hereinafter provided, and the Municipality may, by written notice, require such building to be altered or demolished, as they may deem necessary.

given permission. The Municipality thereupon gave him a notice under section 33, clause (3) of the District Municipal Act (Bombay Act VI of 1873) ordering him, within fifteen days, to remove the building from the land on which he had encroached.

Plaintiff then filed this suit against the Municipality to have it declared that the notice was illegal, and for an injunction restraining the Municipality from demolishing his building.

The Municipality pleaded that the land in suit was not comprised in the area on which plaintiff had obtained permission to build, that he had exceeded the limits given in the said permission, and that they were justified in ordering the removal of the building erected by the plaintiff in excess of the permission.

[189] The First Class Subordinate Judge at Surat found that the plaintiff had exceeded the limits of his permission, and that the order of the Municipality was legal. He, therefore, dismissed the suit with costs.

On appeal the District Judge of Surat confirmed the decree of the lower Court with costs.

Plaintiff preferred a second appeal to the High Court.

*Kalabhai Lalubhai* (with him *C. H. Setalvad*), for Appellants :—The notice issued by the Municipality under section 33 of the District Municipal Act not only speaks of building without permission, or in excess of the permission granted, but also speaks of encroachment. Treating the notice as one relating to an encroachment, the Municipality has not complied with the requirements of the Act Treating it as one under the latter part of section 33, the Municipality had nothing whatever to do with the sanad, or the title to the property. If we produced the sanad, that ought not to make our position worse than it would have been if we had not produced the sanad at all. A sanad is no evidence of the actual area of land, even if it were, the Municipality had no power to define the limits within which the building was to be erected on our own land. The main question is, whether the Municipality can order a building to be demolished so far as it exceeds the permission granted. The words in section 33 of the Act are : "alter or demolish as the Municipality shall deem necessary." The word 'necessary' in this clause means necessary for the purposes of the Act—*Lewis* v. *Weston-super-mare Local Board*, 40 Ch. D., 55. The mere fact that a building is erected without the permission of the Municipality does not render it liable to demolition. It only renders the owner liable to a fine or to a criminal prosecution. If a building is objectionable on grounds of sanitation, or for other valid reasons, and if it is built without permission, I admit that it would be liable to demolition. No such valid reason is shown in the present case. I, therefore, submit that the order for the demolition of the building is illegal.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Municipality :—The question is whether plaintiff could build [190] without a previous notice to the Municipality Section 33 makes such notice imperative. Here the permission given to the plaintiff to build was on the land specified in his notice ; while it is admitted that he subsequently built beyond that area. This he had no right to do. The superstructure on the excess land having been unauthorized, the Municipality had a right to compel its removal or demolish it themselves. See *Dave Harishankar* v. *The Town Municipality of Umreth*, I. L. R., 19 Bom., 27.

**Parsons, J.** :—This case raises an important question of municipal law. The appellant under section 33 of the Bombay District Municipal Act gave notice to the defendants that he intended to build on his land, and stated that he held a sanad (Exhibit No. 51) under the City Survey Act for that land. In

this sanad the limits and tenure of the appellant's holding were specified by plan and description (section 10 of Bombay Act IV of 1868) The defendants sent their *daroga* to inspect the premises, and the appellant pointed out to him the land on which he intended to build, and showed him his sanad The *daroga* measured the land so pointed out, and found that it agreed in area with that specified in the sanad, and reported so to the defendants The defendants then gave the appellant permission to build on the land specified in his sanad

The appellant, however built not only on the land so specified, but also on land outside it on the northern and southern sides The defendants there upon, under clause 3 of section 33 of the Act gave him a notice to demolish so much of the building as was erected on land beyond the limits specified in his sanad Hence the cause of action arose

It has been argued before us by Mr Kalabhai for the appellant that the issuing of this notice is illegal because (1) the defendants had no right to define the limits within which the appellant should build on his own land, (2) building in excess of the permission granted will not justify the issue of a notice to demolish the excess (3) a notice of demolition is only justified where the building violates some rule of sanitation and cannot be altered so as to be made to conform to that rule (4) the notice [191] of demolition in this case was not necessary and is purely a work of destruction It seems to me that most of the argument is beyond the scope of the present case

It may be that so long as an applicant conformed to the orders of a Municipality passed with reference to an intended building the latter could not prevent his building on the whole of his land but as to this see some remarks in *Nagar Valab Narsi v The Municipality of Dhandhuka* I L R 12 Bom, 190 At the same time it is I think clear that an applicant having asked for and obtained permission to build on a specified portion of his land would not be justified to use that permission to erect a building on another portion of his land That is the case here Appellant asked for permission to build on the land specified in his sanad That was the information he gave to the defendants regarding the limit of the proposed building The defendants accepted that information and gave him permission to build within those limits If the appellant wished to build outside those limits a fresh notice would be required to be given By not giving this notice, and by building without notice on the land outside the limits for which notice had been given the appellant built without notice and he became, therefore, liable to the consequences prescribed in clause 3 of section 33

In this view of the case it is immaterial to inquire whether the land so built on was the appellant's own land or not or whether the defendants could have prevented the plaintiff building on it after he had given notice Building in excess of the permission granted that is to say on land other than that for which notice has been given seems to me to be simply building without notice so far as the excess land is concerned

I cannot accept the argument that a notice of demolition is not justified when a building erected without notice otherwise conforms to the orders of the Municipality as to materials drains sewers &c, or can be altered so as to be made to conform to them It may be that where a building is otherwise unobjectionable the Municipality might allow it to remain even if built without notice, but the power of deciding this question is in the [192] first instance at any rate given to the Municipality, and a Civil Court would not interfere with their rightful exercise of this power In the present case the defendants have deemed the demolition necessary and have taken action accordingly I cannot hold that they are not perfectly within their legal rights in so doing. I may point

out to the appellant that he has been throughout in the wrong Having given definite information as to the limits of his intended building he had no right to overstep those limits When he purposed to extend those limits he should have done what he can still do, namely give a fresh notice specifying the limits he wishes to build upon

With regard to the further point taken that no notice at all was necessary since the appellant merely built on his old foundations, both the lower Courts have found that this is not the case and no point of law is involved in it We confirm the decree with costs

**Candy, J** —Plaintiff gave notice to the Municipality of his intention to erect a new building and he volunteered the information regarding the limits of this new building by stating that it would be constructed on the land covered by his City Survey sanad, which specifies the limits of his holding On the Municipal officer taking measurements in the presence of the plaintiff and finding that the limits pointed out by plaintiff corresponded with the limits specified in the sanad, the Municipality did not think it necessary to require any further information, and accordingly issued the necessary permission

Plaintiff then built on the land above described He also built on two plots north and south of that land outside the area for which the Municipality had given permission

The Municipality then gave him a notice under section 33 clause (3), of the District Municipal Act, ordering him within fifteen days to remove the building from the land on which he had encroached This is the notice of which plaintiff complains and he brought this suit to have it declared illegal

It is evident that the notice is inaccurate so far as it speaks of *encroachment* on *public* land But this may be taken as surplusage The plan annexed to the notice, and the clear allegation on **[193]** the face of the notice that it purported to be issued under section 33, clause (3) of the Act, are sufficient indications that plaintiff was required to alter his building, by demolishing so much as had been erected on the plots A and B which were outside the area for which the Municipality had given permission to build because he had offended against the provision of section 33 of the Act

There is no doubt that so much of the building had been erected without notice Whether it was erected on plaintiff's own land or not it was erected without notice It is no answer to say that no notice was necessary, because during the hearing of the case some old foundations were found on digging the land adjacent to the house in dispute and under the land of the street That was not the reason on which plaintiff based his claim when he filed his suit Mr Kalabhai argued that building without permission and building in excess of permission are quite distinct But it is evident that so much of the building as is in excess of the limits for which the permission was given is really a building constructed without permission that it was made without the notice prescribed There can be no doubt therefore that the plaintiff was liable to the penalty provided in section 71 (1) of the Act

But then comes the important question Can the Municipality also in such a case call upon the person so building to pull down the part so built without notice, without in any way establishing the necessity for such an order? Here it is not contended for the Municipality that the situation of the drains, sewers, privies and cesspools (if any) of the excess building is such that they (the Municipality) would have forbidden the erection of the excess building as it now stands, had due notice thereof been given in accordance with clause (1) of section 33. The contention of the Municipality apparently is that the mere

fact that the plaintiff built a portion of his building without notice is in itself sufficient justification for the Municipality ordering the excess portion to be demolished. It is notorious that in Surat City there is considerable hostility on the part of many of the citizens against the Municipality. If a man can obtain permission to build on land A, and can then proceed to build on land A and B (B being possibly ten times as large as A), and subject [194] to the penalty of a fine not exceeding Rs. 25 [section 74, clause (1),] can defy the Municipality to touch the excess building, until they have discharged the onus of proving that such excess building is contrary to the requirements indicated in clause 1 of section 33 of the Act, then in many cases the notice in writing required by clause 1 of section 33 will be a farce. The words at the end of clause 3 of section 33 are very wide. In addition to the penalty which may be exacted from the person building without notice, "the Municipality may require such building to be altered or demolished as they may deem necessary." The Municipality are to be the judges as to which is necessary. But there is nothing to connect the necessity with the sanitary requirements indicated in clause (1) of the section

Mr. Kalabhai referred to the case of *Queen-Empress* v. *Veerammal*, I. L. R., 16 Mad., 230, which was decided with regard to sections 180, 263 of the District Municipalities Act, 1881, (Madras) corresponding with the sections of the Bombay Act now under consideration In that case the person intending to build (a lady) made the necessary application for a license, which the Municipality granted as regards a portion only of the applicant's land, as they required the rest for widening a lane The building was erected on the whole land, and the builder was convicted of building contrary to the terms of the license. The High Court held that the Magistrate ought to have considered the legality of the order of the Municipality by which they declined to grant the applicant a license to build on her own land, simply because they intended to acquire it for public purposes. Mr. Justice BEST said:

"It is clear on a perusal of section 180 that no power is thereby conferred on the Municipal Council of depriving owners of the legitimate use of their land. The object of the section is no other than to ensure the safety and sanitation of buildings to be newly erected What the Council has to consider under the section is the plan of the proposed building; and the grounds on which the same can be disapproved are such as are stated in clause (4)."

The High Court, therefore, held that the original order of the Municipality being bad, no penalty could be enforced on the [195] builder, and no notice could be given to her requiring her to pull down the building. Here the license given by the Municipality was good Whatever may be the object of section 33 in requiring written notice of intention to build, with such further information as may be deemed necessary so as to ensure the safety and sanitation of the building to be erected there is nothing in our Act limiting the power of the Municipality to alter or demolish a building which has been erected without any notice at all It is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their powers" (*Duke of Bedford* v *Dawson*, L. R., 20 Eq., 353). The Municipality are not bound to order the alteration or demolition of the building erected without notice. It is a matter entirely for their own discretion: and, unless it is shown that they have been manifestly abusing their powers, the Court cannot interfere. It is possible to conceive a case in which the removal of an infinitesimally small excess building would involve the demolition of a large and expensive structure. I am not prepared to say that there may not be cases in which on the facts it would be clear that the Municipality had acted *malâ fide* and without the

exercise of due discretion. But the present suit has not been brought on such allegations; and I think, therefore, that it was rightly dismissed.

*Decree confirmed.*

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**NOTES.**

[A right to control balconies overlooking private streets was held to vest in the Municipalities in (1902) 27 Bom., 221; (1900) 2 Bom. L. R., 572.]

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[21 Bom. 196]

## APPELLATE CIVIL

*The 16th October, 1895.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE

Madar Saheb and others............(Original Defendants) Appellants

*versus*

Sannabawa Gujranshah............(Original Plaintiff) Respondent.*

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*Landlord and tenant—Lease—Lessee's covenant not to alienate—Alienation contrary to terms of lease—Absence of any clause as to re-entry—Ejectment—Forfeiture*

A clause in a lease whereby the lessee covenanted not to alienate, unaccompanied by any clause for re-entry upon breach of the covenant, *held* to be a covenant merely and not a condition, and a suit for ejectment brought by the lessor was dismissed.

*Narayan* v. *Ali Saiba*, I. L. R., 18 Bom., 603, followed.

[196] SECOND APPEAL from the decision of J. L. Johnston, District Judge of Dharwar, in Appeal No. 147 of 1893.

One Madar Saheb (defendant No. 1) obtained from the plaintiff a certain piece of land on lease for building purposes and passed to him a rent-note agreeing not to sell or mortgage to any person the building to be erected thereon, and that such sale or mortgage, if made, should be invalid; the document, however, contained no clause giving the plaintiff the right of re-entry upon such alienation being made.

Madar Saheb built a house on the land and sold it to three persons (defendants Nos. 2, 3 and 4) in violation of his agreement.

Plaintiff brought this suit against Madar Saheb and his alienees to recover possession of the land, alleging that the terms of the lease had been violated.

The defendants denied that the lease contained any such agreement as was relied on by the plaintiff; they also pleaded that Madar Saheb (defendant No.1) was a perpetual tenant, paying an annual rent of Rs. 2 to the plaintiff, that defendants Nos. 2, 3 and 4 were willing to pay that rent; and that the condition, if it did exist, was of a penal character, and as such should be relieved against.

The Assistant Judge of Dharwar dismissed the suit, holding on the issues as follows:—(1) that the defendant No. 1 took the ground as a permanent tenant; (2) that the condition relied upon by the plaintiff was not a penal one, but it was inoperative and, therefore, not binding on the defendant, and, therefore, he should be relieved from it; (3) that the plaintiff was not entitled to recover possession of the land. He, therefore, dismissed the suit.

In appeal the District Judge of Dharwar reversed the decision of the Assistant Judge, holding (1) that the defendant No. 1 took the land under the

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* Second Appeal, No. 666 of 1894.

agreement relied on by the plaintiff, and his tenancy was liable to determine on his breach of that agreement, (2) that the condition was not of a penal nature and should not be relieved from, (3) plaintiff was entitled to possession of the site and to the house also on valuation, if not removed by the defendants within three months' time

**[197]** Defendants preferred a second appeal to the High Court

*Narayan Ganesh Chandavarkar*, for the Appellants

Respondent in person

The following authorities were cited during the argument —*Narayan* v. *Ali Saiba*, I L R, 18 Bom, 603 *Shaw* v *Coffin* 14 C B, N S, 372, *Crawley* v. *Price*, L R, 10 Q B 302 *Doe* v *Watt* 8 B & C, 308, *Mohana* v *Shekh Sadodin*, 7 Bom H C R 69 A C Transfer of Property Act, 1882, section 111, Woodfall's Landlord and Tenant, 325 *Narayana Sanabhoga* v *Narayana Nayak* I L R, 6 Mad 327 *Vyankatraya* v *Shivrambhat*, I L R, 7 Bom, 256, *Tamaya* v *Timapa Ganpaya* I L R, 7 Bom 262

**Jardine J** —The question to be decided is whether the promise made by the lessee not to alienate is a covenant merely to which the principle on which *Narayan* v *Ali Saiba* I L R 18 Bom 603, was decided applies, or whether it is a condition which dispenses with express right of re entry in the event of breach We treat the clause as a covenant only following *Shaw* v. *Coffin*, 14 C B N S 372 which was approved in *Crawley* v *Price*, L R, 10 Q B, 302 and distinguished from *Doe* v *Watt* 8 B & C 308, where well known words of condition are used See Coke on Littleton section 325

We must, therefore, hold that a suit for ejectment does not lie, whatever other remedy there may be *Mohana* v *Shekh Sadodin* 7 Bom H C R, 69 A C We therefore reverse the decree of the District Judge and restore the original decree but order each party to pay his own costs in the appeals

*Decree reversed*

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**NOTES**

[A similar decision was given in (1902) 26 Mad 157 (perpetual lease) (1910) 14 C L J, 614 (ibid) in the absence of a right of re entry ]

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## [198] APPELLATE CIVIL

*The 12th November, 1895*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE

Ganesh Lala (Original Defendant No 4) Appellant

*versus*

Bapu and others (Original Plaintiffs, &c ) Respondents *

*Minor—Estoppel —Fraud —Fraudulent representation by minor that he was of age—Contract by minor*

A minor representing himself to be of full age sold certain property to *A* and executed a registered deed of sale The deed contained a recital that he was twenty two years of age.

*Held* in a suit by him to set aside the sale on the ground of his minority, that he was estopped

SECOND APPEAL from the decision of Rao Bahadur N G. Phadke, Joint First Class Subordinate Judge, A. P, of Sholapur

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* Second Appeal, No. 840 of 1893.

On 10th June 1885, two brothers, Bandu and Bapu, and their mother, Bhagubai, as guardian of a third brother, Devman, who was a minor, executed a registered deed of sale of certain family property to one Kushaba, the third defendant. There was no question as to Bandu having at that time attained majority. As to Bapu, however, the sale-deed recited that he was twenty-two years of age. Bhagubai had on 30th November 1877, obtained a certificate of guardianship and administration to the estate of all three sons who were then stated to be fifteen, nine and five.

Kushaba (defendant No. 3) duly obtained possession of the property he had purchased, and he subsequently sold it to Ganesh Lala Pardeshi (defendant No. 4), who purchased it in good faith and for valuable consideration.

In 1891 a suit was brought by Bapu for himself, and as guardian of his brother Devman, to have the sale-deed cancelled and to recover possession of the property. Bhagubai and Bandu were joined as defendants to the suit. The main grounds upon which plaintiffs based their claim were that (1) they were minors at the time of the sale and (2) that the sanction of the District Court had not been obtained to the sale. Bhagubai (defendant No. 1) denied knowledge of the sale. Bandu (defendant No. 2), and Kushaba (defendant No. 3) did not appear.

[199] Defendant No. 4 (Ganesh) contended that Bandu and Bapu had ceased to be minors at the date of the sale, and that they were living together with Devman (plaintiff No. 2) and their mother; and that the sanction of the District Court was not necessary.

The Subordinate Judge of Barsi found that the sale-deed was proved; that when the sale-deed was passed in 1885, Bapu was a minor, seventeen or eighteen years of age, but that as he had fraudulently induced defendant No. 3 to believe him to be twenty-two years old and to act on that belief, he was estopped from avoiding the sale.

As to the second plaintiff Devman, who was admittedly a minor, the Subordinate Judge held that Bhagubai's certificate of guardianship being still in force, Bapu could not sue as guardian of the minor. The Subordinate Judge, therefore, dismissed the suit, but without prejudice to the rights of the minor Devman, plaintiff No. 2.

In appeal by the plaintiffs the Joint First Class Subordinate Judge, A. P., of Sholapur awarded plaintiff No. 1's claim. He observed :—

"According to the Indian Majority Act, plaintiff No. 1 was a minor at the time and was under a legal disability rendering him incompetent to enter into a transaction like the sale in dispute, notwithstanding the fact that he had good intelligence and had attained understanding powers. The certificate of administration issued to the defendant No. 1 being still in force, at least as regards plaintiff No. 2, who is still a minor, the plaintiff No. 1 cannot properly and legally represent him. See *Atmaram Hari* v. *Anandibai kom Ganesh*, P.J., 1885, p. 199.

"In this state of things, permission of the District Court was a condition precedent to the validity of the sale to defendant No. 3 according to the Minors Act of 1864."

Against this decision defendant No. 4 preferred a second appeal to the High Court.

*Mahadev Bhaskar Chaubal*, for the Appellant (Defendant No. 4) :—There is no doubt that plaintiff No. 2 cannot sue by any other person except his certificated guardian.

But as regards plaintiff No. 1, he joined in the sale to Kushaba (defendant No. 3) though a minor, representing himself to be twenty-two years old. As a matter of fact it has been found by [200] the District Judge that he was eighteen years of age at the time; but the District Judge holds him to be a minor,

because the certificate of his guardianship under Act XX of 1864 had not been cancelled He relies for this decision on the Indian Majority Act (IX of 1875), section 3, whereby the age of majority is fixed at twenty-one years But it is doubtful whether the fact of a guardian having been once appointed is sufficient to bring the case within the first clause of section 3 of that Act. See *Yeknath* v *Warubai* I L R, 13 Bom, 285.

Under the Hindu law, Bandu, the eldest son, became the manager of the family on his attaining majority, and ousted the mother, who was a guardian under the certificate, and became thenceforth the guardian of the person and property of plaintiff No 1 See Act XX of 1864 section 30, *Savage* v *Foster*, 2 W & T, 678 at p 692 The doctrine of estoppel applies to a minor—*Wright* v *Snowe*, 2 De Gex and S 321 Kerr on Fraud, 122 Fraud binds infants—*Evroy* v *Nicholas*, 2 Eq Ca Abridg, 188

*Manekshah Jehangirshah*, for the Respondent (Plaintiff No 1). The doctrine of estoppel does not apply to a minor, if it did, a minor would be able to enter into a valid contract of sale Simpson on Infants p 42 shows that a minor is not bound by recitals in deeds which he has joined in executing Section 18 of Act XX of 1864 gives the rule of law on the subject

**Jardine J** - The plaintiff No 1 (Bapu) being at the time seventeen or eighteen years of age, and a ward under Act XX of 1864, and, therefore a minor by operation of the Indian Majority Act, IX of 1875 section 3 joined actively in the contract of sale, dated the 10th June 1885, which contained a statement that his age was twenty two years We infer as did the Subordinate Judge, that this statement induced the defendant No 3 (Kushaba) to purchase the property Bapu seeks to have the sale set aside in his favour on the ground of his minority The Subordinate Judge applied the doctrine of estoppel by fraud and rejected the claim of Bapu against defendant No 3 and his vendee (defendant No 4), as neither of them were put on inquiry as to the age of Bapu The lower Court of Appeal ignored this doctrine, and **[201]** held that the defendant No 4 must have been put on inquiry at the time he bought from defendant No 3.

It has been contended by Mr Manekshah that the rule of estoppel cannot be applied to a plaintiff asking to rescind a transaction knowingly entered into by him when an infant, even though he may have made statements untrue in fact The exception of an infant is not made in section 115 of the Evidence Act, nor suggested in the authoritative decision on the meaning of that section by the Privy Council in *Sarat Chunder* v *Gopal Chunder*, I L R, 20 Cal, 296, nor in *Wilts* v *Fox* 37 Ch D, 153 where the difference between cases depending on estoppel and contract is explained Proof of fraud on the part of the infant is not essential *Wright* v *Snowe*, 2 De Gex and S 321 shows these propositions, and that the infant could not afterwards, as plaintiff, get the aid of a Court to treat his deed as a nullity when the other party had acted upon it The cases we have cited govern the present and justify the original decree The Court reverses the decree of the lower Court of Appeal and restores that of the Subordinate Judge Costs of both appeals on the plaintiff Bapu.

*Decree reversed.*

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**NOTES**

[ Estoppel was held to apply, in (1911) 13 C L J, 228 (minor under the Guardian and Wards Act but of over 18 years of age), (1897) 2 C W N., 18, but not in (1898) 25 Cal, 616, (1898) 26 Cal 381 See also (1910) 9 I C., 124, (1908) 31 All, 21 (restitution of benefits), (1905) 30 Bom, 226 ]

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[21 Bom. 201]

## ORIGINAL CIVIL

## FULL BENCH

*The 14th February, 1896*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE STRACHEY AND MR. JUSTICE TYABJI.

Mulji Lala and others . . Plaintiffs

*versus*

Lingu Makaji and another . Defendants.*

*Limitation—Limitation Act (XV of 1877), Sec. 19—Acknowledgment—Stamp Act (I of 1879), Sch. I, Art. 1, and Sec. 34—Evidence.*

An acknowledgment of a debt coming under Art. 1 Schedule I of the Stamp Act I of 1879 cannot, if unstamped, be given in evidence for any purpose including the purpose of saving limitation.

REFERENCE by C. M. Cursetji, Third Judge of the Bombay Small Causes Court, under the provisions of section 617 of the Civil [202] Procedure Code (Act XIV of 1882) for the opinion of the High Court. The reference was as follows:—

"This suit was filed on the 18th September 1895 and is for Rs. 102, balance of an account for price of grain sold. The balance is adjusted, written out and signed in plaintiffs' book by the defendants on the 21st October 1892. The defendant No. 1 alone appeared. He denied the adjustment and the signing of the account balance acknowledgment. He also pleaded limitation. I have found that the account was adjusted and the acknowledgment of the balance was signed by the defendants and on the point of limitation I have found that the claim is barred as the said acknowledgment on which this suit is brought is not stamped in accordance with law, and is, therefore, inadmissible in evidence.

"3. The accounts between the parties stood as follows:—At the beginning of Samvat 1947 (1890-1), the opening balance brought over from the preceding year was Rs. 105. Further supplies debited up to Kartik Sudh 11th Rs. 7-2-0, whilst the credit side shows payments Rs. 9-2-0. Since Kartik Sudh 11th, Samvat 1947 (November 1890), the dealings have ceased entirely. On Kartik Sudh 1st, Samvat 1949 (21st October 1892) balance Rs. 102 is brought forward, the account is adjusted, and the defendants acknowledge the same by signing the balance entry.

"4. A true copy of the acknowledgment is annexed and is marked A. The following is a correct translation of the same:

"The account of two persons Kamati Lingu Makaji and Vithoba Lingu Samvat 1949.

Rs. 102. Kartik Sudh 1st day of the week Friday. The old account being made up, and all the accounts being considered, Rs. 102 (in letters rupees one hundred and two) in full up to the 21st day of October 1892. After making up all accounts, this writing is made and given.

The signature of KAMATI LINGU MAKAJI Rs. 102 (in letters), his own and

* Small Cause Court Reference, No. 23880 of 1895.

[203] The signature of VITHOBA
LINGU Rs. 102 (also in
letters), all account being made
up, dated 21st October 1892,
his own hand.'

"5 This acknowledgment, not being stamped, I have held, is not admissible in evidence, and thus this suit must fail, as but for such acknowledgment the claim on the grain account would clearly be time-barred

"6 The plaintiff's vakil, however, contends that this acknowledgment could be received in evidence under section 19 of the Indian Limitation Act to keep such claim alive and relies on a recent decision of the Bombay High Court—*Fatechand* v *Kisan*, I L R, 18 Bom, 614

"7 But for this ruling, I should have had no hesitation in holding the present claim to be barred A consideration of this decision, however, has left my mind in considerable doubt, and it is, therefore, with the very utmost diffidence I make this reference, and most respectfully submit that the point decided there deserves to be reconsidered"

(The learned Judge after discussing the point continued)

"With those remarks I beg to submit the following question for the opinion of the Honourable the High Court —

"Whether an acknowledgment of a debt requiring to be stamped under the Indian Stamp Act I of 1879, and not duly stamped, is admissible in evidence to save the debt from being barred under the provision of section 19 of the present Indian Limitation Act?'

*C H Setalvad* (*amicus curiæ*), for Plaintiff argued that the acknowledgment was admissible He cited *Fatechand* v *Kisan*, I L R, 18 Bom, 614, *Venkaji* v *Shidramapa*, I L R, 19 Bom, 663 *Bishambhar* v *Nand Kishore*, I L R, 15 All, 56 *Morris* v *Dixon*, 4 Ad and E, 845, Mitra on Limitation, p 239.

*Kazi Kabirudin* (*amicus curiæ*) for the Defendant He cited *Ranchhoddas* v *Jeychand*, I L R, 8 Bom, 405 *Chowksi Himutlal* v *Chowksi Achrutlal*, I. L. R, 8 Bom, 194, *Fatechand* v *Kisan*, I L R, 18 Bom, 614

[204] **Farran, C J** —We consider that the question submitted to us by this reference is in too general terms Such questions should be confined to the point of law arising in the particular case before the Court, but as the form of the entry is given in the reference, and it was not disputed in the Small Causes Court that it was 'an acknowledgment' within the meaning of article 1, Schedule I, of the Indian Stamp Act I of 1879, we can, we think, treat the question as confined to acknowledgments falling within the scope of that article. As, however, in the arguments addressed to us by the learned counsel who as *amici curiæ* appeared for the plaintiffs and defendants respectively, to whom our acknowledgments are due, it was contended for the plaintiffs that the acknowledgment which was sought to be put in evidence in the Small Cause Court might be read as not fulfilling the conditions of the article, we should add that the acknowledgment, in our opinion, fulfils all the requirements of an "acknowledgment of a debt" given in the article

That being so, we are clearly of opinion that an acknowledgment fulfilling the conditions of article 1 of the schedule cannot, if unstamped, be given in evidence 'for any purpose" The words of section 34 of Act I of 1879 appear to us to be free from ambiguity, and to prevent an instrument which is chargeable with a one anna stamp, and which cannot be admitted on payment of a penalty, from being admitted in evidence "*for any purpose*," including the purpose of saving limitation. The insertion of the italicised words in the later Act after it

had been held under the former Act XVIII of 1869, section 18 (which did not contain them), that the unstamped documents could be admitted in evidence "for a collateral purpose," renders this, we think, free from doubt; and if the decision in *Fatechand* v. *Kisan*, I. L. R., 18 Bom., 614, was intended to decide the contrary, we feel unable to agree with it. We are not, however, satisfied that such is the necessary meaning of that decision. It will be seen from a reference to the facts that the Subordinate Judge who heard the case was of opinion that the acknowledgment there in question was not intended to supply evidence of the debt, while it does not appear what view the District Judge took of the [206] document. The decision of the High Court will, in our view, be in accordance with the provisions of the Stamp Act, if it took the same view of the instrument as the Subordinate Judge. There are doubtless expressions in the judgment which tend to show that the Court went further, but the omission of all reference to section 34 of the Stamp Act—"no instrument shall be admitted in evidence for any purpose"—leads to the inference that the judgment does not convey the exact meaning of the learned Chief Justice. In each case, the instrument of acknowledgment must be carefully examined in connection with the surrounding circumstances to ascertain whether it has been signed to supply evidence of a debt—*Banjaram* v *Raj Mohan Roy*, I L R, 8 Cal., 288; *Bishamber* v. *Naval Kishore*, I. L. R., 15 All, 56. Upon the result the decision as to the admissibility or non-admissibility of the unstamped acknowledgment will depend.

We answer the question proposed to us in the negative.

**NOTES.**

[See also (1903) 30 Cal, 687; (1903) 31 Cal., 195; (1906) P. R., 66.]

**[ 21 Bom. 205 ]**

ORIGINAL CIVIL.

*The 2nd July, 1896.*

PRESENT:

MR. JUSTICE STRACHEY.

Sardarmal Jagonath............Plaintiff

*versus*

Rao Bahadur Aranvayal Sabhapathy Moodliar............Defendant.*

C. Agnew Turner, Official Assignee............Claimant.

*Partnership—Insolvency—Insolvency of one partner—Vesting order—Subsequent decree against insolvent, and attachment of the firm's property in execution—Claim by official assignee to set aside attachment—Civil Procedure Code (Act XIV of 1882), Secs. 278* et seq.—*Summons taken out in wrong name—Amendment of summons at hearing—Practice—Procedure—Act of insolvency—Jurisdiction of Insolvent Court—Indian Evidence Act (I of 1872) Sec. 44.*

The defendant was the manager of a joint Hindu family consisting of himself and two nephews carrying on a family business in Bombay, Madras and other places. In a suit brought in the High Court of Bombay against him as manager of the said joint family a decree was passed on the 11th April 1896, which was in terms against the defendant alone. On the same day certain property in Bombay, in which (as found by the Judge) the nephews

* Suit No. 181 of 1896.

and the defendant were jointly interested, was attached in execution of the decree Two days previously, however, *viz* on the 9th April 1896, the defendant had been adjudged an insolvent by the Insolvent Court at [206] Madras under section 9 of the Indian Insolvent Act (Stat 11 and 12 Vict, c 21) On the 6th May 1896, the official assignee took out a summons to have the attachment removed

*Held* that the claim of the official assignee must prevail and the property be released from attachment At the time of the claim of the official assignee the defendant's schedule had not been filed the claim was therefore governed by section 278 and the following sections of the Civil Procedure Code (Act XIV of 1882) As at the time of the attachment the defendant's interest in the property had by the vesting order been completely divested from him and vested in the official assignee the property was in his possession partly on account of the official assignee and partly on account of the solvent partners of his firm, that is wholly on account of other persons All his property and all he could honestly dispose of, whether for his own benefit or for the benefit of the joint family had prior to the attachment passed to the official assignee and consequently there was nothing which the decree holder could attach and sell

Where subsequently to the insolvency of one of several partners in a firm a decree is obtained against the firm and property of the firm is attached in execution such attachment should be removed By allowing the execution the solvent partners abandon their right of administering the joint estate and in the interest of the joint creditors the decree holder must be restrained from going on with the execution, and the partnership assets will be applied by the Insolvent Court in paying the joint creditors rateably the official assignee receiving the insolvent's share of the surplus and the rest being handed over to the solvent partners

By mistake the summons in this case purported to be taken out by the official assignee of Bombay, omitting to describe him as constituted attorney of the official assignee of Madras

*Held*, that the summons might be amended at the hearing by substituting the name of the official assignee of Madras and disposed of on that basis

It was contended that the creditor's petition in the Madras Insolvent Court disclosed no act of insolvency which could legally justify an adjudication under section 9 of the Indian Insolvent Act (11 and 12 Vict, c 21) and that the adjudication order was, therefore made by a Court not competent to make it within the meaning of section 44 of the Indian Evidence Act (I of 1872), and that consequently both it and the vesting order were nullities, and the official assignee of Madras had no title to the attached property

*Held* that the order although it might be erroneous and subject to reversal on appeal, was within the competency of the Madras Insolvent Court

*Held*, also on the evidence that there was no proof of such collusion between the creditor and the insolvent in obtaining the order of adjudication as would bring that order within section 44 of the Indian Evidence Act (I of 1872)

IN chambers Summons obtained by the official assignee calling on the plaintiff to show cause why an attachment levied by him on property of the defendant should not be removed

[207] The plaintiff filed this suit on the 31st March 1896 to recover Rs 7,482 6 2 from the defendant This suit was a summary suit, and on the 11th April 1896 the plaintiff obtained a decree for the full amount claimed On the same day (11th April), the sheriff in execution of the decree attached certain property of the defendant

In the meantime, however *viz* on the 9th April 1896, the defendant had been adjudicated insolvent by the Court for the Relief of Insolvent Debtors at Madras under section 9 of the Indian Insolvent Act (Stat 11 and 12 Vict, c 21), and on the 6th May 1896 the official assignee of Bombay as the agent of the official assignee of Madras took out this summons to have the attachment removed By mistake the summons omitted to describe the claimant as the constituted attorney of the official assignee of Madras.

*Scott* (for the Plaintiff) showed cause. The plaintiff is entitled to attach the property. He cited *Ketlilamma* v. *Kelappan*, I. L. R., 12 Mad., 228; *Ex parte Coates*; *In re Skelton*, 5 Ch. D., 979; *Hari* v. *Jairam*, I. L. R, 14 Bom., 597; Yate Lee on Bankruptcy, p. 484; *Morgan* v. *Marquis*, 5 M. & S., 336; *Harvey* v. *Crickett*, 9 Exch. Rep., 145; *Kalyanbhai* v. *Motiram*, 10 Bom. H. C. Rep., 378.

*Macpherson* in support of the rule.

**Strachey, J.** :—This is a Judge's summons taken out by Mr. C. A. Turner, the official assignee of the Court for the Relief of Insolvent Debtors at Bombay, and the constituted attorney of the official assignee of the corresponding Court at Madras, calling upon the plaintiffs in Suit No. 181 of 1896 to show cause why an attachment levied by them on certain property in execution of their decree in the suit should not be removed. It is in substance a claim under section 278 of the Code of Civil Procedure (Act XIV of 1882) to property attached in execution of a decree, on the ground that the property is not liable to such attachment.

The decree was passed on the 11th April 1896, in favour of the plaintiffs in a summary suit upon *hundis*, under Chapter XXXIX [208] of the Code. On the same date the plaintiffs applied for execution of the decree by attachment of various properties under sections 268, 269 and 270, and the properties were accordingly attached by the sheriff. On the 9th April, that is, two days before the decree and attachment, the judgment-debtor was, on the petition of another creditor, adjudged to have committed an act of insolvency, by an order of the Insolvent Court at Madras, and on the same day the usual vesting order was made, vesting all his estate and effects in the official assignee of that Court. On the 15th April, Mr. Turner, acting on behalf of the official assignee of Madras, wrote to the sheriff informing him of the adjudication and vesting order, and requesting him to remove the attachment, and, the request not having been complied with, took out the present summons. The plaintiffs have appeared and shown cause against the summons upon various grounds which I have now to consider.

The first objection raised by Mr. Scott, who appears for them, is that the summons has been taken out by and in the name of a claimant who, as shown by his own affidavit, neither has nor alleges any interest in the property attached, and that it should be dismissed on that preliminary ground. In the summons the claimant is described as "Charles Agnew Turner, the Official Assignee of Bombay, residing at Malabar Hill outside the Fort of Bombay." In Mr. Turner's affidavit of the 1st May 1896, in support of the summons, he states that he is the constituted attorney of John George Kernan, the Official Assignee of the Court for the Relief of Insolvent Debtors at Madras and assignee of the estate and effects of the insolvent defendant. The affidavit further sets forth the adjudication and vesting order of the 9th April, the attachment of the 11th April, the contention that the attachment is void and inoperative as against the said John George Kernan, and the correspondence with the sheriff, and concludes with a prayer for the removal of the attachment. It is thus obvious that the description, in the summons, of Mr. Turner as the claimant is incorrect, the real claimant being Mr. Kernan, for whom Mr. Turner only acts as a constituted attorney, and that Mr. Turner cannot claim the attached property in his own name, as he alleges no interest in it on his own account.

[209] It was suggested that under section 2 of the Powers of Attorney Act VII of 1882, Mr. Turner, as the attorney of Mr. Kernan, could make this claim on Mr. Kernan's behalf in his own name. That provision is a reproduction of section 46 of the Conveyancing and Law of Property Act, 1881. Even if it could be held to enable the donee of a power of attorney not only to execute instruments in pursuance of the power, but to institute and carry on

legal proceedings in his own name, I am disposed to think that it would only apply where the donor authorized the donee to act in his own name, and this has not been shown to be the case here.

The question is whether the summons should be dismissed as taken out by a claimant having no interest in the property attached, or whether the insertion of Mr. Turner's name should be regarded as a misdescription, and the summons amended by substituting the name of Mr Kernan as the real claimant. Having regard to all the circumstances, I think that the latter course should be adopted. In the first place, the summons itself refers to Mr. Turner's affidavit, which shows that the real claimant of the property is Mr. Kernan, and that Mr. Turner claims only as his attorney. The summons, which is dated the 6th May, was served next day on the plaintiffs' attorneys; on the 8th May a copy of the affidavit was sent to them, and on the 10th June an affidavit in reply was made by one Hajarimal Chotmal on the plaintiffs' behalf. That affidavit contests the validity of the Madras Court's order of adjudication, and annexed to it is a certified copy of the creditor's petition on which the order was made, and copies of a correspondence between the plaintiffs' attorneys and the Clerk of the Madras Court This is not, therefore, a case in which there has been or could be any mistake on the part of the plaintiffs or their advisers as to the claim being made by Mr. Turner not in his own right but on behalf of Mr. Kernan. That does not alter the fact that Mr. Turner could not properly make the claim under section 278 in his own name, but it is a reason for treating the matter as a misdescription which may, without impropriety or risk of injustice, be set right by amendment. In *Carter* v. *Mis'ee Lal*, 2 N.W P H.C. Rep, p. 179, a suit to establish the right [210] of a claimant to attached property was brought by Mr. Carter, agent and general attorney of the official assignee of the Calcutta Insolvent Court, in his own name; and, on appeal, the Allahabad High Court, instead of dismissing the suit, remanded it to the Court of First Instance, with a direction to return the plaint for amendment, and retry all the questions in dispute between the parties. If, as contended by Mr. Scott, the analogy of a suit should be followed, section 27 of the Civil Procedure Code allows the substitution of the right plaintiff for one in whose name the suit has been wrongly instituted through a *bonâ-fide* mistake. In the case of a claim under section 278 there is no provision which prevents me from looking to the substance of the thing and allowing the application or summons to be amended by substituting the name of the real claimant, where I am satisfied that the wrong name has been used through a *bonâ fide* mistake, that the other parties have been in no way misled or prejudiced, and that the only result of dismissing the summons would be that a new summons could be taken out in the proper name. I shall, therefore, allow the summons to be amended by substituting the name of John George Kernan, the official assignee of Madras, for that of Charles Agnew Turner, and shall proceed to dispose of the summons on that basis.

The next objection raised by Mr. Scott is more serious. It is that the order of adjudication of the Madras Insolvent Court upon which the vesting order is based was delivered by a Court not competent to deliver it within the meaning of section 44 of the Indian Evidence Act (I of 1872); that consequently both it and the vesting order are nullities; and that the official assignee of Madras has, therefore, no title to the property of the judgment-debtor which has been attached. This objection is based on the contention that the creditor's petition in the Madras Court discloses no act of insolvency which could legally justify an adjudication under section 9 of the Indian Insolvent Act, Stat. 11 and 12 Vict., c. 21. The petition purports to be made by a creditor of

the judgment-debtor residing in the town of Madras, it alleges a petitioning creditor's debt, and states that the debtor, up to the 31st March 1896, had carried on the business of a cotton merchant in Madras and at Bellary. It also states that, on or about [211] the 31st March, the debtor in consequence of being in pecuniary difficulties, and not being able to meet his debts in the usual course of business, closed his places of business at Bellary and Madras. It further states that, on or about the 1st April, the debtor, with intent to defeat and delay his creditors, left his usual place of abode in Brucepettah, Bellary. It adds that, in consequence of the debtor having failed in business, the present plaintiffs have filed Suit No 181 of 1896 in this Court, and are about to obtain a decree and issue out execution It does not specify which of the acts of the debtor which it mentions are acts of insolvency, but it prays that he may be adjudged to have committed an act of insolvency and that the proper order may thereupon be made The order of adjudication of the 9th April refers to the petition, declares and adjudges that the debtor has committed an act of insolvency, and directs a vesting order to be issued and a schedule to be filed. In pursuance of this order the usual vesting order was issued on the same date. Mr Scott contends that no act of insolvency within the meaning of section 9 of the statute is shown upon the face of the petition He argues that neither the closing of the debtor's places of business at Bellary and Madras in consequence of pecuniary difficulties, nor his departure, with intent to defeat or delay creditors, from Bellary - a place outside the limits of the jurisdiction of the Madras High Court —was an act of insolvency, and that the Madras Insolvent Court was therefore, not competent under section 9 of the Insolvent Act to adjudge the judgment debtor to have committed an act of insolvency

It appears to me that this argument ignores the distinction between an order which a Court is not competent to pass and an order which, even if erroneous in law or in fact, is within the Court's competency To sustain an objection that the Madras Insolvent Court's order is a nullity conferring no title to the debtor's estate on the official assignee, it is obviously not sufficient to prove that the order was wrong. To hold otherwise would virtually erect into a Court of appeal from the Insolvent Court, not only this Court, but every Court in which the official assignee might sue or be sued, and would be inconsistent with section 41 as well as section 44 of the Evidence Act What, then, [212] is the test of whether the order of adjudication in this case was not merely wrong, but an order which the Insolvent Court was not competent to make? In *Kellilamma* v *Kelappan* I L R, 12 Mad, 228 it was held that the words "not competent" in section 44 refer to a Court acting without jurisdiction, and that the decree of a Court in a suit which should have been dismissed as barred by section 244 of the Code of Civil Procedure, though wrong, could not be treated as passed by a Court not competent to pass it In article 46 of SIR JAMES STEPHEN'S Digest of the Law of Evidence the rule of English law corresponding with section 44 of the Indian Evidence Act is stated to be that whenever a judgment is offered as evidence, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction The "competency" of a Court and its "jurisdiction" are thus synonymous terms. They mean the right of a Court to adjudicate in a given matter They do not mean, in a case where that right exists, the coming to a correct conclusion upon any question of law or fact arising in that matter To determine whether the Madras Insolvent Court was competent in this sense to pass its order of adjudication it is only necessary to ask what was its duty upon receiving the creditor's petition. The Court was the right Court the petition was presented by a person alleging himself to be a creditor for an amount specified: it stated that

the debtor had committed an act of insolvency and it prayed for an order of adjudication Upon receiving the petition it was the duty of the Court to decide whether the debtor had committed an act of insolvency within the meaning of the statute and, if he had, to adjudicate accordingly This duty included the determination of the question, not only whether the acts alleged had been committed in fact but also whether they constituted acts of insolvency in law By its order adjudging the debtor to have committed an act of insolvency the Madras Insolvent Court decided both questions in the affirmative If it decided either of them wrongly, how does that affect its right to decide them, in other words, its jurisdiction or competency to pass the order? It cannot have been incompetent to decide the very questions which section 9 of the statute required it to decide or competent to decide them only in the nega-[213]tive Suppose the petition had alleged a departure by the debtor from his usual place of business in the town of Madras with intent to defeat or delay his creditors That would undoubtedly be an act of insolvency within section 9 Could the plaintiffs have sought to nullify the order by giving evidence to show that there had been no departure in fact? Could they have given evidence to show that although the debtor had departed from his usual place of business, he had not done so with intent to defeat or delay his creditors but as BACON, C J put it in *Ex parte Coates* 5 Ch D at p 980, "to bury his wife or his mother, or to a meet of foxhounds" To treat competency or jurisdiction as depending upon such questions as these would be to fall into the fallacy pointed out by RICHARDSON J, in *Fitton* v *Kinnaird* 1 Br & Bing. 432 21 R R 680 at p 688, of assuming that the fact which the Court had to decide was that which constituted its jurisdiction In this respect I can see no difference in principle between questions of fact and questions of law The order of adjudication is a decision that one or more of the acts set forth in the petition not only were committed, but constituted acts of insolvency It is not for me to speculate as to what may have been the Insolvent Court's reasons for this decision, or to criticise those reasons For all I know the petition may have been supplemented by statements verbal or otherwise which are not before me but which satisfied the Insolvent Court that the facts came within the section Either with or without any supplementary matter the Court may have construed the statements in the petition as substantially alleging a departure by the debtor from his place of business in Madras as well as Bellary with intent to defeat or delay his creditors To say that such a construction would be erroneous is altogether irrelevant the point is that the Court was fully as competent to adopt it as I am to hold that it is wrong To say that the Court was incompetent to pass its order because the allegations of the petition do not in law justify an adjudication, is like saying that any decree of a Court otherwise competent may be collaterally impeached for want of jurisdiction by showing that the plaint disclosed no cause of action If such a doctrine were accepted, no judgment would be final, and no title based upon a judgment would be safe The [214] legal sufficiency of a petition or plaint has never been held to be a test of jurisdiction The real test is whether the petition raises a question, whether of its own legal sufficiency or otherwise, which the Court has authority to decide Here the petition raised the question whether the debtor had committed an act of insolvency for which he was liable to be adjudged an insolvent, and the Insolvent Court had authority to decide that question and did decide it Once recognise that a Court is competent to decide a suit or a petition in insolvency or any other matter and it follows that it is competent to decide all questions which arise in that matter, whether they are questions of fact or of law, and whether they appear on the face of the plaint or petition or arise subsequently. If it

decides them wrongly, its decision may be subject to reversal on appeal or otherwise, but cannot be treated as a nullity In England an order of adjudication by a Court of Bankruptcy has been held to be conclusive as against third persons of an act of bankruptcy having been committed, and of the jurisdiction of the Court—*Revell* v *Blake* 7 C P 300, 8 C P, 533, *Ex parte Learoyd*, 10 Ch D, 3 For these reasons I am of opinion that the Madras Insolvent Court was competent to pass the order of adjudication and the vesting order of the 9th April, and that this objection fails

Another objection raised by Mr Scott and also based on section 44 of the Evidence Act, is that the order of adjudication was obtained by collusion This objection is founded on the following facts By a circular dated the 21st March 1896, the debtor convened a meeting of his Bombay creditors to induce them to give him time and to consent to a composition In this circular he stated that most of his Madras creditors had agreed to give him time that if the Bombay creditors also would agree to do so he would be saved from his difficulties but that if they refused, the only alternative was a voluntary liquidation On the 28th and again on the 30th March a meeting was held, but it broke up without result, as the debtor would only consent to an inspection of his books upon conditions which the creditors present rejected At the first meeting he stated that he had arranged with his Madras and Bellary creditors that they should not molest him The meeting was adjourned from the 30th [215] March to the 8th April On the 31st March, however, the plaintiffs filed the present suit, and the debtor, without waiting for the meeting, left Bombay for Bellary On the 8th April the adjourned meeting was held, but again no agreement was arrived at, and after the meeting, and on the same day, the debtor's Bombay agent Narayan Dhondiba, sent the following telegram to the agent at Madras – "Meeting held Nothing settled Inspection books demanded Delay filing petition dangerous On the next day, the 9th April, the petitioning creditor filed his petition in the Madras Insolvent Court, and the order of adjudication and the vesting order were made Upon these facts the question is whether it is proved that the order was obtained by collusion within the meaning of section 44 of the Evidence Act I am of opinion that it is not Whatever may be the fact, it is not proved that the creditor in presenting his petition acted in concert with the debtor or the debtor's agent There is no evidence whatever of any communication between the creditor and the debtor, or the debtor's agent Although it may hereafter turn out that Narayan Dhondiba's telegram of the 8th April and the creditor's petition of the 9th April were cause and effect the mere sequence of dates does not prove it The creditor may have had ample reasons of his own for presenting the petition at that time According to the petition, the debtor owed him over Rs 17,000 for money lent in July 1895 The debtor had, to the knowledge of his Madras creditors, been for some time in difficulties Upon the materials before me how can I say that between the 31st March and the 9th April the petitioning creditor could not have learned, and did not learn, from sources wholly independent of the debtor, of the filing of the suit, the imminence of a decree and execution and the commission of an act of insolvency, and that these facts did not induce him to petition on his own account? Even if the petitioning creditor did not act of his own motion, but presented the petition at the instance of the debtor or the debtor's agent, I doubt whether that would constitute collusion unless there was some arrangement to mislead the Insolvent Court, to induce it by false representations to adjudge the debtor an insolvent I am also disposed to think that collusion implies what LATHAM, J., in [216] *Ahmedbhoy Hubibhoy* v *Vulleebhoy*

*Cassumbhoy*, I. L. R., 6 Bom., 703 at p. 711, called "no battle but a sham fight": "an agreement or arrangement that the position of the parties to the action apparently hostile shall be friendly, that the action and judgment which purport to be an attack on, shall in fact be a protection to the defendant, an agreement that the reality shall be different from what is represented"—*Girdlestone* v. *The Brighton Aquarium Company*, 4 Ex D., at p. 112 There is no evidence of any such arrangement. It is not necessary, however, to decide whether, if concert between the petitioning creditor and the insolvent had been proved, that concert would have amounted to collusion. I am of opinion that the objections to the order of adjudication and to the official assignee's title fail. I may add that although the order was made on the 9th April, and it is clear from Exhibit A to Mr Turner's affidavit of the 19th June and paragraph 4 of Gopal Malhar's affidavit of the 24th June, that the plaintiffs' attorneys were informed of it on the 10th April, the plaintiffs have as yet taken no steps, either to move the Insolvent Court to annul it, or to appeal to the Madras High Court as persons aggrieved by it within section 73 of the statute.

The vesting order having been passed on the 9th April, two days before the plaintiffs' decree, the title of the official assignee took effect, and no property remained in the insolvent which was liable to attachment It is, however, contended by Mr Scott that the decree and attachment are binding, not only upon the insolvent, but upon others who are equally interested with him in the attached property, and whose interests in it are not affected by the vesting order It is said that the suit was brought against the insolvent in a representative capacity as the manager of a joint Hindu family consisting of himself and his two nephews, that it was brought in respect of a family debt, that the attached property forms part of the joint family estate, and that the decree and attachment must, therefore, be held to affect, not only the insolvent's share in the property, but also the shares of the solvent partners—*Hari Vithal* v. *Jairam Vithal*, I L R, 14 Bom, 597. It is argued that the effect of the adjudication and vesting order passed against one partner only in the family business was to make [217] the official assignee a tenant in common with the solvent partners, and that all he is entitled to is to sue to have the partnership accounts taken and the share of the insolvent ascertained, while the solvent partners, and not the official assignee are entitled to wind up the partnership. Mr Scott contends that, this being so, the official assignee is not entitled to take the partnership property, or to have it released from the attachment.

The plaint shows that, although the insolvent alone was made a defendant to the suit, he was expressly stated to be the manager of a joint Hindu family consisting of himself and his two nephews, and carrying on a family business in Bombay, Ahmednagar, Madras and other places The relief was claimed against the defendant "who is the manager of the joint family aforesaid." The suit was upon six *hundis* drawn in favour of the first plaintiff by the defendant's firm in Ahmednagar upon the Bombay firm and dishonoured by non-payment. The decree is in terms passed against the insolvent alone The application for execution states that enforcement of the decree is sought against the defendant "as manager of the joint family mentioned in the plaint, and his two nephews mentioned in the plaint" In the warrants of attachment issued to the sheriff, the insolvent alone is mentioned. The property attached consists of debts due to the defendant, a promissory note executed in his favour, and a safe, a cupboard, and other office furniture. In his affidavit of the 10th June 1896, the plaintiffs' munim Hajarimal Chotmal states that "the business of A Sabhapathy Moodliar and Co. was carried on by the defendant on behalf of the joint family consisting of himself and his two nephews, who are joint in food, worship and

estate, as declared by the defendant at the first meeting of creditors in answer to certain questions put by Mr. Hiralal, and thus the two nephews, one of whom has attained his majority long ago, are partners and interested in the business. The *hundis* sued upon were given in respect of the said business. The two nephews have not been adjudicated or sought the benefit of the Insolvent Debtors' Act, and are otherwise fit and competent to manage and wind up the affairs of the firm of A. Sabhapathy Moodliar and Co." The only other evidence on the point is in paragraph 9 of the affidavit of the insolvent's munim Narayan Dhondiba, [218] affirmed on the 19th June 1896, in which he says: "I know that the defendant lives with his nephews in the same house, but I do not know whether the defendant is joint with them in food or worship or estate. It is untrue, so far as my knowledge goes, that the defendant has or ever had any partners with him in the business he carried on. I say that at Bombay and at every other place where the defendant carried on business, so far as my knowledge goes, he carried it on solely on his own account, and he had no partners anywhere." Thus the munim admits that the insolvent lives with his nephews; he is not in a position to deny that the uncle and nephews are joint as alleged; he cannot positively deny the positive statement of Hajarimal Chotmal that the nephews are partners in the business; and he is wholly silent as to the alleged declaration by the insolvent in answer to Mr. Hiralal's questions at the meeting of creditors. The second paragraph of Narayan Dhondiba's affidavit of the 26th June 1896, shows that he was or shortly before had been in communication with the insolvent; but no further contradiction of Hajarimal Chotmal's statements, by the insolvent or any one else, is forthcoming. Upon the materials before me, therefore, the probabilities are that the insolvent's nephews are jointly interested with him in the property under attachment.

Assuming this to be so, does it afford an answer to the claim of the official assignee to have the property released from attachment? As, at the time of the claim, the insolvent's schedule had not been filed, the claim is governed not by section 49 of the Insolvent Debtors' Act, but by section 278 and the following sections of the Code of Civil Procedure—*Kashi Prasad* v. *Miller*, I. L. R., 7 All., 752 By the vesting order the official assignee had, at the date of the attachment, the interest in the attached property required by section 279. However the decree might be enforced, it was passed against the insolvent alone. By section 280, if the property when attached was not in the possession of the judgment-debtor, or was in his possession not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court must release the property from [219] attachment either wholly or in part. As at the time of the attachment the judgment-debtor's interest in the property had, by the vesting order, been completely divested from him and vested in the official assignee, the property was not in his possession either wholly or partly on his own account. It was in his possession partly on account of the official assignee and partly on account of the solvent partners, that is, wholly on account of other persons. If it had not been for the vesting order, the plaintiffs could have attached and sold on account of the family debt for which the suit was brought, not only the interest of the judgment-debtor but also the interests of the whole joint family of which he was the manager—*Hari Vithal* v. *Jairam Vithal*, I. L. R., 14 Bom., 597; *Jankibai* v. *Mahadev*, I. L. R., 18 Bom., 147; *Sheo Pershad Singh* v. *Saheb Lal*, I. L. R., 20 Cal., 453. I do not see, however, how they can attach and sell those interests in execution of a decree passed against the manager alone at a time when not only his personal interest, but, if the decision in *Rangayya Chetti* v. *Thanikachalla Mudali*, I. L. R., 19 Mad., 74, is right, his power as

manager to convey the family property in payment of family debts had vested in the official assignee. A judgment-creditor can only attach and sell in execution property which the judgment debtor could honestly sell—*Meghji Hansraj* v *Ramji Jotta*, 8 Bom H C Rep, 169, *Sobhagchand Gulabchand* v. *Bhaichand*, I L R, 6 Bom, 193 at p 202, *Sorabji* v *Govind Ramji*, I L R., 16 Bom, 91 at p 110 Here all the property of the judgment-debtor, and all that he could honestly dispose of, whether for his own benefit or for the benefit of the joint family, had, prior to the attachment, passed to the official assignee, and consequently there was nothing which the plaintiffs could attach and sell. It follows that the claim of the official assignee must prevail, and the property must be released from the attachment

Even if the decree could be regarded as passed against all the partners and if the attachment had been levied against partnership property in the hands of the solvent partners as well as of the insolvent, I should still come to the same conclusion The question would then be whether, after a separate adjudication of in [220] solvency against one partner, a joint creditor can attach and sell the firm's property, or even the shares in it of the solvent partners, as he could no doubt have done before the adjudication That question does not appear to have been considered in any Indian case In England it has frequently been discussed By section 11 sub-section 1 of the Bankruptcy Act, 1890, (Stat 53 and 54 Vict, c 71) where the goods of a debtor are taken in execution, and before the sale or completion of the execution, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall on request deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, the costs of the execution being however, a first charge on the goods or money By sub section 2, where the debtor's goods are sold under an execution in respect of a sum exceeding £20 if, within fourteen days from the sale, notice is served on the sheriff of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against him, the sheriff shall pay the net proceeds of the sale to the official receiver or trustee, who is entitled to retain them as against the execution creditor In his book on Partnership (p 692), Lord Justice LINDLEY expresses the opinion that these clauses apply as well to cases where one partner is bankrupt, and the same partner is the execution debtor, as to those where all the partners are bankrupt and all are execution debtors, and that they "will also be probably held to apply where one partner only is bankrupt, and the execution is against the firm for a partnership debt, (v) provided that the Court is in a position to ensure a proper distribution of the assets of the firm among the creditors thereof" In a foot-note (v) the Lord Justice adds "Following the analogy of the old law—see *Barker* v *Goodair*, 11 Ves, 78 8 R R, 89, and *Dutton* v *Morrison*, 17 Ves, 193 at p 210 11 R. R, 56 see, too, *Re Watt*, 1 J. and W, 610, *Anon*, 12 Mod, 446" The "old law as stated in these cases and explained in the 1863 edition of Lindley on Partnership (Vol II, pp. 954-956) is that after a separate adjudication against one partner only, a judgment creditor of the firm could not have execution against the partnership effects [221] even to the extent of the shares of the solvent partners, and that any property taken in such execution must be given up for rateable distribution among all the creditors of the firm, the joint estate as well as the separate estate being administered, just as if the whole firm had been bankrupt. In the latest case on the subject, *Dibb* v. *Brooke & Sons*, (1894) 2 Q B, 338, there had been an execution sale of the partnership goods for a partnership debt, completed before the petition in bankruptcy of one of the partners; and the

County Court Judge, considering himself bound by the passage in Lindley on Partnership just quoted, held, on an interpleader issue between the official receiver and the execution creditor, that the former was entitled as against the latter to the net proceeds of the sale in the hands of the sheriff On appeal this decision was reversed the Queen's Bench Division holding that the official receiver had failed to make out his title to the proceeds of the sale VAUGHAN WILLIAMS, J, dissented from Lord Justice LINDLEY'S view that section 11 of the Act of 1890 applied where one partner was bankrupt and the execution was against the firm for a partnership debt, and held that sub-section 2 applied only where the debtor whose goods were seized and the debtor who was bankrupt were the same person and that the Act could not be so construed that, upon the bankruptcy of one partner the proceeds of the partnership goods would become vested in the trustee merely because an execution had been put in upon the partnership goods and carried out to the point of sale It is, however, clear from the judgment that the difference between Lord Justice LINDLEY and Mr Justice VAUGHAN WILLIAMS is only a difference as to the construction of section 11 of the Act of 1890 and as to the application to it of the analogy of the old law it is not a difference as to the meaning and effect of the old law itself Speaking of the cases referred to by the Lord Justice Mr Justice VAUGHAN WILLIAMS says "All they really decide is this "if before the execution is completed something happens which makes the property cease to be the property of all the partners, and vests an interest in somebody else—that somebody else being the trustee in the bankruptcy of one of those partners then the Court of Bank [222] ruptcy exercising in this respect the jurisdiction of a Court of equity will in the interest of the joint creditors restrain the execution creditor from going on with his execution and will take upon itself to order an account to be taken of the joint estate, and then will distribute the proceeds among the joint creditors rateably, and hand over the surplus if any to the solvent partner The decisions in those cases were undoubtedly an interference with the right of a solvent partner but, as I understand them, an interference which is justified by the facts that an execution has been put in, and that the solvent partner, by allowing that to be done has abandoned his right of administering the joint estate There is, however nothing in those cases to suggest that the Judges who decided them thought that the joint assets vested in the assignee in bankruptcy There is, therefore nothing in them to show that the trustee in bankruptcy gets a title to the joint estate in such a case as the present, and there is nothing whatever to show that the 11th section of the Act is by some analogy to those decisions to be construed as applying to such a case You are not entitled to construe an Act of Parliament by any analogy of that sort and if you were entitled so to construe the Act, the analogy would not help you here"

In the present case the adjudication and the vesting order preceded the decree and attachment in other words, before the execution was completed or indeed begun, "something happened which made the property cease to be the property of all the partners" and vested the interest of one of them in the official assignee By allowing the execution to be put in the solvent partners abandoned their right of administering the joint estate, and in the interest of the joint creditors, the plaintiffs must be restrained from going on with their execution, and the partnership assets applied by the Insolvent Court in paying the joint creditors rateably, the official assignee receiving the insolvent's share of the surplus and the rest being handed over to the solvent partners The insolvency is in effect an action and execution for all the creditors—*Johurra Bibee* v. *Sreegopal Misser*, I. L R, 1 Cal, at p 475,

including not only the separate creditors of the insolvent, but also the joint creditors of the firm—*In re Watt*. It is, therefore, an execution for the [223] plaintiffs among the rest, and it would be inconsistent with the policy of the insolvency law that they should obtain a further remedy by an independent execution of their own, an advantage not shared by the other creditors. "So completely does the bankruptcy of one partner sever the joint rights and interests of the partnership, that even an execution issued against the partnership effects subsequently to the act of bankruptcy will be invalid and inoperative upon these effects, for the act of bankruptcy overreaches the execution, and it is not competent for the execution creditors to disappoint the arrangements made in bankruptcy for the equal distribution of the effects of the partnership among all the creditors, since it would defeat the just policy of the bankrupt laws"—Story on Partnership (5th Ed), p 537 Substituting "the adjudication" for "the act of bankruptcy," these principles appear to me to be equally applicable to this country

The Judge's summons must be made absolute, and the claim allowed with costs, subject to the amendment of the summons by substituting the name of the official assignee of Madras for that of Mr Turner I certify for counsel

Attorneys for Plaintiff — Messrs *Hiralal, Mulla and Mulla.*

Attorneys for Claimant —Messrs *Craigie, Lynch and Owen.*

Attorneys for Defendant —Messrs *Chitnis, Motilal and Malvi*

NOTES

[1 As regards the Official Assignee's position see also (1901) 28 Cal., 419, (1908) 30 All., 486, (1902) 26 Mad, 214

2 As regards jurisdiction, see also (1901) 28 Mad., 26; 437, (1912) 13 I. C., 568 (Punjab).

3 As regards permission subsequent, see also (1900) 22 All, 269.]

[21 Bom 223]

## APPELLATE CIVIL.

*The 14th November, 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

Bhomshetti Jinappashetti........... (Original Defendant) Applicant

*versus*

Umabai.. . . . .(Original Plaintiff) Opponent.*

*Practice Procedure—Summons—Service of summons—Civil Procedure Code Act (XIV of 1882) Secs 80 82*

Where a defendant is temporarily absent from home, and is not represented at his house by an agent or male member of his family, a Judge is not justified in treating the fixing of a summons to his door as due service. The summons should be again sent to the defendant's house to be served upon him when the inquiries made show that he is likely to be at home and to be found there

[224] The Civil Procedure Code (Act XIV of 1882) in the matter of the service of a summons does not take into account the female members of a defendant's family, and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts Act IX of 1887) against an order passed by Rao Bahadur Jayasatya Bodhrav Tirmalrao, First Class Subordinate Judge of Belgaum.

* Application No. 204 of 1894 under extraordinary jurisdiction.

Application by the defendant to have the decree passed against him on the 13th April 1894, set aside on the ground that the summons had not been duly served upon him

It appeared that on the 3rd April 1894, the bailiff went to the house of the defendant, but could not find either the defendant or any male upon whom service could be effected that he was told by the defendant's wife that the defendant had gone to Gokak and would return in two or four days, that thereupon the bailiff had posted a copy of the summons on the outer door of the defendant's house

The Subordinate Judge held that this was sufficient service and passed a decree against the defendant *ex parte* on the 13th April 1894

In the following May the defendant having heard of the decree applied to the Subordinate Judge to set it aside under section 108 of the Civil Procedure Code, but the Subordinate Judge rejected the application

The defendant applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi*, calling on the plaintiff to show cause why the order of the Subordinate Judge should not be set aside

• *Vasudeo G Bhandarkar* appeared for the Applicant (Defendant) in support of the rule —The summons was not properly served The record if correct shows that the plaintiff was informed of the place where defendant had gone There was no report by the bailiff that defendant could not be found or that attempts had been made to effect service on defendant and that he had evaded it Under section 80 and 82 of the Civil Procedure Code the Court must be satisfied that the defendant is evading service of [225] the summons *Ramahay v Shridhar Parshad* 4 Cal L R 397 *Cohen v Nursing Dass* I L R, 19 Cal, 201 The fact that the defendant's wife knew that the bailiff came to the house to serve the summons on her husband does not show that the defendant came to know of the suit A wife cannot be said to be an agent under the provisions of the Civil Procedure Code nor does it contemplate that females should be treated as agents

There was no appearance for the Opponent (Plaintiff) to show cause

**Farran C J** We think that in this case the order of the Subordinate Judge exercising Small Cause Court jurisdiction, refusing to set aside the decree, was not according to law

The defendant applied to set aside an *ex parte* decree passed against him on the 13th April 1894 on the ground that the summons had not been duly served From the affidavit of the serving officer it appeared that he went to the house of the defendant at Hasur on the 3rd April 1894 and not finding the defendant there, nor any male upon whom service could be made was told by the defendant's wife that the defendant had gone to Gokak a neighbouring village, and would return in a period according to the bailiff's statement of four, and according to that of the plaintiff's servant of two days Thereupon the serving officer posted a copy of the summons on the outer door of the house The Subordinate Judge treated this as due service We are of opinion that he was in error in doing so

The object of the service of a summons in whatever way it may be effected (other than substituted service to which other considerations apply) is that the defendant may be informed of the institution of the suit in due time before the day fixed for the hearing, and when from the return of the serving officer it appears that there is no likelihood that the summons will come to the defendant's knowledge in due time, or a probability that it will not so come to his knowledge, it cannot be said that there has been due service When a defendant is tempo-

rarily absent from home and is not represented at his house by an agent or male member of his family, we think that a Judge is [226] not justified in treating a summons affixed to his door as due service. The summons should be again sent to the defendant's house to be served upon him when the inquiries made show that he is likely to be at home and to be found there. The Civil Procedure Code in the matter of the service of a summons does not take into account the female members of a defendant's family, and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence.

In the present case it appears from the petition of the defendant that he did not hear of the institution of the suit until after the decree had been passed. That fact was not, however, before the Subordinate Judge. The defendant there relied upon the technical insufficiency of the service of the summons, as we think he was justified in doing. Section 108 provides that if the defendant satisfies the Court that the summons was not duly served, it shall pass an order to set aside the decree. There was no evidence before the Subordinate Judge that the defendant knew of the service of the summons before the hearing.

We make the rule absolute, and setting aside the decree, direct the Subordinate Judge to restore the suit to his file and dispose of it on the merits. Costs of this application to be costs in the case.

*Rule made absolute and decree set aside.*

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**NOTES.**

[ Mere temporary absence is not an excuse, (1897) 21 Mad., 419; (1902) 24 All., 302; (1906) 2 N. L. R., 63; (1910) 9 M. L. T., 118, (1907) 5 C.L.J., 555 while one need not be waiting indefinitely (1897) 21 Mad., 324, (1911) 17 C. W. N., 999; (1911) 13 I. C., 127 (Cal.); (1910) 7 A.L.J., 286.]

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[ 21 Bom 226 ]

## APPELLATE CIVIL.

*The 14th November, 1896.*

PRESENT:

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Parashram Harlal............(Original Plaintiff) Applicant

*versus*

Govind Ganesh Porgaumkar........ ....(Original Applicant and Original Defendant) Opponents.*

*Mortgage—Equity of redemption—Execution—Attachment of equity of redemption—Civil Procedure Code (Act XIV of 1882), Secs. 266 and 274—Transfer of Property Act (IV of 1882), Sec. 60.*

The equity of redemption of the mortgagor is immoveable property, and is, as such, liable to be attached and sold in execution of a decree under section 266 of the Civil Procedure Code (Act XIV of 1882). Its attachment can be effected under section 274 of the Code by an order prohibiting the judgment-debtor from dealing with it [227] in any way and all persons from receiving it, such order being proclaimed and notified as therein directed.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Rao Saheb D. V. Bhat, Subordinate Judge of Sangamner in the Ahmednagar District, in an execution proceeding.

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* Application, No. 146 of 1896 under extraordinary jurisdiction

In execution of a money decree against one Balvant Trimbak the plaintiff attached his shop. Thereupon one Govind Ganesh Porgaumkar applied for the removal of the attachment on the ground that he was in possession of the shop as mortgagee of Balvant. The Subordinate Judge ordered the attachment to be raised, holding that the shop being in Govind's possession as mortgagee, the equity of redemption could not be sold in execution. In his order the Subordinate Judge observed that though it was the practice of his and other Courts to attach and sell an equity of redemption even when the property mortgaged was in the possession of the mortgagee, the practice was wrong according to section 280 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff applied under the extraordinary jurisdiction and obtained a *rule nisi* calling on Govind (the mortgagee) to show cause why the order of the Judge should not be set aside.

*Daji Abaji Khare*, appeared for Plaintiff in support of the rule.

*Ghanasham N. Nadkarni*, appeared for the Mortgagee to show cause.

**Farran, C. J.** :—This is an application to set aside an order of the Subordinate Judge raising the attachment on certain immoveable property and (*inter alia*) upon a shop of the judgment-debtor which was in the possession of Govind Ganesh and another as his mortgagees. The Subordinate Judge raised the attachment upon the ground that an equity of redemption in immoveable property in the possession of a mortgagee is not liable to be attached and sold in execution of a decree. For that proposition he relies upon *Kassirav* v. *Vithaldas*, 10 Bom. H. C. R., 100, though he admits that it has been long the practice of his and other Courts to attach [228] and sell the equity of redemption in mortgaged premises under such circumstances.

The equity of redemption in mortgaged premises is immoveable property. " An equity of redemption has always been considered as an estate in the land, for it may be devised, granted or entailed with remainders, and such entail and remainders may be barred by fine and recovery and, therefore, cannot be considered as a mere right only; but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets." Per HARDWICKE, L. C., in *Casborne* v. *Scarfe*, 1 Atk., 603, cited in *Heath* v. *Pugh*, 6 Q. B. D., 339 at p 360; *Mahalavu* v. *Kusaji*, I. L. R., 18 Bom., 739 at p. 745. As such it is liable to be attached and sold, falling within the scope of section 266 of the Civil Procedure Code (Act XIV of 1882).

The attachment of such property is effected under section 274 of the Code by an order prohibiting the judgment-debtor from transferring or charging the attached property in any way and all other persons from receiving the same from him by purchase, gift, or otherwise, such order being proclaimed and notified as there directed. The property to be attached should, however, be not the mortgaged property itself, but the " equity of redemption " of the mortgagor, or as it is called in section 60 of the Transfer of Property Act " the right of the mortgagor to redeem " the mortgaged premises. This is not vested in the mortgagee, nor does he hold it in trust for the mortgagor. When the right to redeem only is attached, the mortgagee cannot come in and ask to have the attachment raised under section 280 of the Code. It is otherwise when the property itself is attached, as it was in the case of *Kassirav* v. *Vithaldas*, 10 Bom. H. C. R., p. 100, referred to by the Subordinate Judge.

In the present case it was clearly the intention of the attaching creditor to attach, not the property itself, but the equity of redemption of the judgment-debtor therein, though that intention has not been expressed in the most apt way.

[229] We make the rule absolute, and set aside the order raising the attachment of the shop, and direct that it continue upon the equity of redemption of the judgment-debtor, or the right of the judgment debtor to redeem the mortgaged premises The application being in part only successful, the parties will bear their own costs in it.

*Rule made absolute and order set aside.*

NOTES.

[See also C. P. C, 1908, O. 21, r. 54, (1911) 35 Bom, 238, (1908) 33 Bom, 311; (1901) 26 Bom., 305.]

[21 Bom. 229]

APPELLATE CIVIL

*The 15th November, 1895.*

PRESENT.

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.*

Kashi and others........ ....(Original Plaintiffs) Appellants

*versus*

Sadashiv Sakharam Shet and others............(Original Defendants) Respondents.*

*Ejectment—Parties to suit—Right of action—Defendant.*

If the plaintiff, in an ejectment suit, can make out a legal title to the land, he is entitled to maintain a suit against the person in actual juridical possession of such land for its recovery without making the person under whom the latter claims to hold a party to the suit.

So where plaintiffs based their title to the land in dispute on a lease granted by Government giving occupancy right to their predecessor in title, and sued the defendants in ejectment and the defendants claimed to hold the land under an occupancy title conferred on them by Government subsequent to the plaintiffs' lease, it was held that though Government might have properly been made a party so as to bind it by the decree and prevent future litigation, it was not a necessary party to the suit.

SECOND APPEAL from the decision of Rao Bahadur Kashinath B. Marathe, First Class Subordinate Judge of Ratnagiri with appellate powers, reversing the decree of Rao Saheb N. B. Bramhe, Second Class Subordinate Judge of Malvan

Suit in ejectment. The plaintiffs sued to recover possession of certain *sheri* or Crown land, alleging that their predecessor had obtained it from Government in 1845, and that from him it had devolved on them.

The defendants claimed to hold the land under an order made in 1885 by the Revenue Commissioner, who had given them possession. They contended that the plaintiffs' cause of action, if any, lay against Government, and not against them.

[230] The Subordinate Judge held that the plaintiffs were entitled to the land, that they had a right to sue the defendants, and that neither Government nor the Revenue Commissioner was a necessary party to the suit. He, therefore, allowed the claim.

On appeal by the defendants the Judge held that the suit was defective owing to the plaintiffs' omission to join Government as a party, and he passed the following order:—

"If the plaintiffs elect, within three months from this date, to withdraw the present suit and present it to the proper Court after joining the Government or the Commissioner or the

* Second Appeal, No. 89 of 1898.

**Secretary of State as a party, they have this Court's permission to do so. The suit will otherwise stand rejected."**

The following is an extract from his judgment:—

**"Now, the most important question is who is the principal offender in the matter, the Government or the defendants? The defendants might have earnestly pressed their request to be put into possession of the land; but they are not guilty of any direct trespass on the land. They have come in as tenants of Government (see Exhibit 82) rather than as trespassers. I think the Government are principally responsible for the trespass, if any, inasmuch as they, by their officers, drove out their previous tenant and put in a new one. The Government, as landlord, have broken their agreement, express or implied, with their former tenant, and have entered into a new agreement with the defendants as new tenants. The new tenants occupy the land under the title of Government as landlord and under no independent title as against the former tenant (plaintiff). The defendants have incurred no independent responsibility towards the plaintiffs. Even if the Government officers' orders should be illegal, the responsibility of Government towards their former tenant cannot disappear, and the Government are a necessary party to the plaintiffs' suit The plaintiffs' pleader argues that the Government have, by their Resolution (Exhibit 117), declared their inability to restore the land to the plaintiffs and admit a claim for compensation. The plaintiffs do not wish to trouble the Government with a suit for recovery of possession of the land. When they deem it fit, they would sue the Government in damages only. Their present claim for recovery of possession should be allowed as against the defendants only, who are in possession, but if the defendants have not come into possession by any independent act of theirs, there is no cause of action as against them alone. At best, the defendants and Government have jointly entered on the land, and they must be ousted by a decree of the Civil Court. The Government, as superior holders and recipients of rent from the defendants, are in direct possession of the land, and the plaintiffs can never completely succeed in getting back their possession, unless and until the plaintiffs obtain a decree against Government declaring the latter incompetent to lease the land to any person other than the plaintiffs during the fresh lease for thirty years. For as soon as the defendants are ejected by a decree of Court against them only, the Government might put in a third person and disappoint the plaintiffs. The Civil Court should, therefore, never give an inadequate and infructuous relief to the plaintiff. The Civil Court is [231] bound to join all persons interested in the subject-matter of a suit. The plaintiffs' suit is, of course, defective for want of parties, and it cannot proceed."**

The plaintiffs preferred a second appeal.

*Inverarity* with *Manekshah J. Taleyarkhan*, for the Appellants (Plaintiffs):—The Government was not a necessary party. We have a legal title to the land and have a right to establish it against the defendants who are in possession. The defendants who have been put in possession by Government may call on the Court to make Government a party, or Government may apply to be made a party, but so far as we are concerned, we have got nothing to do with Government. We want to establish our title against the defendants. If the Court had joined Government as a party at the instance of the defendants, future litigation, if any, might have been prevented, but the non-joinder of Government cannot affect us—Dicey on Parties to Actions, pp. 430, 494.

*Branson* with *Narayan G. Chandavarkar*, for Respondents (Defendants):—We claim under Government, and until Government is brought on the record, the question as to title cannot be fully determined. Government is, therefore, a necessary party, and as the plaintiffs omitted to join them, the suit was properly dismissed—*Mahomed Israil* v. *Wise*, 21 Cal. W. R., 327; *Krishno Lall* v. *Bhyrub Chunder*, 22 Cal. W. R., 52; *H. H. Cannon* v. *Bissonath*, 5 Cal. L. R., 154. Government is considered to be a necessary party to such suits in Bengal.

**Farran, C. J.**:—The order made by the First Class Subordinate Judge, A. P., in this case cannot, in our opinion, be supported.

The plaintiffs, alleging that the land in suit was their land by right of ownership, brought the present action to eject the defendants from, and to recover possession of it. They base their title to the land on what they allege to be a lease granted by Government, giving occupancy rights to one Ramji, from whom they claim that it has devolved upon them.

The suit in its frame is a simple action of ejectment to recover the land from the defendants, who are admittedly in possession of it, and, if the plaintiffs' case is correct, wrongfully in such pos-[232]session. That being the nature of the plaintiffs' claim, *primâ facie*, the defendants are the proper defendants to the suit.

The defendants on their part also claim to hold the land under an occupancy title conferred on them by Government subsequent to the plaintiffs' lease; but, if the plaintiffs' case is correct, Government having already alienated the land to the plaintiffs' predecessor-in-title by granting him an occupancy lease, could not (unless Government had the right to, and did, resume it, which is one of the questions in the case) afterwards grant it to the defendants.

The Court of First Instance, deeming that the plaintiffs had made out a good title as occupants of the land, passed a decree in the plaintiffs' favour. The Appellate Court, without adjudicating upon the merits of the appeal, passed the following order:—"If the plaintiffs elect, within three months from this date, to withdraw the present suit and present it to the proper Court after joining the Government, or the Commissioner, or the Secretary of State as a party, they have this Court's permission to do so. The suit will otherwise stand rejected. The costs throughout in both Courts up to date shall be borne by the plaintiff-respondents"

That order was based upon the ground that as it was the action of the Commissioner by which the plaintiffs were deprived of the land, the cause of action of the plaintiffs was primarily against Government, as Government was the principal offender, and that the defendants had incurred no independent responsibility towards the plaintiffs. This, however, is a misconception of the nature of a suit in ejectment. The owner of land is entitled to maintain a suit for its recovery from the person in possession without regard to the question how he (the owner) has been deprived of possession or how the present possessor has obtained it. The cause of action is the wrongful retention of the land by the defendants from its owners.

In appeal before us it has been argued, for the respondents that the cases of *Mahomed Israil* v. *Wise*, 21 Cal. W. R., p. 327, *Krishno Lall* v. *Bhyrub Chunder*, 22 Cal. W.R., p. 52, and *H. H. Cannon* v. *Bissonath*, 5 Cal. L.R., p. 154, show that Govern-[233]ment is a necessary party to the suit, and that as the plaintiffs have not made Government a party to it, or withdrawn the suit, it now properly stands dismissed. For the appellants, on the other hand, it is argued that though Government might have properly been made a party so as to bind it by the decree and prevent future litigation, Government is not a *necessary* party to the suit, and that all the questions involved in it can, as between the plaintiffs and the defendants, be decided in the absence of the Government; and that the order of the Appellate Court, which is in effect an order dismissing the suit for want of parties, is erroneous.

We are of opinion that the appellants' contention on this point is correct. We consider that if the plaintiff in an ejectment suit can make out a legal title to land, he is entitled to maintain a suit against the person in actual juridical possession of such land for its recovery without making the person

under whom the latter claims to hold a party to the suit. It is in the power of the Court at the instance of the defendant or of its own motion, if it considers it expedient, to make the person under whom the defendant claims to hold a party to the proceedings. This is the English rule and practice (Dicey on Parties, Rules 112 and 113), and it appears to us to be the most convenient and just course It is enough for the plaintiff to sue the person in actual possession. It would be unfair upon him to compel him to add a party of whom he may know nothing and against whom he may have no cause of complaint, while the defendant by disclosing the name of the person under whom he claims to hold can have him made at his own risk a defendant to the suit.

The cases in the Calcutta High Court to which we have been referred do not, in our opinion, decide more than this—that Government is a proper party in a suit like the present. In that view we entirely concur.

In the present suit the defendants' case is that they were placed in possession of the land by Government, and they could have asked that Government should be made a party. They did not ask this, neither has there been any application on the part of Government to be made a party. The issue in the first Court [234] was based on the plea of the defendants that the suit was bad, inasmuch as it was not brought against Government. That issue was properly decided in the negative by that Court The Appellate Court wrongly decided otherwise. The suit is not bad as it is framed and brought, neither is Government a necessary party to it. The most that can be said is that if Government be made a party, the questions at issue between the plaintiffs and Government can be effectually tried and determined in this suit, but the plaintiffs do not ask that those questions shall be determined in this suit, and Government cannot be affected by the result of this suit, so that those questions may safely be left to be determined, if necessary, in future litigation. Had the Court of First Instance in the exercise of its discretion joined Government as a party, there would have been nothing to say against its procedure, but we think that it was unfair and unjust in the present case for the Appellate Court to have called on the plaintiffs at that stage of the proceedings to amend their plaint by adding Government as a party. Such an amendment would have the effect of materially changing the frame of the suit and nullifying the whole of the proceedings already had in it, since it would necessitate the return of the plaint to the plaintiffs and their presenting it afresh in another Court.

We must, therefore, set aside the order of the Lower Appellate Court and remand the appeal for a trial on the merits, that is, for a determination of the title of the plaintiffs to the land as against the defendants. Costs hitherto incurred to abide the result.

*Order set aside.*

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**NOTES.**

[The Government was held to be a necessary party to a suit for mining rights claimed under a *mokurrari* lease granted by a *Digwar* in (1907) 34 Cal, 753. See also (1912) 17 C. L. J., 183 at 186: 40 Cal., 323.]

# [235] APPELLATE CIVIL.

*The 22nd November, 1895.*

PRESENT:

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Balaji Raghunath Phadke............(Original Plaintiff) Appellant

*versus*

Bal bin Raghoji Dalvi and others............(Original Defendants) Respondents.*

*Khoti Act (Bombay Act I of 1865)—Khoti Settlement Act (Bombay Act I of 1880), Secs. 16, 17, 21 and 33 (c)†—Khot—Occupancy tenant—Entries made by the settlement officer in a form headed as issued under Bombay Act I of 1865 when Act I of 1880 was in force—Finality of the entry as to the liability of the tenant.*

[236] At a time when the Khoti Act (Bombay Act I of 1865) had been repealed and the Khoti Settlement Act (Bombay Act I of 1880) had come into operation, the survey officer made, in a form which was headed as being issued under Act I of 1865, entries of rent payable by the occupancy tenant to the khot with regard to some survey numbers of a fixed amount of

* Second Appeal, No. 762 of 1893.

† Sections 16, 17, 21 and 33 of the Khoti Settlement Act (Bombay Act I of 1880):—

16. Whenever a survey settlement of the land-revenue of any village to which this Act extends is made or revised under the provisions of Chapter VIII of the Bombay Land Revenue Code, 1879, the settlement register prepared under section 108 of the said Code shall show the area and assessment of each survey number and also whether such survey number is held by a privileged occupant or not.

If a survey number is held by one or more privileged occupants, the said register shall further specify the tenure on which such number is held the name of the registered occupant thereof, and, in the case of a survey number held by an occupancy-tenant, whether his interest therein is transferable otherwise than by inheritance or not.

Survey numbers which are not held by privileged occupants shall be entered in the said register in the name of the khot, or if a partition of the khotki has taken place, of the co-sharers to whose shares they respectively belong.

The said register shall also contain a list of all the co-sharers of the khotki, if the village be not held by one khot in his own sole right, and shall specify the extent of each such co-sharer's interest in the khotki.

17. The other records prepared under the said section shall specify the nature and amount of rent, payable to the khot by each privileged occupant according to the provisions of section 33, and any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established.

21. In any such matter the decision of the said survey officer, when not final, shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court.

33. Rent payable to the khot by privileged occupants shall be as follows, (namely):—

(a) by a dharekari: the survey assessment of his land;

(b) by a quasi-dharekari: the survey assessment of his land and in addition thereto the amount of grain or money respectively set forth in the schedule;

(c) by an occupancy tenant: such fixed amount, whether in money or in kind, as may have been agreed upon or as may at the time of the framing of the survey record, or at any subsequent period, be agreed upon between the khot and the said tenant;

or on the expiry of the term for which any such agreement shall have been, or shall be made, or if no such agreement have been, or be made, such fixed share of the gross annual produce of the said tenant's land not exceeding one-half in the case of rice-land, nor one-third in the case of warkas-land and such share, if any, of the produce of the fruit-trees on the said tenants' land, as the survey officer who frames the survey record shall determine to be the customary amount hitherto paid by occupancy tenants in the village in which the said land is situate.

grain and with respect to one survey number as held rent free instead of a fixed share of the gross annual produce of the land as directed in the second paragraph of clause (c) of section 33 of the Khoti Settlement Act (Bombay Act I of 1880) without recording that the rent had been so fixed by agreement

*Held*, that the entries of the rent payable by the occupancy tenants were duly made under section 17 of the Khoti Settlement Act (Bombay Act I of 1880) according to the provisions of section 33 so as to make them conclusive and final evidence of the tenant s liability which it was not open to a Civil Court to question

SECOND APPEAL from the decision of T W Walker, Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb Parashram B Joshi, Subordinate Judge of Rajapur

The plaintiff, a khoti sharer in the village of Khanaoli sued for a declaration that he was entitled to recover from defendants Nos 1, 2 and 3 one third of the produce of bhat and varkasal by pahani (survey settlement) as rent of certain lands situate at mauje Khanaoli and for an order directing the said defendants to deliver to him the said fraction of the produce He alleged that the defendants were cultivating tenants and liable to pay rent according to pahani and that the survey settlement officer, on the 18th March 1890, had wrongfully decided that the said defendants were liable to give to the khot only 7½ maunds of bhat on account of the aforesaid lands and that the settlement officer also wrongly decided that the said defendants should enjoy part of the said lands rent free The plaintiff further alleged that defendants Nos 4—12, who had along with him an eight annas share in the khoti, were made party defendants as they would not join him in instituting the suit

Defendants Nos 1 and 2 denied the plaintiff s claim

The other defendants were absent

The Subordinate Judge dismissed the suit

The following are extracts from his judgment —

'I do not think from the wording of the section (17 of Bombay Khoti Settlement Act I of 1880) that a civil suit is barred to rectify the entry made under sections 16, 17 33 of the Khoti Settlement Act if that entry be shown to be wrong What I understand from the above named section is that if the khot were to claim more rent from the privileged occupant, then the privileged occupant can show from the [227] entry made under section 33 that he is not liable for more It is only when the question is as to what rent the privileged occupant is liable the entry made in the register under section 33 of the Khoti Settlement Act is conclusive and final evidence The entry would be final and conclusive evidence in a rent suit if any instituted by khot against occupancy tenant The entry is not said to be conclusive and final for all purposes Having regard to the provisions of the Bombay Revenue Jurisdiction Act (X of 1876) Bombay Land Revenue Code (V of 1879) and Bombay Khoti Settlement Act (I of 1880) I do not think that the khots in the Ratnagiri and Kolaba districts have lost the right of instituting suits to set aside decisions of survey settlement officers if those decisions be shown to be wrong and when those decisions refer to matters in dispute between superior and inferior land holders The decision referred to in this suit and which is sought to be set aside has reference to matters in dispute between the khots and occupancy tenants I am, therefore, of opinion that this suit is maintainable in this Court

* * * * *

" There is no reliable evidence to show that the defendants ever used to give *vasul* by pahani. None of the plaintiff's witnesses or the plaintiff has produced papers of the management of the village of the last 25 or 30 years This the plaintiff could have easily done if defendants Nos 1 3 were really tenants paying *vasul* ⅓rd by pahani The settlement officer, when he made inquiry, found that within 12 years previous to the inquiry no *kam jast vasul* (less or more rent) was given, that is, one and the same amount was given throughout for 12 years

continuously (see Exhibit 61S). If the *vasul* had been taken by pahani, the same amount every year could not have been found due against defendants Nos. 1—3. The plaintiff has, therefore, failed to prove that defendants Nos. 1—3 are tenants of the plaint lands and are liable to pay rent ⅓rd of the produce by pahani."

On appeal by the plaintiff the Judge confirmed the decree on the ground that the suit was barred by the entry made by the settlement officer on the 18th March 1890.

The plaintiff preferred a second appeal.

*Ganesh K. Deshmukh*, for the Appellant (Plaintiff):—We sued to recover *thal* (rent in kind according to the Khoti Settlement) in spite of the *makta* (fixed rent) settled by the survey authorities. With respect to one of the survey numbers, the survey authorities settled that nothing was payable and that the tenants should enjoy the land rent-free. The settlement was made on the 18th March 1890, and the present suit was brought on the 16th March 1891. The entry made by the settlement officer is Exhibit 63 in the case. The settlement was made under Bombay Act I of 1865 and Government Resolution No. 1474, dated the 26th April 1876. If the entry was made under Bombay Act I of 1865, then it was not final. The settlement which [238] was completed in 1890 came into operation when Bombay Act I of 1865 was in force. It had commenced before the Khoti Act I of 1880 came in operation. Section 30 of Act I of 1880 shows that all the khoti villages in the Konkan did not come directly under the operation of the Act as soon as it was passed. It appears from Government order (Exhibit 21) that Act I of 1880 was not made applicable till the 30th August 1890, that is, after the settlement was made applicable to the village on the 18th March 1890.

Assuming that the settlement was made under Act I of 1880, we submit that the decision of the settlement officer is *ultra vires*. The entries under section 17 of the Act would be final if they were in accordance with the provisions of section 33. In the present case the tenants are occupancy tenants, and, therefore, clause (*c*) of section 33 applies. Under this clause the settlement officer has jurisdiction to settle a fixed amount only when there is an agreement. In the present case the settlement officer has fixed the amount of rent at 7½ maunds of grain. Under paragraph 2, clause (*c*), the settlement officer is empowered to settle only a fixed share of rent and not the amount of the rent. In column 5 of Exhibit 63 the reason given by the settlement officer for settling the fixed amount of rent is that the khot did not show that varying rent was paid during the last twelve years. We submit that the reason is bad. Further, the settlement officer had no jurisdiction to declare that a tenant should hold particular land rent-free.

*Daji A. Khare* for the Respondents (Defendants):—There is no allegation on the part of the plaintiff that the settlement was made under Bombay Act I of 1865. Under that Act no such settlement as the present could be made. The first Court held that the settlement was made under the Khoti Act I of 1880. The settlement in dispute is the settlement between the khot and occupancy tenants, and such a settlement could not be made under Bombay Act I of 1865. That Act refers only to a general settlement. Act I of 1880 provides for a settlement between khots and their tenants. The entry in Exhibit 63 being made under section 17 of Act I of 1880 must stand. Government [239] Resolution No. 1474, dated the 26th April 1876, was the result of a compromise between the khots and rayats, and the Khoti Act I of 1880 is the outcome of that Resolution. It may be contended that section 38 of Bombay Act I of 1865 provides for a settlement between the khots and rayats, but that provision was repealed some time before the settlement was made in 1890. We

submit that a settlement, which commenced under an existing Act, but finished after that Act was repealed and another Act has come into force, would be good under the latter Act—*Sankappa* v. *Basappa*, P. J. for 1880, p. 106.

Next we contend that, even according to the provisions of the Khoti Act I of 1880, the entry made by the settlement officer in Exhibit 63 is not *ultra vires*. The Act has given some particulars for the guidance of the settlement officer, and in fixing the amount of rent it took into consideration the circumstance that the khot did not prove that the tenants paid more or less rent during the past years. An entry made under section 17 of the Act is conclusive; and no suit can be brought to set it aside—*Gopal Krishna* v. *Sakhojirao*, I. L. R., 18 Bom., 133; *Ramchandra* v. *Raghunath*, P. J. for 1895, p. 142; I. L. R., 20 Bom., 475; *Ramchandra* v. *Mukundshet*, P. J. for 1895, p. 145; Second Appeals, Nos. 565 and 673 of 1893, decided on the 11th November 1895 (JARDINE and RANADE, JJ.).

If the plaintiff thinks himself aggrieved by the entry of the settlement officer, he can seek redress under section 21 of the Khoti Act I of 1880.

With respect to the entry that the tenant should enjoy particular land rent-free, it seems that the khot did not take any rent from the tenants with respect to that land for the past years, and, therefore, the settlement officer made an entry to that effect.

**Farran, C. J.**:—I do not entertain doubt that, notwithstanding the heading of the record of the settlement officer in this case, the particulars entered therein, in accordance with the provisions of sections 16 and 17 of the Khoti Settlement Act, 1880, must be taken to have been entered in pursuance of the provisions of those sections. At the time when the entries were made, Bombay Act I of 1865, section 38, had been repealed, and Bom-[240]bay Act I of 1880, which repealed it, had come into operation. It was only under the provisions of the later Act that the survey officer could have made the entries, and the fact of his making them under an improper heading, probably having used an old form, does not, I think, deprive them of legal validity. See *Sankappa* v. *Basappa*, P. J. for 1880, p. 106. When, therefore, the settlement on the 12th of August 1890, came into force, as sanctioned by Government by the order (Exhibit 21) of the 18th of March 1890, those entries became, if made in accordance with section 33 of the Act, conclusive and final evidence under section 17.

The more important question argued before us hence arises whether the entries of the rent payable by the occupancy tenants, the defendants in this case, were duly made under section 17 of the Khoti Act according to the provisions of section 33 so as to make them conclusive and final evidence of the defendants' liability, which it is not open to the Civil Court to question *Gopal Krishna* v. *Sakhojirao*, I. L. R., 18 Bom., 133.

It is contended that the entries are not in accordance with the provisions of section 33, because the rent entered is not a fixed share of the gross annual produce of the land as directed in the second paragraph of clause (*c*) of that section, but is in the case of some of the survey numbers a fixed amount of grain, and in the case of No. 118 it is entered as held rent-free, and it is not recorded that the rent has been so fixed by agreement. In considering this question it must be borne in mind that the object of the Act, as appears from the preamble and the provisions of sections 16 and 17, is to compile, through the agency of the settlement officer, a complete record of the nature of the holding of each and every privileged occupant in the khoti village, and to ascertain and define the amount of rent payable by each. Section 33 accordingly provides for the case of occupancy tenants, which it places in two classes—those tenants who have their rent

fixed by agreement, and those whose rents are not so fixed It is, I think, clearly intended that such classification shall be exhaustive The section makes no special provision for the case in which tenants have been paying a fixed rent for a long period but who may be unable to prove the origin of their right to pay [241] in that form As it cannot, I think have been intended that such tenants should be deprived by the settlement operations of their established right, it seems to me that the Legislature must have intended to embrace them within the class of those whose rents have been agreed upon before the time of the survey As the Courts in such cases would presume a lost agreement it would be open to the settlement officer to infer the same Where in such cases there is a dispute between the khot and the occupancy tenant as to the rent payable by the latter section 20 imposes upon the survey officer the duty of investigating and determining it and framing the record accordingly When he has thus after such investigation framed the record under section 17, it becomes conclusive and final evidence of the rent payable by the tenant

In the present case the survey officer found the tenant paying a fixed amount of grain in respect of part of the land and as to part holding the land rent free To that effect he has made an entry and it is not I think open to the Civil Courts to say that he has made his entry on insufficient or inadequate evidence It must I think be taken that he has found the tenant to fall within the scope of the first paragraph of clause (c) of section 33 and to have made the entry accordingly If we were to hold otherwise we should be frittering away the finality as evidence which section 17 gives to the entry of the settlement officer and opening the door to litigation (which it was the object of the Act to avoid) in every case in which the settlement officer has recorded a fixed amount of rent as payable by the tenant It appears to me to make no difference whether the tenant has established his right to the satisfaction of the settlement officer to hold his land on a fixed rent or rent free The settlement officer is bound to frame his record in accordance with his decision

In so deciding I follow what has been already ruled in Second Appeals Nos 565 and 673 of 1893 by another Bench though the particular instance of an occupancy tenant holding rent free did not arise in these cases

**Parsons J** This case raises a very important question between khots and occupants of land in khoti villages The plaintiff is in the position of the khot The defendants have been [242] held by the survey officer to be occupancy tenants and the rent payable by them to the khot has been determined by him after inquiry to be 7¼ maunds of rice The plaintiff disputes the legality of this determination and has brought this suit for a declaration that he is entitled to recover from the defendants for rent one third of the actual produce of the land

In the face of the decisions in *Gopal Krishna* v *Sakharam*, I L R, 18 Bom, 133 *Ramchandra* v *Raghunath* I L R 20 Bom, 475 and *Ramchandra* v *Mukund* not P J for 1895 145 it is not contended that the determination if duly made would not be conclusive and final and would not bar the present suit The argument is first that the determination has not been made under section 33 of the Khoti Settlement Act, 1880, at all, and secondly, that if it has, it is not a legal determination under that section

The first argument is founded upon the heading of the form in which the entry is recorded, which is thus ' Maoji Khanavle Tarf Sanji, Taluka Rajapur, Appendix D classifying the Ryots, etc, under Act I of 1865, and Government Resolution No 1474 of the 26th April 1876 The determination was made on the 18th March 1890, at a time when the Khoti Settlement Act, 1880, was

in force and Act I of 1865 was repealed There could, therefore, have been no proceedings at all held under Act I of 1865, proceedings could have been had under the Act of 1880 only, and I must assign the acts of the survey officer to a valid and proper enactment In all probability the misdescription arose from the fact that the survey had been commenced at a time when Act I of 1865 was in force though it was not introduced until 1890 and the printed forms that were suitable to the time when the survey was commenced continued to be used throughout There can be no doubt that the determination in question was really made under section 33 of the Khoti Settlement Act, 1880, and that the entry of it in the record was made under section 17 of the same Act I think, therefore that there is no force in this first argument

The second argument relates to the determination itself It is laid down in section 33 that an occupancy tenant shall pay [243] such fixed amount, whether in money or kind as may have been agreed on in the past or may in the present or future be agreed on between him and the khot and in the absence of agreement such fixed share of the gross annual produce of his land as the survey officer shall determine to be customary In the present case the survey officer has determined the rent for survey Nos 121 123 122 36 and 28 to be a fixed amount of 7½ maunds of rice and has held that survey No 118 (9) is rent free The award of a fixed amount of grain in the absence of agreement and awarding no rent at all for survey No 118 (9) are relied on as illegalities under the section

It appears, however to me that it is not open to a Civil Court to go behind the entry and inquire whether it is the correct result of a legal and valid determination The Legislature has entrusted to the survey authorities the duty of determining the amount of rent that an occupancy tenant shall pay to the khot, and has declared that the entry of the nature and amount of rent so determined to be payable in the record made under section 17 shall be conclusive and final evidence of the liability thereby established Determinations on other matters it has allowed to be reversed or modified by decrees of competent Courts This one it has declared to be final (section 21) Unless a Court can go behind the determination and enquire into its merits it is impossible for it to say that it is either illegal or invalid In the present case for instance the survey officer may have found upon absolutely undeniable evidence that there was an agreement to pay the amount of grain he fixed for the rent of the land and to pay nothing for survey No 118 (9) in other words an agreement to pay for the whole holding 7½ maunds of rice If this was the case, his determination would be perfectly legal and valid

For this reason I think that the lower Courts have rightly dismissed the suit Plaintiff's remedy is clearly not by suit in a Civil Court If he has a remedy at all, it is before the authorities to whom the Legislature has entrusted the work of framing and keeping the record We confirm the decree with costs

*Decree confirmed*

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NOTES

[See also (1895) 21 Bom 241 (1896) 22 Bom 9[illegible] ]

## [244] APPELLATE CIVIL.

*The 25th November, 1896.*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS.

Gopal Ramchandra Naik . . . (Original Plaintiff) Appellant

*versus*

Dashrathshet and others . . . (Original Defendants) Respondents *

*Khoti Settlement Act (Bom Act I of 1880), Secs 16, 17, 20, 21, 22 and 33†—Land Revenue Code (Bom Act V of 1879), Secs 109, 110, 120, 129, 156, 203, 211 and 212 —Determination by the survey officer of the liability of the defendant to khot —Entry in the settlement register as occupancy tenant—Revision of the record by the Collector Power of alteration—Decision as to the rent payable not final and conclusive evidence—Difference between declaring an entry to be a final and conclusive evidence and a decision to be final Appeal lies from a decision*

In May 1885 under section 33 of the Khoti Settlement Act (Bom Act I of 1880), the survey officer determined the liability of the defendant to pay to the khot as rent for his land the survey assessment and the local fund cess and this was entered in the record made under section 17 of the Act notwithstanding that in the settlement register the defendant was entered as an occupancy tenant In April 1889 the Collector on the application of the plaintiff revised the entry in the record which as revised showed that the defendant was liable to pay one third of the produce of his land as rent to the khot

A question having arisen as to the legality of the revised entry by the Collector

*Held* that the revised entry in the record was duly made by the Collector under section 17 of the Khoti Settlement Act (Bom Act I of 1880) and was conclusive and final evidence of the liability established by it It is not open to a Civil Court to inquire into the legality or otherwise of the reasons which may have led to the determination of the amount of rent payable

The Khoti Settlement Act (Bom Act I of 1880) does not make the decision of rent final In section 17 it only makes the entry which is the result of the decision, final and conclusive evidence Under section 33 an appeal lies from a decision and the decision can be revised under section 211 of the Land Revenue Code (Bom Act V of 1879) by the authorities therein mentioned

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* Second Appeal, No 51 of 1894

† Sections 16 to 17 21 and 33 of the Khoti Settlement Act (Bom Act I of 1880), see *ante* p, 235 , sections 20 and 22 are as follows

Section 20 of Act I of 1880 —

"If it shall appear to the survey officer who frames the said register or other record, that there exists any dispute as to any matter which he is bound to record he may, either on the application of any of the disputant parties or of his own motion, investigate and determine such dispute and frame the said register or other record accordingly "

Section 22 of Act I of 1880 —

"No suit shall lie against the said survey officer or against Government, or any officer of Government to set aside any such decision of a survey officer , but the record shall from time to time be amended by the said survey officer or when the survey settlement is concluded, by the Collector, in accordance with any such decree as aforesaid which the parties may obtain *inter se* on an application, accompanied by a certified copy of such decree, being duly made to the said survey officer, or to the Collector for that purpose."

[245] SECOND APPEAL from the decision of A. S. Moriarty, Acting District Judge of Ratnagiri, confirming the decree of B. Y. Gupte, Subordinate Judge of Devrukh.

The plaintiff as khot sued to recover a certain amount as *thal* rent (rent in kind) due to him by defendants for three years in respect of his eight-annas share in a certain khoti village.

The defendants pleaded (*inter alia*) that the settlement officer had decided in the year 1885 that they were liable only to pay assessment and local fund cess on their lands, and that the plaintiff could not claim *thal* rent without setting aside the settlement officer's decision

The Subordinate Judge found that the settlement officer's decision was final and conclusive, and could not be set aside by any subsequent proceedings in a Civil Court. He, therefore, rejected the claim.

On appeal by the plaintiff the Judge confirmed the decree. The plaintiff preferred a second appeal.

*Daji A. Khare*, for the Appellant (Plaintiff) —Our claim was rejected on the ground that under section 17 of the Khoti Settlement Act (Bom Act I of 1880) the determination by the settlement officer (Exhibit 37) that the defendants were liable to pay assessment and local fund cess was conclusive In Exhibit 37 the defendants are entered as khatedar kuls We submit that under section 17 of the Khoti Settlement Act, the decision of the settlement officer is not final and conclusive. The decision is liable to be modified or set aside by a competent Civil Court Under section 17 of the Act, the entry as to the tenant's liability is only final and conclusive.

*Vasudeo G. Bhandarkar*, for the Respondents (Defendants):– In the year 1885 the settlement officer made the entry under section 20 of the Khoti Settlement Act, and the entry is final and conclusive under section 17. Subsequently the Collector revised the entry on the plaintiff's application. We submit that the Collector had no power to do so Section 20 read along with section 17 of the Act, shows what entries are final and conclusive, and what entries can be interfered with by Civil Courts Section 3, clause (12) of the Act enacts that any word or expression [246] which is defined in the Land Revenue Code (Bom Act V of 1879), and is not defined in the Khoti Act, shall be deemed to have the meaning given to it by the code Section 212 of the code lays down that when a decision or order is final, no appeal can lie against it. The order passed by the settlement officer being final, no appeal could, therefore, lie against it. The Collector was, therefore, wrong in revising it Entries made by officers specially appointed are held to be final, as, for instance, entries made by officers appointed to settle boundaries under sections 119 and 120 of the Land Revenue Code—*Bai Ujam* v. *Valiji Rasulbhai*, I L R 10 Bom. 456.

**Parsons, J.** :—There is no dispute about the facts of this case. On the 3rd May 1885, under section 33 of the Khoti Settlement Act, 1880, the survey officer determined the liability of the defendant to pay to the khot, as rent for his land, the survey assessment and the local fund cess, and this was entered in the record made under section 17 of the Act, notwithstanding that in the settlement register the defendant was entered as an occupancy tenant. On the 25th April 1889, the Collector on the application of the plaintiff revised the former record, and as it now stands it shows that the defendant is liable to pay one-third of the produce of his land as rent to the khot. We have held in the case of *Balaji Raghunath* v. *Bal bin Raghoji*, *Ante*, p. 235, that it is not open to a Civil Court to enquire into the legality or otherwise of the reasons which may have led to the determination of the amount of rent payable. The Court must accept an entry in a record duly made under section 17 as conclusive and final evidence of the liability established by it.

The only point therefore that arises is, whether the revised entry in the record was duly made by the Collector The Act of 1880 is not very clear in its terms but sections 16 and 17 read together show that the record of rent is a separate record from the settlement register, so that the restrictions as to alterations and corrections of the latter contained in sections 109 and 110 of the Bombay Land Revenue Code would not apply to the former The terms of section 33 itself seem to imply a power of alteration, since it speaks of an agreement made at some period subsequent to the framing of the survey record Section [247] 20 provides for the investigation and determination of disputes section 21 declares that the decision, when not final, shall be binding till reversed or modified by a decree of a competent Court, and section 22 provides for the amendment of the record in accordance with such decree when obtained

As section 17 has declared the decision of the rent payable to be conclusive and final evidence and as no suit lies to reverse or modify that decision, there can be no amendment possible under section 22 We are therefore driven to the conclusion that the Act of 1880 gives no express power of appeal or of revision We can however look to the Land Revenue Code itself to see whether there is anything in it which gives such power Section 203 gives a general right of appeal from all decisions or orders passed by a revenue officer to that officer's immediate superior in the absence of express provision to the contrary Section 212 restricts this power by declaring that no appeal shall lie from a decision or order declared in the Act to be final

It has been argued before us and it is the opinion of the lower Courts, that the Act of 1880 has declared the decision of rent to be final This, we think, is a mistake Had the Legislature intended to make the decision final, it would have expressly said so in section 33 (*Cf* sections 120, 129 and 156 of the Land Revenue Code) It does not however, there say a word about the decision and in section 17 it only makes the entry, which is the result of the decision final and conclusive evidence There is a marked difference between declaring an entry to be final and conclusive evidence and a decision to be final

There being then no express provision prohibiting an appeal, we think that an appeal lies from a decision under section 33 as indeed it is only right an appeal should lie from a decision on such an important point It follows that not only an appeal lies but that the decision can be reviewed under section 211 of the Land Revenue Code by the authorities therein mentioned In the present case the Collector on the application (it is called an appeal in the document itself) of the plaintiff has modified the decision of the survey officer which was that the defendant though only an occupancy tenant, was liable to pay rent as if he [248] were a dhuekari and has held him liable to pay the rent that an occupancy tenant is liable to pay It is not within our power to go behind that latter decision or to inquire into the validity of the reasons which induced the Collector to exercise his jurisdiction It is an entry duly made under section 17 and we must accept it as final and conclusive evidence of the liability established thereby

We reverse the decrees of the lower Courts and award the claim with costs throughout

*Decree reversed*

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[21 Bom 248]

## APPELLATE CIVIL

*The 25th November, 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

Narayan Bhaskar Khot (Original Plaintiff No 1) Appellant

*versus*

Balaji Bapuji Khot (Original Defendant) Respondent *

*Small Cause Court suit—Second appeal Civil Procedure Code (Act XIV of 1882) Sec 586 Suit to recover a certain sum on account of a share in property —Amount to be found due on taking account Title*

Plaintiffs sued to recover on account of their share in the produce of certain *dhara* and *khoti* properties Rs 339 14 2 or any other sum which might be found due to them on taking account from the defendant who was the managing khot The defendant denied the plaintiffs' right to the produce of some of the properties The first Court and the Court of appeal found that the amount due to plaintiffs was Rs 72 14 11. On second appeal

*Held* that the suit was a Small Cause Court suit and no second appeal lay The mere fact of a question of title arising did not prevent a suit being cognizable by a Court of Small Causes By merely asking in the alternative for an account of the profits a suit cognizable by a Small Cause Court cannot be converted into one of a different nature

SECOND APPEAL from the decision of T Walker Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb K S Patankar, Subordinate Judge of Dapoli

The plaintiffs sued to recover Rs 339 14 2 as their one twelfth share in certain *dhara* and *khoti* properties or any other sum which might be found due to them from the defendant who was the managing khot, on taking accounts between them

[249] The defendant denied the plaintiffs claim in respect of some of the properties

The Subordinate Judge passed a decree for the plaintiffs for Rs 72 14 11, and on appeal by plaintiff No 1 the Judge confirmed the decree Plaintiff No 1 preferred a second appeal

*Gokuldas K Parekh* (with *Ganpatrao I Bhole*), for the Respondent (Defendant) took a preliminary objection This is a small cause suit in which no second appeal is allowed section 586 of the Civil Procedure Code (Act XIV of 1882), *Damodar Gopal Dikshit* v *Chintaman Balkrishna* I L R 17 Bom, 42

*Daji A Khare*, for the Appellant (Plaintiff No 1) This is a suit for account There is a distinct prayer to that effect in the plaint There are also questions of title in the suit We claim a share in the profits of immoveable property, and the defendants have denied our title to those properties Therefore section 23 and article 31 of Schedule II of the Provincial Small Cause Courts Act (IX of 1887) are applicable and the suit is not a small cause suit In *Damodar Gopal Dikshit* v *Chintaman Balkrishna* I L R 17 Bom 42, no account was asked for

*Gokuldas K Parekh*, in reply —In a small cause suit the question of title can be incidentally gone into In calculating profits the Court has to make accounts, but that circumstance would not make section 23 or article 31 of the Provincial Small Cause Courts Act applicable

* Second Appeal No 219 of 1894

**Farran, C. J** —The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes That has been determined in a long series of decisions Section 23 of the Small Cause Courts Act, 1887, does not alter the law upon this subject, but points out a course which a Small Cause Court Judge may adopt when he considers that he cannot conveniently try such a question as is there indicated in his Small Cause Court jurisdiction See *Muttukaruppan* v *Sellan*, I L R, 15 Mad, 98 It can have no application when a case is filed in the Court of a Subordinate Judge not invested with the jurisdiction of a Court of Small Causes

**[250]** We must, therefore, consider whether this as a suit for an account, is excepted from the jurisdiction of the Small Causes Court This question is determined by authority We cannot distinguish the present case from *Damodar Gopal Dikshit* v *Chintaman Balkrishna* I L R 17 Bom 42 Here, as there, the profits sought are not alleged to have been wrongfully received By merely asking in the alternative for an account of the profits the plaintiff cannot convert a suit cognizable by a Court of Small Causes into one of a different nature There is no account within the meaning of article 31 Schedule II of the Small Cause Courts Act here to be taken A definite sum only is to be ascertained *viz* the amount of profits received by defendant during the years in question, from which by a simple calculation what the plaintiff's share in those profits amounts to can be ascertained No second appeal lies under section 586 of the Civil Procedure Code

We therefore reject the appeal with costs

*Appeal rejected*

**NOTES**

[This was followed in (1901) 25 Bom 625 (*ulpan*) (1904) 6 B m L R 370 (*khoti tak shin*) (1908) 32 Bom 560 (pr fits fr m land) (1910) 8 M L T 281 (pr fits from land) (1905) 3 A L J 23 (balance of partnership account) (1911) P R 20 9 I C 579 (*chaihawa*)]

**[21 Bom 250]**

## APPELLATE CIVIL

*The 25th November 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

The Poona City Municipality (Original Defendant) Applicant

*versus*

Ramji Raghunath (Original Plaintiff) Opponent*

*Small Cause Court Provincial Small Cause Courts Act (IX of 1887), Sec 25—Jurisdiction of the High Court*

An error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed by section 25 of the Provincial Small Cause Courts Act (IX of 1887)

The powers conferred by the section are however purely discretionary, and the section does not give a right of appeal in all Small Cause Court cases either on law or on fact The High Court is to determine in what cases it shall exercise the powers conferred upon it

It is not the practice of the Bombay High Court to interfere under section 25 of the Act when there are no substantial merits in the case of the applicant It interferes to remedy injustice It is slow to interfere where substantial justice has been done by the Subordinate Court although that Court may technically have erred

* Application No 168 of 1895 under the extraordinary jurisdiction.

[251] The provisions of section 622 of the Code of Civil Procedure (Act XIV of 1882) do not afford a safe guide for the exercise of the extraordinary jurisdiction under section 25 of the Provincial Small Cause Courts Act (IX of 1887) The wording of the two sections is wholly different, that of section 25 of the Provincial Small Cause Courts Act being of the widest description and conferring the most ample discretion on the High Court, while it has been held by the Privy Council that section 622 of the Civil Procedure Code (Act XIV of 1882) ought to be construed in a very restricted and limited sense

APPLICATION under the extraordinary jurisdiction of the High Court against the decision of Khan Bahadur Navroji Dorabji, Judge of the Court of Small Causes at Poona, under section 25 of the Provincial Small Cause Courts Act (IX of 1887)

The plaintiff sued the Municipality of Poona to recover Rs 809 3 11 alleged by him to have been paid as octroi duty on goods imported by him for the use of Government and which he claimed to be refunded under the octroi rules in force at Poona

The plaintiff contracted to supply corn to Government at Poona Kirkee and the Camp of Exercise from 1st April 1892 to 31st March 1893 and during that period he imported corn into Poona for the purposes of his contract and paid octroi duty upon it according to the revised octroi rules

By one of these rules (Rule No 3) it was provided that where imported goods were intended for the use of Government or subsequently became the property of Government the duty paid on importation should be refunded on production of the proper certificate The following is the rule referred to

"Rule 3 Goods the property in which is not vested in Government at the time they passed the barrier but which being imported with a view to the fulfilment of a Government contract or otherwise intended for the use of Government will in the ordinary course of things, become the property of Government after importation shall on passing the barrier be declared as intended for the use of Government in fulfilment of a certain (specified) contract The duty on them shall then be paid and if subsequently they actually do become the property of Government the duty shall be refunded on a certificate to that effect signed by the departmental officer concerned

The plaintiff alleged that he had produced the necessary certificates in respect of a large quantity of grain and asked to be refunded the amount claimed, but the defendants allowed a refund in respect of such grain only as had been delivered to Government in the Poona Cantonment but refused it in respect [252] of such as had been delivered to Government at Kirkee and the Camp of Exercise The plaintiff therefore brought the present suit

The Municipality pleaded that as in the case of goods taken to Kirkee and the Camp of Exercise the goods passed outside the octroi limits, the plaintiff ought to have taken certificates for export as required by Rules 14 to 21 that in the absence of such export certificates the plaintiff was not entitled to claim the refund, and that Rule 3 applied only to such goods as were delivered to Government within municipal limits and not to goods delivered to Government outside these limits

The following were the rules relied on by the Municipality

14 Persons, importing goods in transit which enter the city and pass out of it intact within a week of their entering shall deposit the amount of duty due on them at the ingoing octroi naka and receive a receipt for the same They shall present the receipt at the outgoing naka for endorsement as to the goods having passed out of the city intact and present the endorsed receipt at the municipal office where on satisfying the municipal officers of the correctness of the endorsement &c they will obtain a refund of the amount of duty deposited by them

"15 Such goods if they stay in the city longer than a week, shall be treated as imported goods for purposes of refund, provided that the importer gives notice to the octroi superintendent to the effect that the goods have remained in the city and gets his receipt endorsed to that effect

"16 Goods which pass out of the city within 12 months of the date of importation shall be entitled to refund of duty

"17. In cases in which the computed duty shall exceed four rupees the goods shall, on their way out, be brought to the municipal office for inspection and verification by the secretary or the octroi superintendent

"18 Refund of duty on goods which have to break bulk or undergo a change of form in the city shall be claimable provided the manufactured articles are brought to the municipal office for inspection by the secretary or the octroi superintendent packed for export in his presence, and a certificate obtained from the outgoing naka within 48 hours after packing certifying the despatch of the articles in question out of the city

"19 In cases where goods are exported by railway the conditions imposed by the two last preceding Rule 17 and 18 (of bringing the goods at the municipal office for inspection) shall be dispensed with and the railway invoice shall be accepted in lieu thereof as evidence of exportation

"20 All demands for refund as above should be made within 4 days of the time of export and they should be supported by the original receipts acknowledging payments of duty and the certificates of export mentioned above

[253] 21 All octroi receipts are transferrable and they will change hands with the goods to which they appertain Refund will be paid only to the party who actually exports the goods and produces the original receipt"

The Judge found that the plaintiff was entitled to the refund, and awarded the claim to the extent of Rs 730 7 11 which he found to be covered by proper certificates from the commissariat officer The Municipality applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling on the plaintiff to show cause why the decision of the Judge should not be set aside contending that the Judge erred in construing the octroi rules, and that the award of the refund was illegal and inequitable

*Macpherson* with *Mahadeo B Chaubal*, appeared for the Municipality in support of the rule The dispute relates to grain brought into Poona and afterwards taken outside With respect to such grain the certificates given by the commissariat officer is not sufficient There is no guarantee that the grain supplied to Government outside the municipal limits was the identical grain which had been imported into Poona Rule 3 must be read along with the succeeding rules Grain supplied to Government outside Poona were goods in transit, and the plaintiff ought to have complied with the provisions of Rules 14 and 17 The plaintiff did not comply with them, and is not entitled to a refund

*Branson* with *Gangaram B Rele*, appeared for the Plaintiff to show cause —The Judge has come to the conclusion that Rule 3 is applicable to our claim He has not committed any error in law and there are no merits in the defendant's case His decision cannot be interfered with under the extraordinary jurisdiction of the High Court (see section 25 of the Provincial Small Cause Courts Act IX of 1887)—*Muhammad Bakar* v *Bahal Singh*, I L R, 13 All, 277, *Raghunath Sahai* v *The Official Liquidator of the Himalaya Bank, Limited*, I L R, 15 All, 139, *Sarman Lal* v *Khuban*, I L R, 16 All, 476, I L R, 17 All, 422

There is no allegation by the Municipality that the plaintiff has committed any fraud We contend that Rule 3 applies to goods supplied to Government, and the other rules apply to goods [254] which are not supplied to Government We have complied with Rule 3 The rules as they stand now

do not impose on us any liability to produce certificates other than those we have already produced.

**Farran, C. J.**:—This is an application by the Poona City Municipality under section 25 of the Provincial Small Cause Courts Act, 1887, by which they seek for a reversal of a decree passed against them in the Poona Small Cause Court for the sum of Rs. 730 7-11, on the ground that the decree was passed against them on an erroneous construction of their Revised Octroi Rules. Cause was shown against the application on the 19th November last, when we took time to consider our judgment Mr. Branson for the opponent cited *Muhammad Bakar* v *Bahal Singh*, I L R , 13 All., 277 , *Raghunath Sahai* v. *The Official Liquidator of the Himalaya Bank, Limited*, I L. R., 15 All., 139 ; *Sarman Lal* v. *Khuban*, I L. R., 16 All., 476 , I L. R., 17 All , 422, and urged that this was not a case in which we should interfere under the section. He also argued that the construction put upon the Poona Octroi Rules by the Small Cause Court Judge of Poona was correct Mr Macpherson for the Municipality maintained the contrary propositions As there is no reported decision in the Bombay High Court upon the first point, it appears to us to be advisable to state our views upon the general law before dealing with the concrete circumstances of this particular case.

The primary question for consideration is What are the extent and nature of the power which the section confers upon the High Court ? And as to this it is, we think, clear that an error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed to it by the section The wording of the section is of the widest description. The High Court is entitled to interfere when a decree or order of the Small Cause Court is not "according to law " Further, we agree with the opinion of the Allahabad High Court, expressed in *Muhammad Bakar* v *Bahal Singh* (*supra*), that the powers conferred by the section (25 of Act IX of 1887) are purely discretionary, and that it was not the intention of the Legislature [255] to give by that section a *right* of appeal in all Small Cause Court cases, either on law or on fact In the event of the decree not being according to law, the Legislature has conferred this jurisdiction on the High Court, but has left it to the High Court to determine in what cases it shall exercise it. It is undesirable, and would be improper for us to attempt, when a power is discretionary, to define the limits within which such power should be exercised. That must depend upon the facts of each individual case, but speaking generally we may say that it has not been the practice of this High Court to interfere under section 25 when there are no substantial merits in the case of the applicant. This has been always a cardinal principle with this High Court. It interferes to remedy injustice. It is slow to interfere when substantial justice has been done by its Subordinate Court, though technically the plaintiff or defendant may have a legitimate ground of attack or defence This principle has also been enunciated in the Allahabad High Court in the case of *Raghunath* v. *The Himalaya Bank* (*supra*), but we hesitate to agree with that decision in holding that the provisions of section 622 of the Civil Procedure Code and the earlier cases decided under it afford a safe guide for the exercise of our discretion under the section which we are considering, though that ruling has been to some extent approved by the Full Bench at Allahabad in *Sarman Lal* v *Khuban* (*supra*) The wording of the two sections is wholly different, and the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh*, I. L. R., 11 Cal., 6, shows that section 622 of the Civil Procedure Code ought to have been construed in a very restricted and limited sense. This last mentioned decision must have been within the knowledge of the Legislature when Act IX of 1887 was passed, and yet it used the widest words in framing

the later enactment. The Legislature intended, we think, to confer the most ample discretion on the High Court.

Turning to the case before us, we think that there is much force in the argument of Mr. Macpherson, that when goods imported into Poona and declared as intended for the use of Government, *i.e.*, in fulfilment of a certain (specified) contract " become subse-[256]quently the property of, and are delivered to, Government, not in Poona itself but outside the municipal limits, the importer of such goods is not entitled to a refund merely on the production of a certificate signed by the departmental officer such as is contemplated under Rule 3. It is clear that in such a case the certificate signed by the departmental officer affords no proof that goods upon which octroi duty has been paid have been delivered to Government. The contractor may sell the declared goods in Poona and deliver other similar goods to Government in Kirkee or elsewhere outside the Poona limits without having paid octroi duty upon them at all. My learned colleague is disposed to think that the expression "after importation" in line 6 of Rule 3 imports that the goods become the property of Government in Poona, and that the words "and before exportation" may be implied after it, and I am inclined to agree with his view, but on the ground that the "certificate to that effect" in lines 11 and 12 of the Rule means a certificate which shows that the imported goods have become the property of Government. That is the most obvious meaning of the phrase, and it is manifest that a certificate given of goods having been delivered outside of Poona in pursuance of a particular contract does not show that goods which have been imported into Poona to fulfil it have been so delivered The difficulty in the way of adopting this, the obvious construction of the phrase, is that even in the case of goods delivered in Poona the certificate does not show that the particular goods imported to fulfil the contract have been delivered under it, inasmuch as the importer may even in that case substitute other goods. He would, however, have no object in doing so, and the certificate of goods of the specified nature having been delivered under the contract in Poona is practically sufficient to safeguard the interest of the Municipality. We shall not, however, decide the point, as we think that we ought not to exercise the jurisdiction in this case which the section (25) has conferred upon us, even if we were to decide the question in favour of the Municipality.

In the first place it does not appear that the Municipality asked the Small Cause Court Judge to state a case for the opinion of the High Court under section 617 of the Civil Procedure Code. [257] Had they done so, and had the Judge refused to accede to the application, we should probably have given a decided ruling to guide the Court in the future when dealing with these rules. The Municipality were apparently contented to take the decision of the Small Cause Court Judge on the construction of their rather ambiguously worded rules, and when he decided against them without their having asked for a case, they cannot, we think, complain that the High Court does not exercise its extraordinary powers to assist them.

In the second place, the defendants have no merits on their side. According to the finding of the Small Cause Court, which has not been challenged, and which there is no reason to distrust, the goods imported into Poona in this case have actually become the property of Government, and the plaintiff is on the merits entitled to the refund which he has obtained, though from the certificate alone he may not be able to prove his right, and he has not taken the precautions which entitle exporters under Rules 14 to 17, inclusive, to a refund. We discharge the rule with costs.

*Rule discharged.*

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NOTES

[This was followed in (1898) 23 Bom, 334, (1899) 21 All 89, (1897) 11 C P L R, 91; (1911) 10 I C, 117 (Cal) See also (1903) 27 Bom 568, (1904) P R, 66

A Full Bench of the Madras High Court on 6 12 1916 [which will be reported in (1917) 40 Mad] dissented from the Bombay and the Calcutta view.]

[21 Bom 257]

## APPELLATE CIVIL

*The 25th November 1895*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE

Savad Hussein Miyan Dada Miyan and another (Original Defendants) Appellants*

*versus*

The Collector of Kaira (Original Plaintiff) Respondent

*Civil Procedure Code (Act XIV of 1882) Sec 539 Sanction Court cannot grant reliefs outside the sanction*

When sanction is given to the institution of a suit under section 539 of the Code of Civil Procedure (Act XIV of 1882) the suit must be limited to matters included in the sanction It is not competent to the Court to enlarge the scope of the suit and grant reliefs other than those included in the terms of the sanction

APPEALS from the decision of Dayaram Gidumal, Joint Judge of Ahmedabad, in Suit No 19 of 1891

This was a suit filed by the Collector of Kaira under section 539 of the Code of Civil Procedure (Act XIV of 1882)

[258] The suit was instituted with the sanction of the Local Government which by a Resolution of the Judicial Department, No 1522, dated 13th March 1891, directed the Collector to move the District Court to appoint new trustees for the administration of the trust funds and to settle a scheme for their management

A Jain widow named Manekbai, of Kapadvanj died in 1876 possessed of considerable moveable and immoveable property she left a will by which she created several public religious and charitable trusts In 1886 defendants Nos 1 and 2 were appointed administrators of her estate, under Regulation VIII of 1827

The plaint stated that some of the trusts were such as could not be satisfactorily carried out by defendant No 1 who was a Mahomedan and that in view of section 22 of Act XX of 1863, the appointment of the defendant No 2 who was nazir of the Subordinate Judge's Court at Kapadvanj was objectionable

The plaintiff therefore, prayed that the defendants Nos 1 and 2 should be removed and new trustees appointed that a scheme of administration should be settled by and under the direction of the Court, and such relief granted as the Court might deem fit

Defendant No 1 did not contest the suit he expressed his willingness to abide by the Court's orders

Defendant No 2 asked to be made a plaintiff and made serious allegations of misappropriation, not only against the former administrators of the estate, —Nihalchand (since deceased) and Chhotalal,—but also against Amratbai,

* Appeals Nos 68 and 108 of 1894

the mother and legal representative of Nihalchand. He asked that these persons should be added as defendants, and made to account for the trust funds in their hands

The District Court accordingly added Amratbai and Chhotalal as defendants Nos 3 and 4, respectively

The Joint Judge found that defendants Nos 1 and 2 were unfit to administer the religious and charitable trusts created by Manekbai's will, that the former trustees, Nihalchand and Chhotalal had been guilty of gross negligence and had committed several breaches of trust for which they were responsible to the trust estate He therefore, passed a decree directing defendants Nos 1 and 2 to be removed and new trustees appointed in their stead [259] He framed a scheme for the future administration of the trust, and ordered defendants Nos 3 and 4 to render an account of the trust funds in their hands and make good the losses sustained by the charity in consequence of their default

Against this decree defendants Nos 1 and 3 made a joint appeal (No. 68 of 1894) to the High Court

Defendant No 4 preferred a separate appeal (No 103 of 1894)

*Scott* (with him *Govardhan M Tripathi*) for Appellants in Appeal No. 68 of 1894

*Gokaldas K Parakh*, for Appellant in Appeal No 103 of 1894

Rao Saheb *Vasudev J Kirtikar*, Government Pleader for the Respondent in both the appeals

A preliminary objection was taken that this suit did not fall within section 539 of the Civil Procedure Code (Act XIV of 1882) and that the District Court had no jurisdiction to hear it The High Court overruled the objection (see *ante*, p 48), and the appeal now came on for hearing on the merits

*Scott* The sanction given to the Collector by Government was of a limited character, and did not include the question as to the removal of trustees or the account and refund The relief granted by the lower Court as against Amratbai was, therefore, unwarranted by the sanction and *ultra vires* of the District Court under section 539 of the Civil Procedure Code—*Trimcumdass* v *Khimji Vullabhdass*, I L R, 16 Bom, 626

The case stated by defendant No 2 is quite independent of the sanction and ought not to have been included in a suit brought expressly under the sanction Amratbai had no notice that she was to be made liable to account The plaint here does not ask inquiry into the conduct of the trustees or for accounts to be taken—*Rendall* v *Blair* 45 Ch D, 139 and 157 *The Attorney General* v *Earl of Devon*, 15 Simon 193 at p 262 *Strickland* v *Weldon*, 28 Ch D, 426

The claim against Amratbai is also barred by limitation—article 98* of the Limitation Act (XV of 1877) Amratbai is the [260] mother of the deceased trustee, Nihalchand She succeeded to his property as heir on his death in January 1883 and remained in management until defendant No 1 was appointed trustee on 26th June 1886 It is not alleged that Amratbai herself committed any fraud or waste It is only for Nihalchand's gross negligence that she is held responsible The case against her, therefore, does not fall

*[Art 98 —

| Description of suit | Period of limitation | Time from which period begins to run. |
|---|---|---|
| To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust | Three years | The date of the trustee's death, or, if the loss has not then resulted, the date of the loss ] |

within section 10 of the Limitation Act, and is barred. The suit ought to have been brought within three years from the death of Nihalchand, the trustee (article 98). It was not brought until more than seven years after his death—*Advocate-General* v. *Bai Punjabai*, I. L. R., 18 Bom., 551 at p. 566; *Vishvanath* v. *Rambhat*, I. L. R., 15 Bom., 148; *Augustine* v. *Medlycott*, I. L. R., 15 Mad., 241; *Sitaram* v. *Lakhmidasji*, P. J. for 1892, 142.

*Gokaldas K. Parekh*, for Appellant in Appeal No. 103.

Rao Saheb *Vasudev J. Kirtikar*, for the Respondent in both appeals:—The Government is not interested in the case against the defaulting trustees. The suit was brought for the purpose of having a scheme prepared for the future management of the trust fund. The Government is not responsible for the fact that defendant No. 2 intervened and asked the District Court to go into questions which the Government did not include in the sanction. Whatever view the Court may take as to the liability of the trustees, the decree, so far as it grants reliefs that were prayed for by Government, is correct and ought to be confirmed.

**Jardine, J.**:—This suit was brought by the Collector of Kaira in the District Court, under section 539 of the Code of Civil Procedure (Act XIV of 1882). The sanction for the suit is Government Resolution No. 1522 of the 13th March 1891, Judicial Department, which instructs the Collector "to move the District Court to appoint new trustees for the administration of the trust funds referred to and to settle a scheme for their management."

The suit was brought against the existing trustees, defendant No. 1, Sayad Husein Miyan, and defendant No. 2, Amratlal. Defendant No. 1 pleaded that he did not oppose, and submitted himself to the Court. Defendant No. 2 objected to the prayer of [261] the plaintiff, urged that Amratbai, mother of a past trustee, Nihalchand, then deceased, had retained property of the trust, and that as actual trustee he wished to sue her for this property (which he did not specify) and for an account, and also that another past trustee, Chhotalal, had been guilty of neglect, and that he wished to sue him for damages therefor. Defendant No. 2 also prayed that for these torts or misfeasances they should both be made defendants in this suit. The District Court passed a decision joining them as defendants, a course advocated by the plaintiff's pleader and objected to by the new defendants Nos. 3 and 4.

Nihalchand died in 1883, and though Amratbai did manage certain funds of the trust after his death as his representative, and although Chhotalal was at one time a trustee, they ceased to be such in June 1886, when defendants Nos. 1 and 2 were appointed. The suit was filed in 1891. The District Court has made the new defendants liable by its decree.

In the appeals here Mr. Scott contends for Amratbai that this relief should be refused as unwarranted by the sanction, and, therefore, *ultra vires* of the District Court under section 539. Mr. Gokuldas for Chhotalal adopts this argument. Mr. Scott also argues that the claim against Amratbai is barred by limitation under article 98 of Act XV of 1877. Indian cases were cited out of the reports. We called for a second argument in order to have the advantage of a discussion of some analogous Chancery cases on the subject of sanction which seemed to us important.

It is not necessary to consider whether the claim made by defendant No. 2 against defendants Nos. 3 and 4 is one to which section 539 applies, as no question about the forum has been raised here, as in *Vishvanath* v. *Rambhat*, I. L. R., 15 Bom., 148, and *Augustine* v. *Medlycott*, I. L. R., 15 Mad., 241. Neither is it necessary to consider the argument raised, but not much pressed by Mr. Scott, that the powers which under section 539 the Collector may

exercise are only those under which the Advocate-General gives a consent in writing to a suit.

The argument raised was that as the Advocate-General had, before section 539 was enacted, a power *ex officio* of instituting [262] his own suit, that power was not assigned under the word "conferred." The Government Pleader asked us to read "conferred" as equivalent to "specified." Coming to the Indian authorities on sanction under section 539 we follow the judgment of PARSONS, J., in *Trioumdass* v. *Khimji Vullabhdass*, I. L. R., 16 Bom., 626, and hold that the section is mandatory. *Primâ facie*, therefore, the District Court ought not to have allowed the defendant No. 2 to enlarge the scope of the suit so as practically to start a new suit without any regard to the absence of a sanction from the Local Government for that purpose. The suit actually determined is not the same as that for which sanction was accorded. See *Srinivasa* v. *Venkata*, I. L. R., 11 Mad., 148, on a Judge's sanction under sections 14 and 18 of Act XX of 1863, where the plaintiff omitted to sue for one of the reliefs sanctioned. The claims started by defendant No. 2 are quite unconnected with the suit sanctioned by the Governor in Council to get defendants Nos. 1 and 2 removed and for framing a scheme. If defendant No. 2 had brought a suit at his own risk, all the pleadings would have been different, as Mr Scott pointed out in his answer in our opinion a sufficient answer – to the question from this Bench suggested by the remarks of the Lords Justices in *Rendall* v. *Blair*, 45 Ch. D., 139, in regard to the absence of express prohibition in section 539 and as to whether it might not be the duty of this Court to allow the Collector to apply for a fresh sanction before the decision of the appeal. This radical difference of the two suits which defendant No. 2 succeeded in raising in the District Court under cover of section 539 from the particular suit sanctioned by the Governor in Council, distinguishes the case from *The Attorney-General* v. *Earl of Devon*, 15 Simon, 193 at p. 262, and *Re Godmanchester Grammar School*, 15 Jur., 833, which are cited by Tudor as exceptions to the rule about sanction in the Chancery cases where he says: "The Court has, however, been in the habit of receiving petitions without the allowance of the Attorney-General upon matters arising out of or having reference to what the Court has before done upon a petition properly signed by him" [Tudor on Ch. Trusts, (3rd Ed.), 332].

[263] In the paucity of decisions it may be well to consider the reasons for the requirements about sanction which may be inferred from those found in the English decisions. The controlling powers given to the Attorney-General in England under the old procedure by information [Tudor on Ch. Trusts (3rd Ed.), Ch. XII], were intended to prevent scandalous suits being brought by individuals about charities in order to make a profit by way of costs. It is the reason for the enactment of section 17 of the Charitable Trusts Act, 1853, Tudor, 3rd Ed., 467– *Braund* v. *Earl of Devon*, L. R., 3 Ch., 800. In *Rendall* v. *Blair*, *ibid.*, 45 Ch. D., at p. 154, BOWEN, L J, says: "This is a Chancery statute. It was intended to cure the mischief of strangers instituting suits when the Charity Commissioners were the proper persons really to form an opinion on the subject." See also *Strickland* v. *Weldon*, L. R., 28 Ch. D., 426. The cases about amendment are generally on informations. The amendment required the sanction of the Attorney-General—*Attorney-General* v. *Fellows*, 1 Jac. and W., 254; for otherwise the whole suit, except the introduction, might be changed. A private petition was under his control; and it was for him to say for what objects the case should proceed, and Lord Chancellor ELDON referred the proceedings to him—*Attorney-General* v. *Green*, 1 Jac. and W., 303. In *Attorney-General* v. *Wyggeston's Hospital*, 16 Beav., 313, a similar reference was made where the relators asked for more than he thought them entitled to and in *Attorney-General*

v *Corporation of Carlisle*, 4 Sim, 275, where the interrogatories were too extensive In *Attorney General* v *Wright*, 3 Beav, 447 it was held that he was the only person to make an application on an information and the relator had no such authority

Turning to India it is obvious that the requirement of sanction protects trust funds and the trustees also from vexatious suits as so great an officer as the Advocate General will not sanction suits without inquiry about the motives, the merits, the expense, and such bars as limitation The Governor in Council will use the same circumspection Though express prohibitory [264] words are not used in section 539, as in the enactment before their Lordships of the Privy Council in *Bisiswar Roy* v *Shoshi Sikari Eswar Roy* I L R 17 Cal 688, the inference clearly is that a sanction from the Governor in Council was required to the enlargement of the suit and that case is an authority for holding the absence of the sanction for that part of the suit to be a fatal objection to the reliefs so claimed by defendant No 2 and the plaintiff Collector This Court must therefore, withhold them in the decree which it will pass

It is not necessary to decide the questions of limitation raised for Amratbai on the findings of the District Court at pages 8 and 9 of its printed judgment, clauses C E and F As to the trivial item C a silver article this Court may well be silent As to the other two findings that Amratbai is bound to pay over to the trust certain money that Nihalchand never collected but might except for his own negligence have collected from debtors, and other money computed as interest which he ought to have paid on money in his hands I am of opinion that section 10 of Act XV of 1877 does not apply as these monies were not vested

I concur in the views expressed in *Sethu* v *Subramanya* I L R 11 Mad, 274, and refer also to *Balwant* v *Puran* L R 10 I A 90 The claim set up by defendant No 2 was substantially for an account and it is doubtful whether such a suit would be permitted under the circumstances for mere laches of Nihalchand and no misconduct of heirs *Advocate General* v *Bai Punjabai* I L R 18 Bom at p 566 It is unnecessary to say whether the claim is barred by article 96 as urged by Mr Scott or whether article 120 applies but it is clear that such a question of limitation is one which the Governor in Council would have felt bound to consider if the District Court had required the Collector to consult that authority before it allowed the scope of the litigation to be enlarged

As the Collector allowed defendant No 2 to urge the enlargement and the defendant No 2 is not a party here perhaps the order of the District Court to treat the contention as that of the Collector and to allow defendant No 2 costs out of the trust funds [265] may be justified by the *Attorney General* v *Governors &c, of Sherborne Grammar School* 18 Beav 256 where the Attorney General was held bound by what he had permitted the relators to urge by their counsel

The Court dismisses the suit as regards the defendants Nos 3 and 4 and in other respects confirms the decree All costs of these appeals to be paid out of the trust monies

**Ranade J** —The question of jurisdiction has been already disposed of by our interlocutory judgment Two more preliminary points were urged by Mr Scott on 25th September 1895 One of these relates to the limited nature of the sanction and the other to the question of limitation It was contended that as the sanction by Government was of a limited character and did not include the relief about the removal of old trustees, and requiring them to render an account and refund monies, the suit was not maintainable in its enlarged form It was further urged that the defendants were allowed

no opportunity to meet the enlarged case. The old trustees in this case were willing to resign the trust; and the sanction of Government was accordingly applied for, and given for the limited purpose of appointing new trustees, and settling a scheme of administration, and the District Judge's inquiry into other matters, and his judgment thereupon, were *ultra vires*. We think there is considerable force in this contention. There has been no ruling on this part of section 539, but the Madras High Court has ruled on a corresponding section of the Religious Endowments Act, XXI of 1863, that there must be close correspondence between the suit instituted and the suit sanctioned. Section 18 of that Act relates to the sanction by the District Judge of suits against trustees of religious endowments, and the ruling in *Srinivasa* v. *Venkata*, I. L. R., 11 Mad., 148, shows that where the sanction given included two reliefs, *viz.*, removal of old trustees, and a claim for damages against them, and the suit prayed only for removal, and did not include a claim for damages it was held that the omission was fatal to the maintenance of the suit. If the omission of a relief has this consequence, the addition of reliefs for which no sanction was [266] obtained must prove equally fatal. This objection was taken by the Madras High Court of its own motion, and the judgment states that the necessity for such leave or sanction indicates on the part of the Legislature an intention to provide an adequate protection to the trustees against vexatious suits. This principle would equally apply to the present case. There is a case under the Bengal Court of Wards Act, where, for want of sanction, a suit properly instituted by the manager under section 55 of that Act was held to be not maintainable—*Biseswar Roy* v *Shoshi Sikar Eswari Roy*, I. L. R., 17 Cal., p. 688, see also *In re Kowlbas Koer*, 8 Ben. L R. App., p. 50. Though the case relates to criminal procedure, the ruling in *Reg.* v. *Vinayak Diwakar*, 8 Bom. H. C. Rep., Cr Ca., p. 32, may also be usefully consulted. It was held there that when the Local Government sanctions the prosecution of a public servant, a Court has no jurisdiction to entertain a charge if preferred otherwise than in the manner directed Following the spirit of these rulings, we must hold that the District Judge was in error in inquiring into matters not included in the order of sanction. It is not necessary on this account to reject the plaint The plaint, so far as it prayed for the appointment of new trustees and the settlement of a scheme of administering the trusts, was strictly within the limits of the sanction The old trustees being willing to resign, their removal was also a matter covered by the sanction. In so far as the inquiry was extended to the investigation of breaches of trust, and the order of the District Judge required the old trustees to refund certain sums, the action of the lower Court seems to us not to be warranted by the terms of the sanction, and as such was *ultra vires*. The action of the Government Pleader in adopting Amratlal's charges was similarly unwarranted.

As regards the question of limitation, it arises only in regard to Bai Amratbai. She is the mother of Nihalchand, and succeeded to his property as heir on his death in January 1883, and remained in management until the Sayad was appointed trustee on 26th June 1886. The District Judge absolves Nihalchand from all dishonest mismanagement. He is, however, found [267] fault with in respect of three matters, (C), (E), (F), in which the District Judge thought he was guilty of gross negligence. The period of limitation to make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust is three years from the trustee's death. It is not alleged that Bai Amrat has herself committed any fraud or waste. She was ready to assign over the securities and she applied to the District Court for the appointment of trustees. As against Amratbai, therefore, the claim in regard

to outstandings and loss of interest (E) (F) is not of the nature contemplated by section 10 of the Limitation Act, namely, a claim to follow up specific property, and section 10, therefore, does not protect the present claim which is barred under article 98—*Shapurji Nowroj* v *Bhikaji* I L R, 10 Bom, p 242, *Sethu* v *Subramanaya*, I L R, 11 Mad, p 274 *Chintamoni* v *Sarup*, I L R, 15 Cal, p 703 The claim marked (C) [the silver censor] is of that nature, but it is of too trivial a character to require further notice

We are, therefore, of opinion that both the objections urged by appellant's counsel are valid in law, and we uphold them accordingly We amend the decree by limiting its relief to the two points covered by the sanction

*Decree amended*

NOTES

[See also (1911) 36 Bom, 168 (1912) 13 M L J 131 (1914) 27 M L J 211 (under a sanction obtained by two one alone cannot sue)]

[21 Bom 267]

APPELLATE CIVIL

*The 25th November 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

Yashvant Narayan Kamat (Original Plaintiff) Appellant

*versus*

Vithal Divakar Parulekar and others . (Original Defendants) Respondents

*Mortgage—Right of mortgagee to sell mortgaged property—Regulation V of 1827—Transfer of Property Act (IV of 1882), Sec 67—Covenant to pay interest—Separate suit to recover arrears of interest Civil Procedure Code (Act XIV of 1882), Sec 43*

The breach of covenant in a mortgage bond to pay interest each year which covenant is not confined to the fixed period of the mortgage and is distinct from and [268] independent of the claim of the mortgagee to recover the principal sum and the performance of which is secured in a different manner gives rise to a distinct cause of action which can be sued upon without suing for the principal sum a decree obtained on such bond for overdue interest does not, under section 43 of the Civil Procedure Code (Act XIV of 1882) bar a subsequent suit to recover the principal and interest by sale of the mortgaged property

Where a mortgage provides that possession of the mortgaged property if taken by the mortgagee, is only to be taken for securing due payment of the interest the mortgagee paying the balance (if any) of the profits to the mortgagor the mortgage is not a usufructuary mortgage, but a simple mortgage and is governed by the general law applicable to mortgages of this nature In such a case although there is no covenant to pay the principal other than that implied in the statement that the principal has been received and that the property has been mortgaged for the stipulated term of years and although there is no express provision that it is to be recovered from the mortgaged property Regulation V of 1827 gives the mortgagee the right to bring the property to sale and section 67 of the Transfer of Property Act (IV of 1882) confers upon him the same privilege

SECOND APPEAL[*] from the decision of T Walker, Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb Narayan Balkrishna, Second Class Subordinate Judge of Malvan

[*] Second Appeal No 316 of 1894

The plaintiff sued in the year 1892 to recover from the defendant personally, or by sale of property mortgaged to the plaintiff, Rs 1,000 principal and Rs 818 12 0 interest due on a bond dated the 24th March 1893 The following is the translation of the material portion of the mortgage-bond —

I (the mortgagor) on this day pass this mortgage deed in writing as follows —I for my own necessity took from you Rs 1 000 in cash of the Queen's currency I received the same In security for the above I mortgage the property situate at mouje Malvan And as I have kept with me the possession of the property I have agreed to pay interest on your money at the rate of Rs 7 8 0 per cent per annum and the period of this mortgage is fixed at five year As to the assessment to be paid to Government in respect of the plots, I will pay the same to Government directly and I will continue to pay rupees seventy five every year as interest In the year in which interest will remain unpaid I will deliver the property into your possession with [illegible] objection And out of the income which may be realized you are to pay the amount on account of Government assessment and out of the remaining profits you should take your interest and the balance if any remaining, should be paid to me If perchance the income is not sufficient for the assessment and your interest as mentioned above I will pay the [illegible] occurring every year By the time I redeem the mortgage should I fail to pay the sum I will before redeeming the mortgage, pay the deficit occurring in respect of the amount the amount of Government assessment which you may perchance be obliged to pay [illegible] any increase made in the present assessment or any other cess which may be levied together with interest at 9 per cent per annum and then redeem the mortgage

[269] The defendants pleaded (*inter alia*) that the plaintiff had, in the year 1882, sued and obtained a decree for interest only that the right to recover principal as well having then accrued the suit was barred by section 43 of the Civil Procedure Code (Act XIV of 1882) and that the claim as against the defendants personally was barred by limitation

The Subordinate Judge rejected the claim

On appeal by the plaintiff the Judge confirmed the decree After referring to the authorities cited by the parties the Judge said —

The mortgage bond (Exhibit 4) provides that the interest on the principal amount of Rs 1 000 should be Rs 75 and if the mortgagor failed to pay that sum to the mortgagee the latter should take possession of the property specified in the deed This is the only remedy provided and I can find no reason to suppose that it was ever the intention of the parties that the property should be sold for payment of either principal or interest nor is it anywhere provided that the mortgagor is personally liable for the debt I am therefore of opinion that neither of the reliefs sought by plaintiff can be granted Whether he is now barred by section 43 from suing for foreclosure is a point I am not now called upon to decide but I will not allow an amendment of the plaint to that effect as an alternative relief as Mr Nanji suggests

Exhibit 9 shows that the plaintiff sued for interest from 1875 to 1881, due on this mortgage bond I am not called upon to criticise that decision but I think that plaintiff's remedy was to sue for possession and perhaps also for foreclosure but as I am doubtful whether he was bound to demand his principal I have some hesitation in thinking that the present demand for it is barred by section 43 While therefore I decide that the property cannot be sold nor can a personal decree be granted against defendants, I will decide that issue in plaintiff's favour

The plaintiff preferred a second appeal

*Branson* with *Vasudev G Bhandarkar*, for Appellant (Plaintiff) —The lower Courts have refused to give us any relief at all on the ground of limitation, and also because there is no covenant in the deed to pay the principal amount We submit that though our personal remedy may be barred, still on principle

we are entitled to recover the debt by sale of the mortgaged property There can be no dispute that the transaction is a mortgage, and that being so it must carry with it the remedies which are open to a mortgagee—*Musaheb Zaman Khan* v *Inayat Ul Lah*, I L R 14 All 513 *Motiram* v *Vitai*, I L R, 13 Bom, 90, *Datto Dudheshvar* v *Vithu* I L R, 20 Bom 408

**[270]** *Manekshah J Taleyarkhan* for Respondents (Defendants) —The plaintiff cannot bring the property to sale the mortgage being a usufructuary mortgage without any covenant to pay the principal —*Shaik Idrus* v *Abdul Rahiman*, I L R, 16 Bom, 303 *Hikmatulla Khan* v *Imam Ali* I L R, 12 All, 203 *Sadashiv Abaji Bhat* v *Vyankatrao Ramrao* P J 1895, p 95 I L R, 20 Bom, 296 Interest being not paid the plaintiff ought to have brought a suit for possession and ought to have retained possession till the debt was paid off But he did not ask for possession in the suit of 1882 and now he is debarred under section 43 of the Civil Procedure Code (Act XIV of 1882) In that suit he ought to have asked for possession in addition to interest because the principal had then become due—*Duncan Brothers* v *Jeetmull* I L R 19 Cal 372 *Subbaraya Kamti* v *Krishna Kamti* I. L R 6 Mad 159 *Anderson, Wright and Co* v *Kalagarla Surji Narain*, I L R 12 Cal 339 Section XV of Regulation V of 1827 provides a remedy for possession so also section 67 of the Transfer of Property Act

*Branson*, in reply – This mortgage is not a usufructuary mortgage while the mortgages in the cases relied on were so The covenant was to take possession only on failure of payment of interest and to deduct interest from the produce and to hand over the balance to the defendant Section 43 of the Civil Procedure Code (Act XIV of 1882) does not bar our suit because the document expressly refers to two agreements one is to the payment of interest, a liability arising every year, and the other as to the payment of principal which did not arise until after the lapse of five years The causes of action are totally different

**Farran C J** - This was a suit by the plaintiff to recover from the defendants personally, or by sale of the mortgaged property Rs 1,000 principal and Rs 816 12 0 interest The claim against the defendants personally is clearly barred, so that portion of the relief sought may be disregarded

The mortgage bond on which the suit is founded is dated the 24th March 1873 The material parts of it are as follows —(His Lordship read the bond and continued )

**[271]** Upon reading the above mortgage it will be observed —(1) That there is no covenant to pay the principal other than that implied in the statement that the principal has been received and that the property has been mortgaged for five years, nor is there an express provision that it is to be recovered from the mortgaged premises (2) That there is a distinct covenant to pay interest, and that the possession of the property if taken by the mortgagee is only to be taken for the purpose of securing due payment of the interest the mortgagee paying the balance (if any) of the profits to the mortgagor

In 1882 the plaintiff sued for the interest in arrear from 1875 to the end of 1881 and obtained a decree He did not then sue for possession of the mortgaged premises nor for the principal It is now contended that his present claim is in consequence of that action barred by the provisions of section 43 of the Civil Procedure Code We do not consider that the contention is well founded The mortgage deed contains a covenant to pay interest each year This covenant, which is, we think, not confined to the fixed period of the mortgage, is distinct from and independent of the claim of the mortgagee to recover the principal sum, and its performance is secured in a different manner. Its

breach, we consider, gives rise to a cause of action which can be sued upon without suing for the principal. It is similar to the covenant to pay interest which is inserted in well-drawn English mortgage-deeds for the purpose of enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of the latter. See Davidson on Conveyancing, Vol. II, p. 391 (Tit Mortgage). The cases cited to us, *Duncan Brothers* v. *Jeetmull*, I. L. R., 19 Cal., 372, *Anderson* v. *Kalagarla*, I. L. R., 12 Cal., 339; and *Taruck Chunder* v. *Panchu Mohini*, I. L. R., 6 Cal., 791, which show that all existing breaches of the same contract must be joined in the same suit although they may have arisen at different times, do not apply, as here there are two separate contracts contained in the same instrument. *Subbaraya* v. *Krishna*, I. L. R, 6 Mad, 159, favours our opinion, but is not really in point. Nor is the case of *Hikmatulla* v. *Imam Ali*, I. L. R., 12 All., 203, when it is carefully considered. There it was held that [272] the cause of action in 1884 (the date of the suit for interest) was not the non-payment of the interest, but the mortgagor's non-delivery of possession of the mortgaged premises which gave the plaintiff the right to recover the principal and interest which formed but one cause of action. There was not (as here) a separate covenant for the payment of interest secured in a separate manner. On this point we agree with the judgment of the District Court. That Court has, however, held that the mortgage provides no remedy for the payment of the principal sum, and that "there is no reason to suppose that it was the intention of the parties that the property should be sold in payment of either principal or interest, nor is it anywhere provided that the mortgagor is personally liable for the debt." The case of *Shaik Idrus* v. *Abdul Rahiman*, I. L R, 16 Bom, 303, is relied upon in support of that view. The mortgage in that case was a usufructuary mortgage and contained peculiar provisions from which the Court drew the conclusion that it was the intention of the parties that the land mortgaged to the plaintiff should not be sold in satisfaction of the mortgage-debt. The mortgages in the cases in which that authority was followed, *Sadashiv Abaji* v. *Vyankatrao*, P. J. for 1895, p 95 I. L. R., 20 Bom., 296, and Second Appeal No. 844 of 1893, were in similar terms, and the same conclusion was drawn. The present is not a usufructuary mortgage, and when the special stipulations for possession, which are inserted to secure the due payment of the interest during the continuance of the mortgage, are read as confined to the purpose to which they are expressly limited, the mortgage is a simple mortgage of the property in question for five years to secure an advance of Rs 1,000 with a covenant by the mortgagor to pay interest thereon till the mortgage is redeemed at the specified rate and is governed by the general law applicable to mortgages of this nature. In such case Regulation V of 1827 gives the mortgagee the right to bring the property to sale, and section 67 of the Transfer of Property Act confers upon him the same privilege.

We must, therefore, reverse the decree of the District Judge and remand the appeal for re-trial, having regard to the above observations. Costs to abide the result.

*Decree reversed and case remanded.*

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**NOTES.**

[In (1914) 41 Cal., 825, separate suits on two shipments under the same indent which provided for each shipment being treated as a separate contract was permitted. See also (1907) P.R., 28; (1910) P.R., 19.]

## [273] APPELLATE CIVIL.

*The 26th November, 1895.*

PRESENT:

CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Mir Ali Mahomed Patel, Liquidator of the Dhulia Manufacturing Company, Limited (Original Applicant)

*versus*

Biharilal Suklal (Original Opponent) Respondent.*

*Company—Winding up—Suit against manager of company—Company not a party to the suit—Attachment before judgment of company's property—Remedy of liquidator—Appeal—Civil Procedure Code (Act XIV of 1882), Secs. 283, 483, 484, 485, 487, 588 and 622—Indian Companies Act (VI of 1882), Sec. 177.*

The Dhulia Manufacturing Company Limited carried on business at Dhulia and had its registered office at Bombay. One Ahmad Mahomed was the manager at Dhulia and he had authority to borrow money and draw *hundis* on behalf of the company. In August 1894, the directors opened negotiations for the sale of the company's factory to one Haji Umer, and in September 1894 while the negotiations were pending a special resolution was passed to wind up the company voluntarily. The resolution was confirmed in October 1894 and Mir Ali Patel was appointed liquidator under section 177 of the Indian Companies Act (VI of 1882). In December 1894 the liquidator agreed to sell the factory to Haji Umer for the said sum of Rs. 38,000. Under the agreement Haji Umer was to enter into possession of the factory but the company was to have a lien upon it until the completion of the purchase which was to take place in May 1895. A month before the date fixed for the completion of the sale one Biharilal filed a suit in the Court of the First Class Subordinate Judge of Dhulia against Ahmad Mahomed the manager of the company in his individual capacity and as manager of the company. His claim was professedly against the company but he did not make the company which was then in liquidation a party to the suit. Subsequently Biharilal applied for and obtained an order for attachment before judgment of the company's factory at Dhulia. No notice of the application or of the order made on it was given to the liquidator. He at once applied to the Court to raise the attachment contending that the Court had no power to attach the property of the company which was not a party to the suit. The Court made the company a party and dismissed the liquidator's application confirming its previous order for attachment. The liquidator appealed to the High Court.

*Held* that the order of attachment should be reversed. The intended sale by the liquidator, which was the sole reason for making the order, was not with intent to obstruct any decree that the plaintiff (Biharilal) might obtain against the company but was being effected by the liquidator in the course of his duty and in pursuance of a contract entered into long before the suit was instituted. The plaintiff's claim, if established, would be satisfied *pari passu* with the other debts of the company. The plaintiff was not entitled to security for his claim in preference to the other creditors.

It was contended that no appeal lay against the order of the Subordinate Judge and that the liquidator's sole remedy was by suit under sections 283 and 487 of the Civil Procedure Code (Act XIV of 1882).

[274] *Held*, that the company having been made a party to the suit, the order of attachment was made under section 485 of the Civil Procedure Code and consequently under

* Appeal No. 32 of 1895 from order.

section 588 an appeal lay from that order If the company had not been made a party, the High Court would have set aside the order of attachment under section 622 of the Code, as in that case the Subordinate Judge would have had no jurisdiction to make it.

APPEAL from an order passed by Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Dhulia

The Dhulia Manufacturing Company, Limited, which was registered under the Indian Companies Act (VI of 1882) had a cotton ginning factory at Dhulia and its registered office at Bombay The manager of the company at Dhulia was one Ahmad Muhamad, who had full authority to borrow money and draw *hundis* and to do all necessary acts on behalf of the company

In August 1894 the directors of the company opened negotiations for the sale of the company's factory at Dhulia to one Haji Umer for Rs 38 000, and on the 7th September 1894 while the negotiations were pending, a special resolution was passed to wind up the company voluntarily The resolution was confirmed on the 6th October 1894 and in pursuance of it, Mir Ali M Patel was appointed liquidator under section 177 of the Indian Companies' Act VI of 1882

On the 12th November 1894 the liquidator entered into an agreement with Haji Umer to sell him the factory for the agreed sum of Rs 38 000 Under the agreement Haji Umer was to be put in possession of the factory but the company was to have a lien upon it till the 1st May 1895 on which date the purchase was to be completed

In January 1895 Ahmad Mahomed the manager drew *hundis* for Rs 10 000 in favour of Biharilal Sukhlal the opponent These *hundis* were dishonoured and thereupon Biharilal filed a suit in the early part of April 1895, against Ahmad Mahomed in his own capacity and as manager of the company to recover Rs 10 552 8 0 His claim professedly was against the company, but he did not make the company which was then in liquidation, a party to the suit

On the 6th April although the company was not a party to the suit, the Subordinate Judge on the application of Biharilal [276] made an order under section 485 of the Civil Procedure Code (Act XIV of 1882) attaching before judgment the factory of the company, and the company was prohibited from alienating the factory Whether or not a notice of the plaintiff's application or of the order made on it was given to the liquidator was not clear from the record of the case

The liquidator on the same day applied to the Subordinate Judge to raise the attachment contending that the Court had no power to attach the property of the company which was not a party to the suit On the 8th July the Subordinate Judge made the company a party to the suit, and disallowing the liquidator's objections confirmed his previous order of the 6th April for the attachment of the property In his judgment the Subordinate Judge treated the company as having been a party throughout

The liquidator appealed against this order, refusing to raise the attachment

*Russell* with *Vishnu K Bhatavdekar* for the Appellant (Liquidator) —The order for attachment was wrong on three grounds First, the company having gone into voluntary liquidation, no order affecting it could be passed without the leave of the Court— section 212 of the Indian Companies Act (VI of 1882) The proper Court to apply to in the present case was the High Court, because the company's registered office is at Bombay see section 130 of the Act Section 163 of the English Companies' Act is similar to section 212 of the Indian Companies' Act See also Buckley on the Companies' Act, (6th Ed ),

p. 396, *In re Thurso New Gas Company*, 42 Ch. Div., 486, *Westbury* v. *Twigg and Co., Limited*, (1892) 1 Q. B., 77.

Secondly, under section 484 of the Civil Procedure Code (Act XIV of 1882), the company ought to have been called upon to furnish security before the order for attachment was made and that not having been done the order is illegal.

Thirdly, the agreement made by the liquidator for the sale of the company's property having been made before the suit was filed, the interest in the property had passed to the intending purchaser. The liquidator should, therefore, be allowed to complete the sale. He will have to account for the proceeds of the sale.

**[276]** *Branson* with *Trimbak R. Kotwal*, for the Respondent (Plaintiff): — Our claim is a just one and we shall not be able to reap the benefit of our decree if the attachment is removed and the sale completed.

[FARRAN, C. J.: — The liquidator will have the proceeds of the sale in his hands, and you can proceed against him. He is a responsible officer.]

On the merits we contend that the attachment should not be removed. The liquidator should at least be asked to give security.

The Court passed the order for attachment under section 484 of the Code, and an order passed under that section is not appealable under section 588. The liquidator can seek redress under sections 283 and 487 of the Code by instituting a suit.

*Russell* in reply: The order was passed under section 485 and section 588 of the Code gives an appeal against an order passed under that section.

**Farran, C. J.**: The proceedings in this matter have been so very irregular that it is difficult to ascertain precisely in what position the parties now stand. The Dhulia Manufacturing Company, Limited was a company registered under the Indian Companies Act 1882 which carried on business at Dhulia, but had its registered office at Bombay. In August 1891 the directors of the company had opened negotiations for the sale of the company's factory at Dhulia to one Haji Umer for Rs. 38,000 and while the negotiations were pending a special resolution was passed in September 1894 to wind up the company voluntarily. The resolution was confirmed on the 6th October 1894, when Mir Ali M. Patel was appointed its liquidator under section 177 of the Act.

On the 12th December 1894 he entered into a general agreement with the purchaser to sell him the factory at Dhulia for the agreed sum of Rs. 38,000. Under the agreement the purchaser was to enter into possession of the factory, but the company was to have a lien upon it until the completion of the purchase which was to take place on the 1st May 1895.

On or about the 1st April 1895 Biharilal Suklal commenced a suit in the Court of the First Class Subordinate Judge at Dhulia **[277]** to recover a sum of Rs. 10,552-8-0. He made one Ahmed Mahomed the defendant to the suit, professing to sue him in his *own* individual capacity and as manager of the company. His claim professedly was against the company, but he did not make the company, which was then, as we have said, in liquidation, a party to the suit.

A day or two after filing the suit the plaintiff applied under section 483 of the Code to attach before judgment the company's factory at Dhulia, and strange to say, the Subordinate Judge, though the company was not a party to the suit, issued under section 484 a notice to the defendants to show cause why they should not be required to furnish security for the sum of Rs. 11,000, or why, in default, the property specified in the application should not be attached until further order, and conditionally attached the company's factory until further order.

On the 6th April, under section 485, this rule was made absolute, as the defendants did not furnish the required security, and the defendants were prohibited from alienating the factory of the company. It does not appear that notice of this application or of the order made upon it was given to the liquidator of the company, though under section 177 of the Companies' Act he was engaged in winding up its affairs and was charged with the duty of distributing its assets.

On the same 6th April the liquidator of the company applied to raise the attachment. The intending purchaser also made a similar application, but with that we are not concerned here The application was argued before the Subordinate Judge, when the strange anomaly of attaching the property of the company in a suit to which the company was not a party was pointed out to him. On the 8th of July the Subordinate Judge made the company a party to the suit, and disallowing the liquidator's objections, confirmed his previous order for the attachment of the property. In his judgment the Subordinate Judge treats the company as having been a party throughout, though technically it was not named as such in the heading of the suit. From this order the company through its liquidator has appealed to this Court.

**[278]** It is objected that no appeal lies, as the liquidator's remedy is by suit under sections 283 and 487 if he feels himself aggrieved by the order. That no doubt would be so if the company were not a party to the suit, but in that case the strange anomaly which we have pointed out would remain, that property admittedly the company's, and not the property of the defendants, would have been avowedly attached in a suit to which the company was not a party. It is clear that the Subordinate Judge would have no jurisdiction to make such an order, and we should not, under these circumstances, have hesitated to set aside the order under section 622 of the Code. It must, however, we think, be taken that the order has now been made against the company under section 485, and the order is in that case appealable under section 588.

The appeal must, we think, be allowed. The sale which the liquidator proposes to carry out, and which is the sole foundation for the making of the attachment, is clearly not being carried out "with intent to obstruct or delay the execution of the decree which may be passed against the company." It is a sale about to be completed by the liquidator in the course of his duty in winding up the affairs of the company and in pursuance of a contract of sale entered into long before the plaintiff's suit was instituted.

The order is attempted to be supported by the Subordinate Judge on the ground that the liquidator does not admit the plaintiff's claim, and that, therefore, he will distribute the company's assets under section 177 without regard to it. There is no ground for that supposition. The liquidator will be bound to satisfy the plaintiff's claim, if he establish it as a debt, *pari passu* with the other debts of the company as he is bound to do under section 177, and there is no reason whatever in this case to suppose that he will not perform his duty. The plaintiff is not entitled to security for his claim in preference to the other creditors of the company. It is unnecessary to consider the other objection made to the order. It will be discharged with costs.

*Order discharged with costs.*

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**NOTES.**

[An appeal lies under C.P.C., 1908, O. 38, r. (q).]

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## [279] APPELLATE CIVIL

*The 27th November, 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

Balaji Sakharam Gurav (Original Petitioner) Applicant

*versus*

Merwanji Nowroji Antia (Original Opponent No 4) Opponent *

*Municipality—Election—Bombay District Municipal Act Amendment Act (II of 1884), Sec 23† —Application to set aside a municipal election—Order made as to costs—Jurisdiction High Court power of, to review such order under section 622 of the Civil Procedure Code (Act XIV of 1882)—High Court's Circular Order No 62*

A District Judge acting under section 23 of the Bombay District Municipal Act Amendment Act (II of 1884) is not a Court within the meaning of the word in section 622 of the Civil Procedure Code (Act XIV of 1882) and the High Court has no jurisdiction to revise his order refusing to set aside an election nor can it interfere with an order made by him that the applicant should pay the costs incurred by the opponent

The High Court's Circular Order (No 62 at page 33 of the Order Book) refers to Courts

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code Act XIV of 1882) against the order of I C O Beaman, District Judge of Thana

The applicant Balaji Sakharam Gurav applied to the District Judge of Thana under section 23 of the District Municipal Act [280] (Bombay Act II of 1884) to set aside the election of certain persons as municipal commissioners of Thana, alleging that the said elections were irregular and illegal Notices of the application were issued to the commissioners and after hearing them the Judge rejected the application and directed the applicant to pay Rs 200 to one of the commissioners as actual costs sustained by him in opposing the application and Rs 320 as costs of the commissioner who was appointed to recount the votes given at the said elections

* Application, No 108 of 1895 under extraordinary jurisdiction

† Section 23 of the Bombay District Municipal Act Amendment Act (II of 1884) —

23 If the validity of any election of a Municipal Commissioner is brought in question by any person qualified either to be elected or to vote at the election to which such question refers such person may at any time within ten days after the date of the declaration of the result of the election apply to the District Judge of the district within which the election has been or should have been held

The District Judge may after such inquiry as he deems necessary pass an order for confirming or amending the declared result of the election or for setting the election aside

For the purposes of the said inquiry the District Judge may exercise any of the powers of a Civil Court, and his decision shall be conclusive

If he sets aside an election, a date shall forthwith be fixed and the necessary steps taken for holding a fresh one

‡ High Court's Circular Order No 62 —

In any miscellaneous proceeding not being one involved in or necessary to the conduct of a suit or an appeal to decree, and in which the subject matter does not admit of a precise valuation in money the fee allowed shall in a District Court or in a Court of Small Causes, be Rs 10, subject by special order of the Court to diminution to a sum not less than Rs 5 and to increase to a sum of not more than Rs 30 for each such proceeding In the Subordinate Courts, and Mamlatdar's Courts constituted under Bombay Act III of 1876 the fee shall ordinarily be Rs. 5 subject to increase by special order to a sum not exceeding Rs 15.

The applicant applied to the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882), contending that the District Judge's order as to costs was made without jurisdiction A rule *nisi* was issued to the opponent to show cause why the order should not be set aside

*Narayan G Chandavarkar* appeared for the Applicant in support of the rule —The District Municipal Act has made no provision for costs which are provided for by the High Court's Circular Order No 62 Though this Court has no jurisdiction to entertain an application with respect to an order relating to municipal elections—*Jagannath Lonapa* v *Rev M F De Souza* P J, 1894, p 87—still we submit that the Court can entertain an application in connection with that part of the order which relates to costs The District Judge had no jurisdiction to order payment of costs

*Chimanlal H Setalvad* appeared for the Opponent to show cause —This Court has no jurisdiction to entertain this application The order as to costs forms part and parcel of the order relating to municipal elections One part of the order is not separable from the other part Section 23 of the District Municipal Act empowers the District Judge as an individual but not as a Court Section 622 of the Civil Procedure Code contemplates a Court and not a particular individual Therefore the present application cannot lie under section 622 of the Code

The circular orders also are passed for the guidance of the lower Courts If the District Judge is not a Court under section 23 of the District Municipal Act, then the circular orders do not apply to him Even supposing that the order is illegal or [281] passed without jurisdiction the applicant's remedy is to bring a suit to recover the costs The question of hardship cannot be considered under section 622 of the Civil Procedure Code

**Farran C J** We are of opinion that a District Judge acting under section 23 of the Bombay District Municipal Act Amendment Act, 1884 is not a Court within the meaning of the word in section 622 of the Civil Procedure Code (Act XIV of 1882) and that this Court has no jurisdiction to revise his order refusing to set aside an election (See *Jagannath* v *Rev M F De Souza*, P J for 1894 p 87) For the same reason we cannot interfere with the order he has made that the applicant shall pay the actual costs incurred by the opponent The circular order referred to (No 62 at p 33 of the Order Book) deals only with District Courts Courts of Small Causes Subordinate Courts and Mamlatdars Courts The District Judge in the present case is neither of these and the order can have no application to him He is merely a *persona designata* and if he has jurisdiction at all to award costs, there is nothing to prevent him from awarding them on the scale he has adopted On this point of jurisdiction we express no opinion as his power to award costs has not been contested before us

We discharge the rule with costs

*Rule discharged*

NOTES

[See also cases regarding the question whether the functionary exercising certain powers is a Court with reference to the powers of revision or appeal the following cases —(1913) 14 M L T 354 25 M L J 536 (Religious Endowments Act) (1914) 16 M L T, 126 27 M L J 227 (Madras Municipalities Act) *Mrs Annie Besant* v *Emperor* (1916) 2 M W N 437]

[21 Bom 281]

## ORIGINAL CIVIL

*The 3rd July, 1896*

PRESENT

SIR C FARRAN KT, CHIEF JUSTICE AND MR JUSTICE STRACHEY

Gordhandas Jadowji ... Plaintiff

*versus*

Harivalubhdas Bhaidas ... Defendant*

*Minor—Minority, period of where guardian has once been appointed although no longer in existence—Indian Majority Act IX of 1875 Sec 3—Guardian and Wards Act VIII of 1890 Sec 52*

The defendant was sued upon a promissory note made by him on the 24th August 1892 he being at that time 19 years of age. Eight years previously [282] on the 4th March 1884 a guardian of his person and property had been appointed by an order of the High Court but the guardian had been discharged on the [illegible] 1892 and at the time of the execution of the note [illegible] no guardian in existence either of his person or property

*Held* that having regard to the provisions of section 3 of the Indian Majority Act IX of 1875 the defendant was still a minor at the date of the note

CASE stated for the opinion of the High Court by Rustomji Merwanji Patell, Second Judge under section 69 of the Presidency Small Cause Court Act (XV of 1882)

"1 This was an action on a promissory note for Rs 501 dated the 24th August 1892 and interest thereon Rs [illegible] 9 0

2 The defendant pleaded minority and the full payment of the promissory note I hold the defendant was of age at the making of the note, and allowing Rs 209 only as payment proved I passed a decree for Rs 342, including interest and costs contingent on the opinion of the High Court on the question of minority

3 The defendant was born on 20th August 1873 or Shravan Vad 13th, 1929 At the date of the execution of the note he was 19 years and 4 days old, but it was contended that he was a ward of the High Court and till he completed his 21st year he should be considered a minor under section 3 of the Majority Act and section 52 of the Guardian and Wards Act of 1890

"4 The following facts were proved —

"(a) Under a decree of the High Court dated the 4th March 1884 in the suit of *Harkisondas Pranjivandas* v *Purshotam Pranjivandas* one Parbhudas Govardhandas was appointed guardian of the person and property of the defendant (Exhibit No 1)

"(b) Under an order of the High Court dated 5th May 1890 one Ramdas Maneklal was on his application appointed guardian of the defendant's person in place of the said Parbhudas Gordhandas By the same order the said Parbhudas was asked to hand over the property of the defendant to Mr Watkins, who had been appointed receiver in the said High Court suit Mr Watkins is spoken of in that order as a receiver and not as guardian of the property of the minor (Exhibit No 2)

*Court Reference, No 20978 of 1895.

[283] "(c) On 26th June 1891, the said Ramdas Maneklal was ordered to be discharged from his office as guardian of defendant's person upon his rendering accounts to the Master in Equity. He was subsequently discharged as such on the 25th June 1892, on the Master passing his accounts as per certificate of that date (Exhibit No. 3). No other guardian of the defendant's person was thereafter appointed, and the defendant was then of the age of 18 years and ten months.

"(d) Defendant applied to the High Court by his affidavit dated 19th September 1892, that Mr. Watkins, the receiver, should be ordered to hand over to him all his property. In paragraph 11 he stated that he had arrived at the age of majority and was of the age of 19 years and was sufficiently competent to manage his estate without the assistance of any receiver (copy affidavit put in by consent, Exhibit A). The High Court thereupon ordered on the 22nd October 1892, that Mr. Watkins be discharged as such receiver and hand over the property of the defendant to him (Exhibit No. 5).

"6. The promissory note sued on having been executed on the 24th August 1892, was, therefore, at a time when there was no guardian of the defendant's person or property. I was of opinion that the order directing Mr. Watkins, the receiver appointed under the Civil Procedure Code in the said High Court suit to take charge of the property of the defendant, did not constitute him a guardian of the minor's property (see section 52 of Act VIII).

"7. The defendant's solicitor relied on *Rudra Prokash* v. *Bholanath*, I.L.R., 12 Cal., 612, and *Birjmohun* v. *Rudra Perkash*, I. L R., 17 Cal., 944. These cases are based on the provisions of Bengal Act XL of 1858, which do not apply to us; and the ruling in the former case is not followed by the latter, the Court holding that it was clear, from section 3 of the Majority Act, that the disability of the minority only continued as long as the Court of Wards retained charge of the minor's property and no longer (see p. 949). *Yeknath* v. *Warubai*, I. L. R., 13 Bom., 285, is based on Act XX of 1864 which does not apply to Bombay.

[284] "8. Reading section 3 of the Majority Act as amended by section 52 of the Guardians and Wards Act (VIII of 1890), I was not prepared to hold, in the absence of any Bombay cases, that on account of the mere circumstance that a guardian has been once appointed of a minor's person or property before he has attained his 18th year, the disability of infancy lasts till the age of 21st, whether the original guardian continues to act or not. On the other hand, looking at the conduct of the defendant, the discharge of the guardian of his person on the 25th June 1892, the statements of the defendant in his affidavit of the 19th September 1892, and the consequent release of his property from the hands of the receiver, it would be inequitable to stretch a point in his favour.

"9. I now respectfully submit the following question for the opinion of their Lordships :—

"Whether under the above circumstances the defendant was a minor at the date of the execution of the note of the 24th August 1892 so as to avoid his liability on the note passed by him.

*Macpherson*, for the Defendant :—He referred to the Indian Majority Act IX of 1875 ; the Guardian and Wards Act, 1890 ; *Yeknath* v. *Warubai*, I. L. R., 13 Bom., 285 ; *Birjmohun Lal* v. *Rudra Perkash*, I. L. R., 17 Cal., 944; *Rudra Prokash* v. *Bholanath*, I. L. R., 12 Cal., 612 ; *Khwahish Ali* v. *Surju Prasad*, I. L. R., 3 All., 598.

**There was no appearance for the Plaintiff.**

**Farran, C. J.**:—The question referred for our opinion in this case should, I think, be answered in the affirmative.

Were it not for the doubt expressed in *Yeknath* v. *Warubai*, I. L. R., 13 Bom., 285, I should have thought that the point was absolutely clear The words of section 3 of the Indian Majority Act IX of 1875, in so far as they relate to this matter both in its original and amended form, are "Every minor of whose person or property (or of both) a guardian has been or shall be appointed by any Court of justice * * * shall * * be deemed to have attained his majority when he shall have completed his age of 21 years, and not before." The words added to that enactment by section 52 of Act VIII of 1890 only serve to elucidate its meaning and make it more clear. [285] They explain that a guardian *ad litem* is not within the scope of the section, and show that the appointment of a guardian, in order to have the effect of extending the period of minority, must be made before the minor has attained the age of 18 years.

Now, in this case a guardian both of the person and property of the defendant has been appointed by the High Court by its decree of the 4th March 1884, before the defendant attained the age of 18 years and the requirements of the section have been complied with I can see no escape from that conclusion. The words of the section are free from ambiguity, and we have no warrant to vary its meaning by reading words into it which are not to be found therein, and thus to alter the expressed will of the Legislature.

This view is in accordance with the decision in *Rudra Prokash* v. *Bholanath*, I. L. R., 12 Cal., 612, and is not, I think, opposed to the ruling in *Brijmohun Lal* v. *Rudra Perkash*, I. L. R., 17 Cal., 944. When that case is examined it will be found that the *ratio decidendi* is that there was no proof before the Court that a guardian of the defendant had been appointed by a Court of justice. The Court differed from the decision in *Rudra Prokash* v. *Bholanath* only in this that they considered the appointment of a guardian by a Collector not to be an appointment of a guardian by a Court of justice, a point not apparently taken in the former case. The ruling as to the defendant not being at the time of suit under the jurisdiction of the Court of Wards, and his majority not being extended by reason of his once having been so, was permissible under the section as it was then worded.

The wording of the section has by Act VIII of 1890, section 52, been altered in that respect. If it were allowable to have recourse to section 52 of Act VIII of 1890 to ascertain the intention of the Legislature in framing Act IX of 1875, the conclusion I should draw would be that it intended the effect of any appointment of a guardian to a minor and the assumption by the Court of Wards of the superintendence of his property to be the same, and that such effect should flow from the mere appointment of the guardian, or assumption of superintendence [286] by the Court of Wards, without regard to the circumstance whether the appointment of a guardian or assumption of superintendence continued or not.

The view which I take of the section was also that adopted by the High Court of Allahabad in *Khwahish Ali* v. *Surju Prasad*, I. L R., 3 All., 598. But we have been referred to a later case, *Pateshri Partap Narain Singh* v. *Champalal*, All. Weekly Notes (1891), p. 118, in which the same Court took the opposite view. The Court in the latter case would, I think, have come to a different conclusion had it had before it the language of section 52 of Act VIII of 1890.

It might have been sufficient to have dealt with this case upon its special facts, which show that the defendant continued to have a guardian until after

he had attained the age of 18 years, but it is undesirable to have the law left in doubt (so far as this Presidency is concerned) upon this important point I have, therefore, dealt with the case in its broader aspect

**Strachey, J** —I am of the same opinion I was at first impressed by the judgment of SIR JOHN EDGE C J and Mr Justice KNOX in *Pateshi Partap Narain Singh v Champalal*, All Weekly Notes (1891), p 118 but upon consideration I think that that judgment proceeds not so much upon the terms of section 3 of Act IX of 1875 as upon a speculation or theory as to the object which the Legislature, in passing the section had in view

The language of the section is however too clear for such speculation to be admissible in applying it Speaking generally it provides that every minor of whose person or property or both a guardian has been or shall be appointed by a Court of justice before the minor has attained the age of 18 years shall be deemed to have attained his majority upon completion of the age of 21 years, and not before And we should not be justified in reading into the section an exception that this provision shall not apply where the certificate of guardianship was subsequently cancelled

If the intention of the Legislature in passing section 3 of the Act has not been fully effected by the language used the remedy is in the hands of the Legislature itself But the words as they [287] stand appear to me to be clear I agree with the Chief Justice that they have been made clearer by the amendment of the section by section 52 of Act VIII of 1890

We answer the question in the affirmative Costs costs in the case This will leave the Small Cause Court the power to deal with them in its discretion

Attorneys for the Defendant Messrs *Daftary and Fereira*

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**NOTES**

[ This was followed in (1907) 29 All 672 (1907) 11 O C 159 (1909) 36 Cal 768 See also (1900) I R 45 (1907) 31 Bom 590 (minority not continued when order is *ab initio* void) (1911) 14 I C 301 (Oudh) (1914) 38 Mad 807 P C ]

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**[ 21 Bom 287 ]**

ORIGINAL CIVIL

*The 7th August 1896*

PRESENT

SIR C FARRAN KT CHIEF JUSTICE AND MR JUSTICE STRACHEY

Velji Hirji and Co . Claimants

*versus*

Bharmal Shripal and Co Attaching Creditors*

*Consignor and consignee —Goods consigned to agent for sale on commission—Hundis drawn against goods and paid by agent Railway receipts sent to agent—Equitable assignment of goods by consignor—Goods attached by judgment creditor of consignor —Claim by agent—Priority—Civil Procedure Code (Act XIV of 1882) Sec 290*

One Ukerda Punja at Viramgam consigned certain bags of seed to Velji Hirji and Co at Bombay for sale on commission and drew *hundis* against the goods for Rs 3 200 which at his request Velji Hirji and Co accepted and paid on receiving the railway receipts by post The goods were to be sold on arrival on Ukerda Punja's account and the proceeds credited to

* Small Cause Court Suits, Nos. 4713, 4714 and 4712 of 1896.

him is against the advances made by the payment of the *hundis* On the arrival of the goods at Bombay they were attached by Bharmal Shripal and Co who had obtained decrees against Ukerda Punja

*Held* that Velji Hirji and Co were entitled to the goods They had made specific advances against the goods Bharmal Shripal and Co as attaching creditors occupied the same position as Ukerda Punja himself and had no better claim to the goods than he had and if he had attempted to prevent the goods reaching the hands of Velji Hirji and Co who at his request had made specific advances against them he would have been restrained by injunction

*Held* also, that at the date of attachment the goods were in p ssession of Ukerda Punja by the railway company on account of ... Velji Hirji and C in the sense in which that expression is u ed in se i n 280 of th Civil Procedure C de (A XIV of 1882)

THIS was a case stated for the opinion of the High Court under section 69 of the Presidency Small Cause Court Act by [288] Mr Rustomji Merw nji Patell Acting Chief Judge, in the following terms

These were three claimants notices issued under section 278 of the Civil Procedure Code calling upon the attaching creditors to show cause why the attachment levied against 562 ba of castor seed in the possession of the B B and C I Railway should not be removed and why the said goods should not be handed over to the claimants who were the consignees under the railway receipts and had advanced Rs 3 200 on the security of the said receipts

One Ukerda Punja had consigned the goods from Viramgam for sale on commission in Bombay by the claimants and drawn four *hundis* against the same for Rs 3 200 At the consignor's request the claimants had accepted and paid the *hundis* on receiving the railway receipts by post The goods represented by the receipt were then in transit and had not arrived in Bombay The sale of the goods on arrival was to be made on account and at the risk of the consignor and the proceeds thereof credited to him as against the advance on his debit

On the evidence I was of opinion that the claimants had made an advance by the payment of the *hundi* of Rs 2 200 against the railway receipts for 387 bags and of Rs 1 000 against the receipts for 175 bags

The railway receipts were in the usual form adopted by the B B and C I and the Rajputana Malwa Railways and were headed Goods receipt note The material portion was as follows

Received from Punja the undermentioned goods for conveyance by goods train, consigned to Velji at Carnac Bridge station The railway ... If the right ... deliver the goods without the production of the receipt ... opinion to receive them has given an indemnity ... If the consignee does not himself ... the person to whom he wishes it made

The goods arrived in Bombay on or about the 22nd August 1895 and were immediately after attached by the firm of Bharmal Shripal who had obtained three decrees against the consignor Ukerda Punja The claimants then applied for the removal [289] of the attachment and based their claim (1) on being holders of the railway receipts representing the said goods (2) on having advanced moneys on the security of the same and (3) on having the property in the goods transferred to them by the delivery of the Railway receipts Their counsel contended that the railway receipts were documents of title, or documents showing title to goods and relied on section 108 of the Contract Act (IX of 1872)

"No evidence was laid before me to prove any custom or mercantile usage to show that merchants in Bombay had in making advances on the security of railway receipts, invariably recognised these receipts as 'documents of title'

"I was of opinion that the circumstances of the present case of an advance made by an agent for his principal on the faith of the railway receipts did not fall within the purview of either section 108 or 178 of the Contract Act; and that these sections did not apply. In the absence of any specific provision of the Contract Act, I applied the principles of common law as they stood before the passing of that Act; and I was of opinion that the railway receipts were not 'documents of title' or 'documents showing title of goods.' I also held that by the mere delivery of the receipts to the claimants, and the subsequent advance made on them, the consignor did not transfer any possession to the consignees. I held that the claimants had neither actual nor constructive possession by attachment of the goods; the possession of the carrier was the possession of the consignor, and not of the consignee, the goods having been carried at the risk and on account of the consignor, and not at the orders of the consignee.

"I was of opinion that such railway receipts could not be placed on a higher footing than the delivery orders issued after the arrival of the goods at the railway station which in the case of *Coventry* v. *G. E. Railway Company*, 11 Q.B.D., 776, BRETT, M.R., held to be non-negotiable instruments that did not pass the property to the pledgee. The wording of the delivery orders in that suit was certainly much stronger than that of the railway receipts [290] in question. I, therefore, held that railway receipts could be regarded only as tokens of authority to receive possession, and that they did not operate to transfer possession, and relied on *Farina* v. *Home*, 16 M. & W, 119, and *McEwan* v. *Smith*, 2 H. L. C., 309. They could not be likened to bills of lading and could only be treated as delivery orders or dock warrants at common law, which, as PARKE, B., said in the former case, were no more than an engagement by the wharfinger to deliver to the consignee or any one he may appoint. I also relied on the *G. I. P. Railway Company* v. *Hanmandas*, I. L. R., 14 Bom., 57, though it was restricted to the construction of section 103 of the Contract Act as regards an unpaid vendor's right of stoppage *in transitu*, as the reasoning of Sir CHARLES SARGENT seemed equally applicable to the circumstances of the present case.

"I held, therefore, that the claimants had no lien against the 562 bags they claimed, and that they failed to establish any right to the possession of them as against the attaching creditor of the consignor; and under section 281 of the Code I disallowed the claim.

"At the request of the counsel for the claimants, my judgment was delivered contingent on the opinion of the High Court. I beg to invite the opinion of their Lordships on the following questions submitted on behalf of the claimants:—

"1. Whether the possession of the railway receipts, coupled with the fact of the claimants having made advances on the same, did not, in law, give the claimants the right to claim the goods represented or covered by such receipts wholly or to the extent of their advances.

"2. Whether the possession of the railway company was not the possession of the claimants after the consignor parted with the railway receipts and obtained advances on the same.

"3. Whether railway receipts in the hands of a commission agent, who had made specific advances against them, are not documents of title, entitling the agent to claim the goods covered by the receipts against a judgment-creditor of such goods.

[291] "4 Whether the claimants obtained any lien over or property in the goods represented by the railway receipts on the security of which the claimants made specific advances

'5 Whether, on the facts found the Court was not in error in disallowing the claim'

*Lang* (Advocate-General) and *Macpherson*, for the Claimants — The lower Court has failed to see the real point in the case There is a good equitable assignment of the goods to us The consignor having induced us to pay the bills could not have stopped the goods The attaching creditors can stand in no better position than the debtor the consignor *Megji Hansraj* v *Ramji Joita* 8 Bom H C Rep (O C J) 169 *Whitworth* v *Gaugain* 3 Hare 416 *Lutscher* v *Comptoir D Escompte* 1 Q B D 709 There can be no doubt that the arrangement was that on paying the *hundis* we were to get the goods —*Ranken* v *Alfaro*, 5 Ch D 786

*Scott* for the Attaching Creditor The advance in this case was not against the goods but against the railway receipts This distinguishes the case from *Megji Hansraj* v *Ramji Joita*, 8 Bom H C Rep (O C J) 169 So again *Lutscher* v *Comptoir D Escompte* 1 Q B D 709 is distinguishable as the advance there was against the bill of lading, which is the symbol of the goods at common law whereas railway receipts are under the decisions of this Court not documents of title *Ranken* v *Alfaro* is in our favour as it shows possession is a condition precedent to a lien The claimant has advanced his money against documents which are worthless

*Lang*, in reply The Judge has held that by the agreement the payments were made for the goods This is a specific appropriation in our favour *Ex parte Banner In re Tappenbeck* 2 Ch D 278 at p 287

**Farran, C J** The exact legal relations between the parties in this case do not seem to have been brought to the mind with sufficient distinctness by the counsel or pleader who on behalf of the claimants presented the points for his consideration to the learned Chief Judge of the Small Cause Court

It appears from the case as stated that one Ukerda Punja consigned the goods in question from Viramgam to the claimants [292] Velji Hirji and Co, Bombay, for sale on commission by the latter and drew four *hundis* against the same i e, against the goods which *hundis* the claimants firm accepted and paid on receiving the railway receipts by post On the arrival of the goods in Bombay Bharmal Shripal and Co who were judgment creditors of Ukerda Punja, attached the same as the property of their judgment debtor The contest, therefore lies between the judgment creditors of Ukerda Punja on the one hand, who have attached the goods, and the claimants firm of Velji Hirji and Co who have made specific advances against the goods on the other hand The claimants firm have neither sold the goods to a purchaser nor pledged them to a third party so neither section 108 nor section 178 of the Contract Act has any bearing upon the case On the other hand the firm of Bharmal Shripal and Co are not either unpaid vendors of the goods seeking to stop them *in transitu* under section 103 of the Contract Act nor are they purchasers nor pledgees of the goods They simply occupy the position of attaching creditors What that position is, has been pointed with great clearness by WESTROPP, C J in the case of *Megji Hansraj* v *Ramji Joita*, 8 Bom H C Rep, 169 They occupy exactly the same position as their judgment debtor Ukerda Punja himself They stand in his shoes and are in no better and no worse situation with reference to the goods in question than he would have been in had he sought to

prevent the goods reaching the hands of Velji Hirji and Co. It is to our minds clear that Ukerda Punja, had he attempted to prevent the goods reaching the hands of the claimants, who had made specific advances against them at his request, would have been promptly restrained in the attempt by an injunction. The case of *Lutscher* v. *Comptoir D'Escompte de Paris*, 1 Q B. D., 709, cited by the Advocate-General, is, in our opinion, exactly in point There the equitable agreement was to place the bill of lading in the hands of the firm who had made advances against it Here it is to place the goods in the hands of the advancing firm Mr. Scott, with extreme ingenuity, contended that the claimants' firm made the advances, not on the goods, but on the railway receipts, and, therefore, advanced their moneys on worthless documents which are not, like [293] a bill of lading, symbols of the goods at all We do not so read the case Its third paragraph states that Ukerda Punja drew against the goods, though the time when Velji Hirji and Co were to accept and pay the *hundis* so drawn was on the receipt of the railway receipts The rest of the paragraph (3) makes this still more clear. The sale of the goods on arrival was to be made on account of the consignor, and the proceeds thereof credited to him against the advances The Judge no doubt goes on to say "On this evidence I was of opinion that the claimants had made an advance by the payment of the *hundis* of Rs 2,200 against the railway receipts for 387 bags, and of Rs 1,000 against the receipt for 175 bags," but what Ukerda Punja drew against were the goods, and the claimants were to be paid their advances out of the proceeds of the goods The learned Judge cannot, we think, be taken to mean that he was of opinion that the claimants had made the advances against the railway receipts, but that the particular advances which he refers to were made against the goods specified in the particular railway receipts which he mentions.

It comes to this that by agreement between Ukerda Punja and the claimants the latter were to make advances against the goods specified in the railway receipts when they received such receipts, and were to pay themselves their advances out of the proceeds of such goods when they received and sold them. We cannot doubt but that that agreement constituted a good equitable charge upon the goods as between Ukerda Punja and claimants' firm when the rights of third parties did not intervene We have already stated that the attaching creditors are but the *alter ego* for this purpose of Ukerda Punja No argument was addressed to us by Mr Scott based upon the wording of section 280 of the Civil Procedure Code We do not, however, think that it offers any difficulty as in the view which we take of the case we find no difficulty in holding that, at the date of the attachment, the goods were in possession of Ukerda Punja by the railway company "on account of or in trust for" the claimants in the comprehensive sense in which that expression is used in the section We notice the point lest it might be thought that we had overlooked it The only doubt which we have felt in the matter is whether, as the [294] aspect of the case, which we have been above considering, was not presented to the acting learned Chief Judge, and was probably not present to his mind when he was stating the case and framing the questions to be submitted to the Court for opinion, we ought to give our opinion upon it. But we think that, as the question (5) "whether on the facts found the Court was not in error in dismissing the claim" is in the widest possible terms, we are at liberty to determine it, and as the facts are all before us, that we ought not to make shipwreck of a good cause upon the rock of overfine technicality by refusing to entertain it. We answer the fifth question in the affirmative, but do not consider it necessary to answer the other questions

submitted for our opinion, as our answer to the fifth question is sufficient to dispose of the case Costs of the reference will be costs in the case

Attorneys for the Claimants — Messrs *Vagjinlal and Rustomji*

Attorneys for the Attaching Creditors —Messrs *Chitnis, Motilal and Malvi*

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NOTES

[This was approved in (1910) 21 M I J 413 See also (1907) 1 S L R 1 ]

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[21 Bom 294]

ORIGINAL CIVIL

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*The 25th September 1896*

PRESENT

SIR C FARRAN KT CHIEF JUSTICE AND MR JUSTICE STRACHEY

Imperial Bank of Persia Plaintiff

*versus*

Fattechand Khubchand Defendant *

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Hundi —*Bill of exchange Suit by holder and indorsee against payee and indorser — Presentment to acceptor Local usage as to presentment Usage of presentment at Bushire —Negotiable Instruments Act (XXVI of 1881) Secs 70 71*

The plaintiffs holder and indorsee of a *hundi* drawn on one Haji Mirza sued defendant as payee and indorser to recover Rs 1 193 4 0 on a *hundi* which had been dishonoured by the acceptor

It was found by the Court (1) that the local usage at Bushire was to present the *hundi* for payment at the bank and for the acceptor to call at the bank at due date and effect settlement (2) that the *hundi* in question was presented for payment at the ninth named agent of the acceptor at the bank on the due date (3) that the said agent refused payment and informed the bank that the acceptor would not pay the *hundi* It was argued that presentment at the bank was not good presentment having regard to sections 70 71 and 137 of the Negotiable Instruments Act (XXVI of 1881)

*Held* that the local usage made the presentment a good presentment

[295] CASE stated for the opinion of the High Court by Rustomji Merwanji Patell, Acting Chief Judge Bombay Small Cause Court under section 69 of Small Cause Court Act (XV of 1882) —

"1 This was a suit by the holders and indorsees of a *hundi* written in the Persian character and drawn in Bombay on one Haji Mirza Ahmed Shirazi for 350 tumans payable fifty days after date The defendant was the payee and the indorser of the *hundi* The plaintiffs sent the *hundi* from Bombay to their branch bank at Bushire on the 4th of August 1895 On that day the acceptor refused payment, and plaintiffs after due notice to the defendant in Bombay filed this suit to recover Rs 1,193 4 0 as on a dishonoured *hundi*

"2 The case first came on for hearing on the 11th May 1896, when the only defences raised were want of notice of dishonour and payment of the *hundi*, either in whole or in part, by the acceptor On the application of the defendant's solicitor a commission was issued to Bushire to prove the plea of payment

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* Small Cause Court Suit No 95/5514 of 1896

"3 On the return of the commission evidence, the suit was heard on 10th August last when the plea of payment was abandoned by the defendant's solicitor and a fresh defence raised denying that the presentment for payment to the acceptor was made as required by the Negotiable Instruments Act (XXVI of 1881)

"4 The plaintiffs relied on the evidence of the manager, accountant and clerk of the bank at Bushire as taken on commission on the defendant's behalf and I held as proved (1st) that the *hundi* was presented for payment to the authorized agent of the acceptor at the bank on the due date, (2nd) that the said agent refused payment and informed the bank that the acceptor would not pay that *hundi*, (3rd) that the local usage or custom at Bushire was to present the *hundis* for payment at the bank and for acceptors of *hundis* to call at the bank on the due date to effect settlement

"5 For the defence it was argued that reading sections 70, 71 and 137 together the presentment at the bank could not be held valid and that the suit must fail This defence was disallowed as I held that the latter part of section 137 should be read with **[296]** the proviso to section 1 which provides that nothing contained in the Act affects any local usage relating to any instrument in an oriental language I was of opinion that in the case of native *hundis* the rules of English law were not strictly applicable, and gave judgment for the plaintiff

"6 At the request of the defendant's solicitor I beg respectfully to submit the following question for their Lordships opinion

"Whether, under the circumstances hereinabove mentioned and referring to the proviso as to local usage in section 1 of the Act the presentment at the bank was a presentment that satisfied the requirements of the Act

"7 The defendant has paid into Court the amount of judgment and professional costs, with Rs 50 for costs of reference

*Macpherson* appeared for the Plaintiff

*Branson* for the Defendant

**Farran C J** As we read the case the local usage or custom found to prevail in Bushire does not exclude the usual presumption which accords with the law as laid down in section 75 of the Negotiable Instruments Act that what a person can himself do he can do by an authorised agent

Reading it in that light we have no doubt that the local usage in this case makes the presentment a good presentment and that the question referred to us must be answered in the affirmative

Costs of reference to be costs in the suit to be taxed as on the original side of the High Court

Attorneys for the Plaintiffs —Messrs *Craigie, Lynch and Owen*

Attorneys for the Defendant Messrs *Chalk, Walker and Smetham*

## [297] INSOLVENCY JURISDICTION

*The 26th February, 1897*

PRESENT

MR JUSTICE STRACHEY, AND IN APPEAL BEFORE SIR C FARRAN, KT., CHIEF JUSTICE, AND MR JUSTICE FULTON

*Re* Aranvayal Sabhapathy Moodliar, an adjudged Insolvent
Karamalli Joosub and another, Petitioning Creditors

*Insolvency—Adjudication of insolvency—Concurrent proceedings in two Insolvent Courts in India—Jurisdiction—Discretion of Court to which second application for adjudication order is made—Act of insolvency—Departure from jurisdiction with intent to delay creditors—Indian Insolvent Act (Stat 11 and 12 Vict c 21), Sec 9*

On the 23rd April 1896 *A* was adjudged insolvent under section 9 of the Indian Insolvent Act (Stat. 11 and 12 Vict, c 21) by the Court for the Relief of Insolvent Debtors at Bombay at the instance of certain creditors resident in Bombay He subsequently took out a rule to annul the order of adjudication on the ground that at the date of the said order he had already (*viz* on the 9th April 1896) been adjudged an insolvent by the Insolvency Court at Madras.

*Held* discharging the rule that the prior adjudication of the Madras Court did not deprive the Court at Bombay of jurisdiction to adjudicate him an insolvent at the instance of a Bombay creditor The latter Court however was not bound under section 9 to make such order but had a discretion to refuse it if having regard to all the circumstances of the case it considered that adjudication in Bombay would be useless

Subsequently to the order of adjudication in Bombay and while it was still in force, the insolvent obtained his personal discharge in the Insolvent Court at Madras under section 49 of the Indian Insolvent Act

*Held*, that there being no longer any ground for apprehending that the proceedings in the Madras Court would be discontinued the proceedings in the Court at Bombay should be stayed leaving the Bombay creditors to take such steps in Madras as they might think proper. It would not be just or equitable to allow the proceedings in both Courts to go on concurrently As the proceedings in Madras were prior in time and all the assets of the insolvent were vested in the official assignee there the Court at Bombay ought to yield to the prior claim of the Court at Madras

A debtor in Bombay summoned his creditors to a meeting fixed for the 28th March 1896 He attended that meeting which was adjourned to the 30th March and at the adjourned meeting he submitted a statement shewing that he had a sum of Rs 11 000 in cash in his hands Two of his creditors asked him to give inspection of his Bombay books of accounts but he refused to do so A further meeting was summoned for the 8th April On the 31st March or 1st April two of his Bombay creditors served him with a summons in an action of debt. On the 6th April he left Bombay for Bellary taking the said sum of Rs 11 000 with him in order (as he admitted) to prevent the said two creditors from attaching it The creditors attended the meeting of the 8th April, but it was dissolved when it was discovered that *A* had left Bombay The books were not produced

[298] *Held*, that under these circumstances the Court was justified in concluding that *A* had left the jurisdiction of the Court with intent to defeat and delay his creditors within the meaning of section 9 of the Indian Insolvent Act

ON the 23rd April 1896, Aranvayal Sabhapathy Moodliar was adjudged insolvent under section 9 of the Indian Insolvent Act (Stat 11 and 12 Vict., c 21) at the instance of the petitioning creditors, Karamalli Joosub and Nur Mahomed Joosub by the Court for the Relief of Insolvent Debtors at Bombay,

on the ground (1) that he failed to attend a meeting of his creditors fixed for the April 1896, (2) that on the 6th of April 1896, he departed from his place of business with intent to defeat or delay his creditors, and (3) that he on the same day made a fraudulent assignment of a sum of Rs. 10,000.

On the 1st July 1896, a rule was obtained on behalf of the said insolvent calling upon the said petitioning creditors to show cause why the said order of the 23rd April 1896, should not be annulled or set aside on the ground that at the date of the Bombay adjudication he had already been adjudicated insolvent by the Insolvency Court at Madras

On the 26th August 1896 the rule came on for hearing

*Mankir* for the Petitioning Creditors showed cause against the rule —Failure to attend a meeting of creditors is an act of insolvency—*Ex parte Beer*, 1 Mont D and De G, 390

This Court has jurisdiction to make an adjudication order against the insolvent, although the Insolvency Court at Madras had made a similar order so far back as the 9th of April 1896 —*Ex parte McCulloch*, 14 Ch D, 716, *Ex parte Robinson*, 22 Ch D 816

It is clear from the affidavits that the insolvent did make a fraudulent assignment of Rs 10 000

*Macpherson* and *Scott*, *contra* —Where there has been one adjudication, the Court under ordinary circumstances will not make another—*Royal Bank of Scotland* v *James Cuthbert* 1 Rose 462 at p 478 Section 7 of the Insolvent Act is similar to the Act under which that case was decided The vesting is imperative All the assets of the insolvent have already vested in the official assignee at Mad [299] ras, and there is nothing now on which the vesting order made here can operate There is no reason why there should now be a second adjudication If it is suggested that it will be hard upon the creditors to have to go to Madras to oppose the insolvent s discharge the answer is that, if this adjudication is not revoked, the creditors will be able to oppose his discharge and proceed against him under the criminal sections of the Act in both places which will be unfair to the insolvent

STRACHEY, J —This is a rule granted by me on the 1st July 1896 at the instance of Aranvayal Sabhapathy Moodliar, who on the 23rd April was adjudged by FULTON, J, under section 9 of the Indian Insolvent Act (Stat 11 and 12 Vict, c 21) to have committed an act of insolvency, calling upon the petitioning creditor to show cause why the order of adjudication should not be revoked

At the time when the order was made, the Court was not aware that on the 9th April the same debtor had already been adjudged to have committed an act of insolvency, and that a vesting order had been made by the Court for the Relief of the Insolvent Debtors at Madras The circumstances in which the order of the Madras Court was made are stated in my judgment of the 11th August granting an application by the official assignee of Madras under section 278 of the Code of Civil Procedure for the release from attachment of property which, after the vesting order had been attached in execution of the decree in Suit No 181 of 1896 (*ante*, p 205) The petition upon which the order of the 28th April was made is supported by affidavits which, if I believe them, disclose ample grounds for an adjudication under section 9 of the statute

The main ground upon which I am asked to revoke the order is that after the Madras Court had adjudged the debtor to have committed an act of insolvency and had made a vesting order, a second adjudication by this Court should not have been made and ought not now to be continued. Having regard to the

cases of *Ex parte McCulloch*, 14 Ch D, 716, *Ex parte Robinson*, 22 Ch. D., [illegible] and *In re Artola Her* [300]*manos*, 24 Q B D, 640, I am satisfied that this Court had jurisdiction to make its order of adjudication, notwithstanding the prior adjudication by the Madras Court Those were decisions under the English Bankruptcy Acts of 1869 and 1883, but the principles upon which they are based appear to me equally applicable to cases under the Indian Insolvent Act. Indeed, the jurisdiction to make the order was not seriously contested in the argument at the Bar, and the substantial contention on behalf of the insolvent was that the Court had a discretion in the matter, and that in the exercise of that discretion an adjudication ought not to be made after the Madras Court's order. On behalf of the petitioning creditor it was not contended that, assuming the Court to have jurisdiction to make the order, it had no discretion to refuse an adjudication upon proof of the facts required by section 9 of the statute. That seems however, to be implied by the decision of MARRIOTT, J., in *In the matter of Thucker Bhagvandas Harjivan*, I L R 4 Bom, 489 He held that the words "it shall be lawful for the Court to adjudge that such person has committed an act of insolvency' were not intended by the Legislature to give the Court a discretion to adjudicate or not according to the circumstances of each particular case, but that "inasmuch as they confer on the Court authority to do a judicial act in a certain case, they make it imperative on the Court to exercise that authority when the case arises, and the exercise of that authority is duly applied for" As authority for this conclusion he relied on the case of *Julius* v. *The bishop of Oxford*, Ap Ca, 214, in which the effect of the words in a statute "it shall be lawful" was discussed by the House of Lords It appears to me that his application of the principles established by that case is open to question None of the judgments lay down an absolute rule that where the words "it shall be lawful" confer on a Court authority to do a judicial act in a certain case, they make it imperative on the Court to exercise that authority when the case arises, and the exercise of that authority is duly applied for. What they lay down is that the words themselves are always permissive and enabling, and never imperative, but that the context, the sub-[301]ject-matter of the statute, the nature of the authority or the thing authorized and all the surrounding circumstances may show that the Legislature intended to couple with the authority a duty to exercise it when invoked. Whether the Legislature intended to create an imperative duty or to allow a discretion in the matter, depends upon the nature, the objects, and the construction of the statute itself, and not upon the enabling words "it shall be lawful" which create the authority. It was further held that it lies upon those who contend that an obligation exists to exercise the authority to show in the circumstances of the case something which creates this obligation, see also *In re Baker*, 44 Ch. D, 262

The question, then, is whether it can be inferred from the nature and objects and construction of the Indian Insolvent Act that the Legislature intended the exercise of the authority created by the words in section 9 "it shall be lawful" to be a duty in the performance of which the Court was to have no discretion. Now in England, no doubt, under the 13 Eliz, c 7, which enacted that the Lord Chancellor, upon complaint being made to him against any bankrupt, should have "full power and authority" to issue a commission, it was held in the case of *Alderman Backwell* 1 Vern, 152, in 1683 that the Lord Chancellor had no discretion, but was bound to issue the commission In later cases, however, it was held that although a commission of bankruptcy was a matter of right to the subject, still the Court had a large discretion to prevent proceedings in bankruptcy being taken for an improper

purpose or a purpose not connected with the legitimate objects of a commission—Yate Lee on Bankruptcy (3rd Ed.), p 80. Under the Bankruptcy Act, 1861, it was held that the commissioner had jurisdiction to refuse to adjudicate if he knew anything which made an adjudication improper—*Ex parte National Bank of England*, L R, 4 Ch, 63 The terms of section 8 of the Bankruptcy Act, 1869, were far more imperative than the "it shall be lawful" of section 9 of the Indian Insolvent Act they provided that the Court, if satisfied with the proof of the petitioning creditor's debt, the trading [302] if necessary, and the act of bankruptcy, 'shall adjudge the debtor to be bankrupt" Yet in *Ex parte Brigstocke*, 4 Ch D, 348, the Court expressly refrained from holding "that the order for adjudication is to follow as a matter of course when the statutory requisites are proved to exist, and suggested cases in which a discretion to refuse the order might be exercised In *Ex parte McCulloch*, 14 Ch D, 716, the Court went further, and not only refused to hold that section 8 "made the adjudication so clearly *ex debito justitiæ* that the Court had no discretion in the matter," but held that notwithstanding its terms, the Court "retained its old jurisdiction to refuse to make a man bankrupt for an improper purpose, and to annul an adjudication when the justice and convenience of the case required it" In *Ex parte Robinson* 22 Ch D 816, the Court went still further, treated the discretion as complete and held that the existence of a bankruptcy in Scotland or Ireland was *primâ facie* a reason for not exercising the jurisdiction *In re Artola Hermanos* 24 Q B D, 640, was decided under the Bankruptcy Act, 1883 section 7 (3) of which gives the Court a discretion to dismiss a creditor's bankruptcy petition if satisfied that no receiving order ought to be made, and the jurisdiction to make the order being undoubted, the question whether it should be made was treated as entirely one of discretion The cases appear to me to establish that there is nothing in the nature and objects of the bankruptcy laws to justify the inference that the Legislature, even when using much stronger expressions than 'it shall be lawful," intended to make an adjudication an imperative duty in the performance of which, if the legal requisites of an adjudication were satisfied, the Court should exercise no discretion, however improper or inexpedient such an order might be I think that the same principle applies to the Indian Insolvent Act, that, therefore the words in section 9 'it shall be lawful' must be given their ordinary permissive and enabling sense, and that the Court has a discretion to refuse an adjudication under the section

Assuming, then, on the one hand, that this Court had jurisdiction to make the order of adjudication notwithstanding the order [303] of the Madras Court, and on the other that it has a discretion under the circumstances to refuse the adjudication, ought I now to exercise that discretion and revoke this Court's order? The principles upon which the discretion should be exercised are shown by the cases of *Ex parte McCulloch* Ch. D, 716, *Ex parte Robinson*, 22 Ch D, 816, and *In re Artola Hermanos*, 24 Q B D, 640 In the first it was held that in the absence of any of the equitable considerations which would make an adjudication improper or inexpedient, the creditors had a right to ask the proper tribunal to adjudge their debtor a bankrupt, that the fact that he had previously been adjudged a bankrupt did not make that untrue, that it was a material circumstance that the debtor was the only person opposing the adjudication, and that an adjudication should be made for what it was worth, leaving for future determination the question in what Court the assets ought ultimately to be administered In the second case it was held that *primâ facie* the mere existence of a bankruptcy in Scotland or in Ireland would be a reason for refusing to make an adjudication, but also that *primâ facie*, there being a

good petitioning creditor's debt and an act of bankruptcy proved, the Court would make an adjudication if there were any assets in England. In the third case it was held (see the judgment of FRY, L.J.) that a receiving order ought to be made where the conditions of the Act had been satisfied, unless there was some valid reason to the contrary; and that not only was no such reason made out, but the presence of assets in England was a strong circumstance in favour of making the order. These principles are fully applicable to the present case. Assuming the facts stated in the affidavits to be established to my satisfaction, there is here a good petitioning creditor's debt; there are large assets in Bombay; an act of insolvency was committed here; and only the debtor opposes the adjudication.

The chief ground upon which the adjudication is resisted is that as all the assets of the insolvent have already vested in the Madras official assignee, there are no assets upon which a vesting order of this Court could operate, and consequently there would be nothing for the official assignee of this Court to administer, and the adjudication would be useless. That having regard to sections [304] 7 and 11 of the statute, all the assets of the insolvent, future as well as present, vest in the Madras official assignee by virtue of the vesting order of the 9th April, and that no subsequent vesting order of this Court could affect the rights acquired under that order, I have no doubt whatever. All that the official assignee of this Court could obtain by virtue of this Court's order would be a sort of contingent or reversionary interest in the assets in the event of the order of the 9th April being hereafter set aside. In my opinion, however, this fact is not a reason for revoking the adjudication. In the first place, the argument that all the property of the debtor had already vested in the Irish assignee did not induce the Court in *Ex parte McCulloch*, 14 Ch. D., 716, to hold its hand. In the second place, although no doubt the distribution of assets is the principal object of an adjudication of insolvency, it is not the exclusive object. There are many cases in which an adjudication is made, though the assets are *nil*. The creditors have a right to an investigation of the whole of the insolvent's conduct. Apart from the distribution of assets, that investigation may possibly result in his prosecution under the penal provisions of the statute. It is not suggested that this insolvent has so acted as to bring himself within those provisions, or that his prosecution is likely or is desired by the creditors. But the question is whether it is reasonable that the Bombay creditors who would ordinarily be entitled to an investigation in this Court the result of which would show whether there is ground for a prosecution or not, should be deprived of that right or sent with their witnesses all the way to Madras for the purpose. Another consideration which influences my mind is that I am informed by the counsel for the insolvent that steps have been taken, or are about to be taken, to induce the Madras Court to revoke its adjudication. Having regard to the circumstances in which that order was made, it is, at all events, possible that these steps may be successful. If merely by reason of the Madras Court's order I were to revoke an adjudication to which the Bombay creditors would otherwise be entitled, the result of that order being set aside would be that the property of the insolvent would revest in him and might be dealt with [305] to the serious injury of the creditors. On the other hand, if the adjudication stands, the assets, in the event of the Madras order being set aside, would immediately vest in the official assignee of this Court, who would at once take steps for their protection. I fully recognise that the Madras Court by virtue of its prior order has the right to control the proceedings; and care must, of course, be taken that nothing is done here which could interfere

with the exercise of that right or of the functions of the Madras official assignee. It seems reasonable, however, that, as was done in *Ex parte McCulloch* the adjudication should continue for what it is worth, and that the Madras Court should have before it all the proper materials for deciding whether it is for the benefit of the creditors generally that the administration should be conducted there or here. For these reasons I am of opinion that if an act of insolvency has been committed, and the other conditions of the statute satisfied the rule should be discharged.

(His Lordship then proceeded to find on the facts that an act of insolvency had been committed, and discharged the rule, ordering the costs of the petitioning creditor to be paid out of any assets of the insolvent which might vest in the official assignee of this Court in his capacity as such and not in his capacity as agent or attorney of the official assignee of Madras.)

The insolvent appealed against the order discharging the rule on the following grounds:

(1) That prior to the date of the order of adjudication in Bombay all the assets of the insolvent had become vested in the official assignee of the Insolvent Court in Madras by an order of that Court dated [illegible]th April 18[illegible].

(2) That it was unjust and inconvenient that the insolvent should be subject to insolvency proceedings in Madras and Bombay concurrently.

(3) That the evidence showed that the petitioning creditor knew when they presented the petition for adjudication at Bombay that the appellant had already been adjudicated an insolvent at Madras and had wilfully concealed the fact from the Court.

The appeal came on for hearing before FARRAN, C.J., and FULTON, J., on the 26th February 1897.

*Inverarity* and *Anderson* for the Appellant (Insolvent):—The first question is whether there can be concurrent proceedings [306] in different Insolvent Courts in India against the same person. The Court below has decided the point in reliance on the English cases which have held that a foreign bankruptcy is no bar to an adjudication in England: *Ex parte McCulloch*, 14 Ch. D. 716; *Ex parte Robinson*, 22 Ch. D. 816; *In re Artola Hermanos* 21 Q.B.D. 640. These cases, however, do not apply. There the bankruptcies were in two different Courts foreign to each other and acting under wholly different laws. Here the Courts are the Courts of the same country and are acting under the same statute. There is no provision in the Act for transfer of a case from one Court to another as there is in England, and there is nothing in it to show that concurrent proceedings in different Courts may go on. See sections 77 and 81. A vesting order has been made in Madras. How can there be a second vesting order made in Bombay? Further proceedings in the insolvency have been taken in Madras. An application to revoke the adjudication order has been made and refused, and on the 11th January last the insolvent got his personal discharge under section 49 of the Insolvent Act. Are these proceedings to be taken over again in the Insolvent Court in Bombay? We submit that the proceedings in the Madras Court are sufficient and that the adjudication order made in the Court should be set aside: *In re Steel*, 3 Mor. Bankruptcy Ca. 78.

The next question is whether the appellant committed an act of insolvency so as to justify the adjudication order under section 9 of the Act. We submit that he has not.

Lastly we say that from the affidavits filed it appears that this adjudication order was obtained by the petitioning creditors, because the appellant would not give them a fraudulent preference. The authorities show that when

creditors seek to use the Court from an improper motive it will refuse an adjudication order—*In re Davies*, 3 Ch D, 461, *In re Adams*, 12 Ch D, 480.

*Mankar*, for the Respondent (Petitioning Creditor) —The two last points are not taken in the memorandum of appeal and should not be heard It is clear however, that the appellant did [307] commit an act of insolvency under section 9 in leaving Bombay on the 6th April 1896, with intent to defeat his creditors A meeting of his creditors was called for the 8th April and he left Bombay two days before it—*Ex parte Lees* 1 Mont D and De G, 390

It is not shown that the adjudication order in this case was obtained from any improper motive and the cases cited do not apply

With regard to concurrent proceedings this Court in the absence of any Indian authority on the point will follow the English rulings *Ex parte McCulloch* 14 Ch D 716 *Ex parte Robinson*, 22 Ch D 816 *In re Artola Hermanos*, 24 Q B D, 640 The Indian Insolvent Act contains no provision on the point

**Farran C J** We agree with the learned Judge who presided in the Insolvent Court in this matter that the prior adjudication of the Madras Court did not deprive the Insolvent Court in Bombay of jurisdiction to adjudicate the appellant an insolvent at the instance of a Bombay creditor assuming that the elements necessary to give the Court jurisdiction existed in the case In analogous cases in England the Lords Justices had no doubt as to the jurisdiction, and we feel unable to distinguish them in principle from the case before us—*Ex parte McCulloch* 14 Ch D 716 *Ex parte Robinson*, 22 Ch D 816 *In re Artola Hermanos* 24 Q B D 640

We also agree with the learned Judge that the Court had a discretion vested in it to refuse the adjudication order if having regard to all the circumstances of the case it considered that adjudication in Bombay would be a vain and useless proceeding The cases which have been referred to are also authorities for that proposition *In re Pratt* (1897) 1 Q B 50 is an authority to the same effect The words of the statute 11 and 12 Vict c 21 sec 21— "It shall be lawful for the Court to adjudge that such person has committed an act of insolvency, provided always that it shall be lawful for the said Court * * * to refuse to make or confirm such adjudication" appear to us to continue to the Insolvent Courts in India the jurisdiction which English Courts of Bankruptcy [308] have always exercised to refuse to make a man bankrupt for an improper purpose and to annul an adjudication when the justice and the convenience of the case require it, per JAMES, L J in *Ex parte McCulloch* 14 Ch D 716 at p 723

On the part of the appellant it is contended that he has not committed an act of bankruptcy in Bombay, and that therefore the element necessary to give the Court jurisdiction does not exist in his case The act of bankruptcy relied on before us by the respondent is that the insolvent being a trader liable to become bankrupt departed from within the limits of the jurisdiction of this Court with intent to defeat or delay his creditor It is not denied that the appellant was a trader He carried on business on an extensive scale and had (as appears from a statement which he made out to be laid before his creditors, annexed to the petition of the petitioning creditor) a head office at Bellary and branches at Madras and Bombay The same statement shows that his debts in Bombay amounted to nearly Rs 7½ lakhs, while he had a large amount of assets there,—not, however, free assets The free assets were comparatively small It also appears that his total assets fall short of his liabilities by nearly seven lakhs Narayan Dhondiba was the manager of his Bombay Branch

It does not appear when the insolvent came to Bombay on the last occasion. On the 21st March 1896, he sent circulars to his Bombay creditors, requesting them to attend a meeting on the 28th of that month. It was held, the insolvent being present, and was adjourned to the 30th March. He then submitted a statement to the meeting, showing amongst other things, that he had a sum of Rs. 11,000 in cash in his hands. Two of his creditors asked him to give inspection of his Bombay books of account, but he refused to do so. A further meeting was arranged on the 8th April. On the 31st March or 1st April, two of his Bombay creditors, Sardarmal and Lalchand, served him with a summons in an action of debt. On the 6th April he left Bombay for Bellary, taking the balance of the Rs. 11,000 (after paying some wages) with him to prevent, as he admits, Sardarmal and Lalchand from attaching it. The creditors attended the **[309]** meeting of the 8th April, but it was dissolved when it was discovered that the insolvent had left Bombay. The books were not produced. On the 9th April he was adjudicated an insolvent in Madras.

We think that under the above circumstances the learned Judge of the Insolvent Court was justified in coming to the conclusion that the insolvent left the jurisdiction of this Court with the intent alleged in the petition. The natural result of an insolvent thus leaving Bombay with a large sum of money, and refusing to allow his books to be inspected is, we think, to defeat and delay creditors, and the case of *Ex parte* [illegible] 1 M. D. and D. G., 390 shows that the Court will attribute to the insolvent the intention which is the natural result of his acts. His admission moreover that he took away the cash to defeat an attachment brings the case within the actual words of the section.

We pass to consider whether the appellant has made out such improper motives on the part of the petitioning creditor as to induce the Court to revoke the adjudication. This reason for annulling the proceedings was not, it is admitted, urged before the Insolvent Court, but as the argument on this head was based upon the affidavits which were used before that Court, it is open to us to consider it. That the petitioning creditor was originally favourable to the insolvent and that he and his partners hoped to induce the insolvent to use his influence in obtaining for them certain agencies which the insolvent had held is pretty clear from the letter of the petitioning creditor of the 14th April to the insolvent and from that of his partner of the 16th April to the manager of the insolvent. It is also clear that the petitioning creditor endeavoured to get his commission of Rs. 4,000 paid by the insolvent early in April when the latter's affairs were desperate. Still it is not denied that the petitioning creditor is a *bonâ fide* creditor of the insolvent for the sum of Rs. 4,000 or thereabouts. At the time when the petition was presented on the 23rd April 1896 the insolvent had already been adjudicated insolvent in Madras. It is suggested that the petitioning creditor's motive in taking proceedings in Bombay was revenge. This he denies. It appears to us that his proceedings here may have **[310]** arisen just as well from a *bonâ fide* desire to protect his own interest as from the improper motives which the appellant seeks to attribute to him, and that we ought not, therefore, to annul the proceedings on that ground, all the more so as this ground for revoking the adjudication was not urged before the Insolvent Court, though it is now relied upon before us in appeal. The conduct of the petitioning creditor in not mentioning to the Court the prior adjudication in Madras when he presented his petition to this Court was reprehensible, but as there were fair grounds for supposing that the petition in Madras was presented in collusion with the insolvent to prevent a similar petition being presented in Bombay, we think that that circumstance ought not, seeing that the other creditors in Bombay are equally interested with the

petitioning creditors in upholding the adjudication here, to induce us to annul the adjudication.

We have lastly to consider whether on account of the pending proceedings in Madras, the Insolvent Court ought not in its discretion to have annulled the adjudication here In this connection it must be remembered that the Madras creditors were favourable to the insolvent and were willing to give him time This is stated by the insolvent in his circular of March and is proved by other circumstances The debts there moreover were comparatively small. There was some reason for believing that the petition might be withdrawn or dismissed There were large assets in Bombay and very large liabilities. Taking these circumstances into consideration we think that the English authorities fully justified the Commissioner in his action Complete protection of the Bombay creditors was the object which he had in view We are therefore of opinion that the appeal fails

We are now however asked to annul the proceedings on the ground that since the order of Mr Justice S[illegible] was made the insolvent has obtained his personal discharge in Madras and that there is no longer any ground for apprehending that the proceedings there will be discontinued It appears to us that it would not be just or equitable to allow the proceedings in both Courts to go on concurrently This would lead to most undesirable conflict of jurisdiction and as the proceedings in Madras [311] were prior in time and all the assets of the insolvent are vested in the official assignee there this Court ought to yield to the prior claim of the Court at Madras The best course we think under the circumstances will be to stay the proceedings here till further order of the Insolvent Court leaving the Bombay creditors to take such steps in Madras as they may be advised to take This may appear to be hard upon them but it would be equally hard on the Madras creditors to be compelled to take steps in Bombay and the Bellary creditors for this purpose must be ranked with the Madras creditors Madras being their natural Court to resort to as there is no Insolvency Court at Bellary Each party to bear his own costs

Attorneys, for the Insolvent (Appellant) Messrs *Craigie Lynch and Owen*

Attorneys, for the Petitioning Creditor (Respondent) Messrs *Hiralal, Mulla and Mulla*

NOTES

[See also (1901) [illegible] (1909) [illegible] (1911) [illegible] W N 211

In (1910) 37 Cal, 418 I C there was [illegible] the official Assignee of Bombay's title was held to prevail over that [illegible] in so much as the latter under the Punjab Laws Act was [illegible] The Privy Council stated 'It is clear that under the [illegible] the Imperial Act the High Court of Bombay [illegible] the Court can effectually administer the estate of the insolvent in such a case as the present ]

[21 Bom. 311]

## APPELLATE CIVIL

*The 3rd December, 1895.*

PRESENT

CHIEF JUSTICE FARRAN AND MR. JUSTICE STRACHEY

Timmappa Kuppaya ........ (Original Plaintiff) Appellant

*versus*

Rama Venkanna Naik ........ (Original Defendant) Respondent.*

*Landlord and tenant—Lease—Sub lease—Ejectment of tenant—Position of sub tenant—No privity of contract between landlord and sub tenant—Notice to quit—Land Revenue Code (Bom. Act V of 1879), Sec. 84†.*

A sub lease differs from an assignment of a lease in that it creates no privity of contract between the sub tenant and the landlord. The landlord has to deal with his lessee and not with the sub tenants of the latter.

A landlord putting an end by proper notice to the tenancy of his tenant thereby determines the estate of the under tenant also.

[312] SECOND APPEAL from the decision of E. H. Moscardi, Acting District Judge of Kanara, reversing the decree of Rao Saheb Phadnis, Subordinate Judge of Kumta.

The plaintiff had brought a suit (No. 205 of 1888) against Venkatesh Achutaya and others for possession of certain land. The defendants in that suit alleged that they were mulgeni tenants but the allegation was held not proved and a decree was passed for the plaintiff. In execution the plaintiff was obstructed by Rama Venkanna (present defendant) who alleged that he was a mulgeni tenant under Venkatesh and the other defendants. The plaintiff thereupon applied under section 331 of the Civil Procedure Code (Act XIV of 1882) for the removal of the defendant's obstruction. The application was numbered and registered as a suit.

The defendant now pleaded that the land in suit was the mulgeni holding of Venkatesh and the other defendants in Suit No. 205 of 1888, that the father of those defendants had let it out to him on mulgeni tenure thirty five years before suit, that he had been in possession ever since, that the plaintiff had no power to eject him because the tenancy was not determined, and that he not having been a party to the former suit (No. 205 of 1888) was not bound by the decree.

The Subordinate Judge found that the defendant was not a mulgeni tenant and passed a decree directing that his obstruction be removed and possession be given to the plaintiff.

On appeal by the defendant the Judge reversed the order of the Subordinate Judge on the ground that the plaintiff could not sue to eject the

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* Second Appeal No. 345 of 1894.

† Section 84 of the Land Revenue Code (Bombay Act V of 1879) —

84. An annual tenancy shall in the absence of proof to the contrary be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March.

An annual tenancy shall require for its termination a notice given in writing by the landlord to the tenant or by the tenant to the landlord at least three months before the end of the year of tenancy at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Schedule I, or to the like effect.

defendant, because he admitted that the defendant was a tenant of the defendants in the former suit (No 205 of 1888) He held that the present suit must fail for want of previous notice to the defendant to vacate under section 84 of the Land Revenue Code (Bombay Act V of 1879)

*Narayan G Chandavarkar* for the Appellant (Plaintiff) - No notice was necessary to put an end to the defendant's tenancy There is no privity of contract between the plaintiff and the present defendant who is only a sub lessee—Platt on Leases pp 102 [313] 104 Woodfall on Landlord and Tenants, p 359 *Roe v Wiggs* 2 Bos and P (N R) 330 *Mellor v Watkins* L R 9 Q B 400, *Bhutia Dhondu v Ambo* I L R 13 Bom 294 *Bij y Govind Singh v Sunkur Dutt Singh* 10 Cal W R 307 *Pleasant v Benson* 14 East's Reports 234 The point of notice was moreover raised for the first time in the Court of appeal It was not taken in the first Court

*Dattatraya A Idgunji* ... for the Respondent (Defendant) Where a lessee surrenders his estate an under lessee is not prejudiced by the surrender —*Great Western Railway Company v Smith* 2 Ch D 235 The defendants in Suit No 205 of 1888 ... failed ... to prove their ... tenancy This failure amounts to a surrender on their part and does not terminate our tenancy The Transfer of Property Act (IV of 1882) has adopted the provisions of English law on the point but those provisions are not applicable to agricultural lands *vide* sections 116 and 117 of the Act Express notice to quit is therefore necessary to terminate our tenancy The question of notice was raised in our written statement

**Farran C J** ... differs from the assignment of a lease in that it creates no privity of contract between the sub tenant and the landlord The landlord has to deal with his lessee and not with the sub tenants of the latter

The English authorities ... that a landlord putting an end by a proper notice to the tenancy of his ... determines the estate of the under tenants of the latter ... is undoubted law *Roe v Wiggs*, 2 Bos and P (N R) 330 *Mellor v Watkins* L R 9 Q B 400 Woodfall on Landlord and Tenant p 359

The question is whether a different rule should be applied in this Presidency by reason of the provisions of section 84 of the Land Revenue Code of 1879 or for any other cause We think not The provisions of the section in question in directing that a landlord must give the notice therein required to his tenant and making no reference to the sub tenants of the latter rather imply the contrary and ... no direction The landlord in many cases knows ... the ... [314] sub tenants of his lessee and when he has given ... notice to ... determine the tenancy of the latter and it may be as here has resorted to legal measures to evict him it would be a hardship on him to find that he had to be in proceedings all over again against the sub tenants An assignee ... of course ... different position for he is brought by his assignment into direct relation with the landlord

The surrender of a lease by the lessee ... gives rise to wholly different considerations - *Great Western Railway Company v Smith* 2 Ch D 235

We must therefore hold on the facts as found by the District Judge that notice by the plaintiff to the defendant in this case was not necessary, and reversing his decree restore that of the Subordinate Judge with costs throughout on the defendant

*Decree reversed*

**NOTES**

[ Assignment establishes privity of estate —(190 ) 29 Bom 391 see also (1903) 27 Mad., 401, (1899) 13 C P L R, 19 ]

[21 Bom 315]

# APPELLATE CIVIL

*The 9th December, 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE STRACHEY

Ramacharya and others . . (Plaintiffs) Appellants

*versus*

Anantacharya and others (Defendants) Respondents *

*Execution of decree – Decree Death of a party to a suit after argument and before delivery of judgment Execution against the heirs of deceased judgment debtor Civil Procedure Code (Act XIV of 1882), Secs 234 248 250 Practice Procedure*

On the 30th November 1892 an appeal in the High Court was argued and the case adjourned for judgment

On the 12th June 1893 one of the defendants respondent died

On the 6th July 1893 the High Court pronounced its judgment and a decree was drawn up as if the deceased respondent was still living

On the 15th December 1893 the plaintiffs applied for execution of the decree but the application was rejected by the Court of First Instance on the ground that as the heirs of the deceased defendant had not been placed on the record before the judgment of the High Court was delivered the decree was incapable of execution

*Held* reversing the lower Court's decision that the decree was on its face a good decree, and it could be executed against the heirs of the deceased defendant under sections 234 and 248 250 of Civil Procedure Code (Act XIV of 1882) without placing them on the record

[315] APPEAL from the decision of Rao Bahadur K B Marathe, First Class Subordinate Judge of Satara, in Suit No 1137 of 1893

The plaintiffs filed a suit for partition of certain joint property consisting of lands, houses and the profits of an ancestral trade

The Court of First Instance passed a decree awarding a portion of the plaintiffs claim

Against this decree the plaintiffs appealed to the High Court

The appeal was argued on the 23rd and 30th November 1892, and the case then stood over for judgment

Judgment was delivered on the 6th July 1893 when the decree of the Court of First Instance was confirmed

In the meantime defendant (respondent) No 1 died on the 12th June 1893, but no steps were taken to amend the record by substituting in his place his heirs and legal representatives

On the 15th December 1893 the plaintiffs presented an application for execution of the High Court's decree, making the heirs and legal representatives of the deceased defendant No 1 parties to the execution proceedings

The Subordinate Judge dismissed this application, holding that as the names of the heirs of the deceased defendant had not been placed on the record before the date of the High Court's decision, the decree could not be executed against the heirs.

Against this decision the plaintiffs appealed to the High Court.

* Appeal, No. 39 of 1895.

*Ganpat Sadashiv Rao*, for Appellant -In this case the judgment should be regarded as if pronounced at the date of the argument The decree speaks from the day on which the argument was closed, and binds all parties The suit does not abate, if either the plaintiff or defendant dies in the interval— *Turner* v *London and South Western Railway Company* L R, 17 Eq, 561. Where the delay arises from the act of the Court it ought not to prejudice the rights of the suitors In such cases it is the practice of the Courts in England to pass judgment *nunc pro tunc* *Harrison* v *Heathorn* 6 Scott's N R 797, *Lawrence* v *Hodgson* 1 Y and J 368 *Moor* v *Roberts* 27 L J (C P), 161 There was no neces [316]sity to bring on the record the heirs of the deceased respondent Under section 234 of the Civil Procedure Code the decree could be executed against the heirs *Hirachand* v *Kasturchand* I L R 18 Bom, 224 *Surendro* v *Doorgasoondari* I L R, 19 Cal 513 No steps were taken by the heirs of the deceased to set aside the decree and it is not shown that they have been in any way prejudiced by it The ruling in *Narna* v *Manager Laramlhatta* P J for 1894 p 403 Sub Nom *Narna* v *Anant*, I L R, 19 Bom 807 is conclusive on this point

*Inverarity* (with him Rao Saheb Vasudev J Kirtikar) for the respondents — The Courts in India have no power to enter up judgment *nunc pro tunc* They cannot alter the date of a decree Under section 198 of the Code of Civil Procedure if the case is adjourned for judgment the Court is bound to give notice to the parties of the day when judgment will be delivered How can such a notice be given if one of the parties is dead unless his representatives are brought on the record? Sections 202 205 206 of the Code also show that the date of the decree cannot be altered unless the decree is amended These provisions of the Code are quite inconsistent with the practice of the Courts in England to pass judgment *nunc pro tunc* We contend that section 368 of the Code applies The heirs of the deceased respondent not having been brought on the record the appeal abated and the decree passed against the deceased respondent is now incapable of execution *Ibraham* v *Ganu*, P J for 1883 p 5 *Par Narain* v *Ramjee* 9 Cal L R 192 *The Representatives of Gour Nath Nag* v *Hur Nath Roy* 10 Cal W R 155 *Munee Lal* v *Kareem Fuzul* 14 Cal W R 337 *Imdad Ali* v *Jagan Lal* I L R 17 All 478

*Ganpat S Rao* in reply The cases cited do not apply In every one of them the death of the defendant or respondent had occurred before the argument

**Farran C J** In this case the High Court on the 6th July 1893 passed a decree for partition of the property in suit in confirmation of the decrees of the lower Courts The plaintiff applied for execution of this decree to the Court of the Subordi [317]nate Judge First Class at Satara That Court refused to execute the decree on the ground that one of the defendants was dead at the time when the judgment was pronounced and the decree drawn up It appears that after the arguments had been concluded on the 30th November 1892 the High Court took time to consider The first defendant Anantacharya died on the 12th June 1893 before judgment was pronounced on the 6th July 1893 The decree was drawn up as though Anantacharya was still living It was dated on the day on which judgment was delivered On its face it is, therefore a good decree which can be executed against the legal representatives of Anantacharya under sections 234 and 248 250 of the Civil Procedure Code without placing them on the record of the suit— *Hirachand* v *Kasturchand* I L R, 18 Bom, 224—unless the decree by reason of the death of Anantacharya is inherently defective

The practice in English Courts of Equity was in such cases to disregard the fact of the death of a party occurring while the Court was considering, and to deliver judgment and draw up the decree as though he were still living. The question was much considered in the case of *Eyre* v. *Hollier*, 12 Ir. Eq. R., 607, where a defendant died while the House of Lords was considering its judgment. The Lord Chancellor of Ireland in the course of his judgment (at p. 610) said: "Nothing is better settled than that where a cause is heard and merely stands over for consideration, the Court will pronounce judgment though the plaintiff or defendant die; and that judgment refers back and is conceived in the same terms as if pronounced when the cause was heard." In a note appended to that case the practice of the English Court of Chancery was thus stated by its Registrar: "As to the drawing up decrees after the death of a party in cases where judgment has been deferred, we give the decree the date at which the judgment was pronounced, and that decree speaks from the day on which the argument closed, and binds all parties then before the Court, and also the representatives of any parties deceased in the *interim* or persons taking under parties living at the time of the hearing." The practice, however, as to the dating of the decree was not uniform. It was sometimes dated as of the day [318] when the arguments concluded. This appears from the several cases noted by the Registrar in his letter above referred to and in the judgment and notes to *Turner* v. *London and South-Western Railway Co.*, L. R., 17 Eq., 561.

The practice prevailing in such cases in the Courts of Common Law was that judgment was entered as of the date when the Court took time to consider. This was done on the principle that the Court will in general permit a judgment to be entered *nunc pro tunc* where the signing of it has been delayed by the act of the Court. "It was a power at common law and by the ancient practice of the Court to prevent an unjust prejudice to the suitors by the delay unavoidably arising from the act of the Court"—Chitty's Archbold's Practice, Ch. LXXXVIII, where the authorities are collected. The power is now confirmed by Order XVII, R. 3, of the High Court of Justice.

In *Surendro* v. *Doorgasoondery*, I. L. R., 19 Cal., 513, at p. 538, the Privy Council, notwithstanding the death of one of the parties pending consideration, delivered judgment and remitted the case to the Indian Courts for disposal without requiring the record to be amended.

We have referred to the English practice and that of the Privy Council to show that there is nothing anomalous or contrary to principle in the delivery of a judgment and drawing up a decree thereon though one of the parties to the suit is dead and the record has not been amended, provided that he has been fully heard in his life-time.

Sections 198, 202, 205, 206, 368 and 574 of the Civil Procedure Code have, however, been read to us, and it has been contended that these provisions are inconsistent with such a course of procedure as has been adopted in England. It has been pointed out that the notice required by section 198 cannot be given without amendment. We think, however, that, as there is no question of principle involved, we ought to follow the ruling in *Narna* v. *Manager Parambhatta*, P. J. for 1891, p. 403, and to consider the drawing up of the decree in this case as at the utmost merely irregular. The legal representatives of the defendant Anantacharya have not pointed [319] out that they have been in any way prejudiced, nor have they taken any steps to set aside or vary the decree.

We have ascertained that the defendant in *Vishram* v. *Ganu*, P. J. for 1883, p. 5, (the case which the lower Court has followed) had died before the argument; and the cases cited by Mr. Branson—*Roop Narain* v. *Ramayee*, 3 Cal.

L R, 192, *The Representatives of Girendronath Tagore* v *Huronath Roy*, 10 Cal W R, p 455, *Vonee Lall* v *Kazee Fuzul*, 14 Cal W R p 337, *Imdad Ali* v *Jagan Lal*, I L R 17 All, 478- were similar in their circumstances. They are not, therefore, at variance with the decision in *Narna* v *Manager Parambhatta*, P J for 1894 p 403 We shall allow the appeal and setting aside the order of the Subordinate Judge, First Class, direct him to proceed with the execution of the decree The respondents have no merits They must pay the costs of the appellants both here and in the Court below

*Order reversed*

NOTES

[The C P C 1908, O 22 r 6 enacts notwithstanding anything contained in the foregoing rules whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment but judgment may be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place"

Similar decisions were given in ( ... ) ... (1902) 26 Mad 101 (1903) 3 Mad 167 (1905) J C W N 710 (1905) ... W N ... ]

As regards the case of death after hearing ... (1 ) ) 35 All ]

[21 Bom 319]

APPELLATE CIVIL

*The 4th December 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

Babu Anaji and another ....... Original Defendants Appellants

*versus*

Ratnoji Krishnarav ....... Original Plaintiff Respondent

*Hindu law—Reversionary interest—Reversioner's expectant on widow's death does not pass on insolvency to official assignee—Adoption—Adoption by widow relates back to her husband's death—Succession of a brother to a deceased brother's estate—Subsequent adoption by deceased's widow divests estate—Conditional vesting of estate in heir—Inheritance*

Balvant and Mahadev were brothers Mahadev was adopted by ... as adopted son had succeeded to ... property He died ... in 1862 leaving his widow Mathurabai as his heir His brother Balvant was next reversionary heir after Mathurabai and in 1880 he (Balvant) became insolvent ... the official assignee who sold to the plaintiff his interest in certain mortgaged property which had belonged to Mahadev and was then in the possession of Mathurabai Mathurabai died in 1886 and after her death the plaintiff sued to redeem the property from the mortgagee

*Held* that at the date of his insolvency Mathurabai being then alive the interest of Balvant as reversionary heir in the said property was a *spes successionis* which [320] could not vest in the official assignee The plaintiff therefore took no interest in the property by his purchase from the official assignee

Atmaram and Sakharam were two divided brothers Atmaram died leaving his brother Sakharam and a daughter in law (Gangabai) (the widow of his predeceased son Govind) him

* Second Appeal, No 403 of 1894

surviving. On Atmaram's death Sakharam inherited his property as his heir, but shortly afterwards Sakharam gave his son Mahadev in adoption to Gangabai, who duly adopted him as son to her deceased husband Govind.

*Held*, that Mahadev on his adoption became not only the son of Govind, but also the grandson and heir of Atmaram. Having been adopted with the assent of Sakharam, he as the adopted grandson of Atmaram divested the estate in Atmaram's property which had vested in Sakharam. Sakharam by giving Mahadev in adoption to Gangabai while divesting Mahadev of the right to inherit as his heir invested him with the right to inherit Atmaram's estate.

For the purposes of inheritance an adoption may be considered as relating back to the death of the adoptive father divesting all estates which have during the intermediate period become vested as it were conditionally in another.

SECOND APPEAL from the decision of T. Walker, Assistant Judge of Ratnagiri, reversing the decree of Rao Saheb S. M. Karandikar, Subordinate Judge of Devgad.

Suit for redemption. The land in question had been mortgaged by one Atmaram in 1863 to the father of the defendants. Atmaram died in 1865, leaving a divided brother Sakharam and a daughter-in-law Gangabai (widow of his predeceased son Govind) him surviving. Sakharam had two sons named Balvant and Mahadev, and soon after Atmaram's death in 1865 he gave Mahadev in adoption to Gangabai (daughter-in-law of Atmaram), who duly adopted him as son to her deceased husband Govind. Mahadev married Mathurabai. He died childless in 1870 or 1872, leaving her as his heir. She survived till 1886.

Sakharam died prior to 1880, and in that year his son Balvant became insolvent and his estate vested in the official assignee. He was then next reversionary heir to Mahadev after Mathurabai. The official assignee sold Balvant's interest in the property to the plaintiff.

After the death of Mathurabai in 1886 the plaintiff filed this suit to redeem the property.

The Subordinate Judge dismissed the suit.

On appeal by the plaintiff the Judge reversed the decree, holding that Mathurabai held the property for her life and that [321] according to the ruling in *Jamiyatram* v. *Bai Jamna*, 2 Bom. H. C. Rep., 11, Balvant had a right in remainder which became vested in the official assignee, who sold it to the plaintiff, and that the plaintiff had a right to redeem it.

The defendants preferred a second appeal.

*Manekshah J. Taleyarkhan* appeared for the Appellants (Defendants):—The decision in *Jamiyatram* v. *Bai Jamna*, 2 Bom. H. C. Rep., 11, which was relied on by the Judge, has been over-ruled in *Lakshmibai* v. *Ganpat Moroba*, 5 Bom. H. C. Rep., O. C. J., 128. Balvant had no right to the property when it was sold by the official assignee to the plaintiff. Mathurabai was then alive. It is after the death of a widow that the next of kin becomes an heir and not before. Balvant had no right during Mathurabai's lifetime—*Rupachand* v. *Rakhmabai*, 8 Bom. H. C. Rep., A. C. J., 114. The last ruling was followed in First Appeal No. 129 of 1893 which was decided on the 18th September 1895.

Section 266 (*k*) of the Civil Procedure Code has prohibited sale of expectancy of succession by survivorship or other contingent rights.

*Daji A. Khare* with *Mahadeo V. Bhat* appeared for the Respondent (Plaintiff):—When Atmaram died, his property vested in Sakharam as heir. On Sakharam's death Balvant became his heir and we claim under Balvant. Govind having predeceased his father Atmaram, he did not inherit the property; consequently his widow Gangabai could not by adopting Mahadev with Sakharam's

consent prejudice Balvant The Subordinate Judge has in his judgment relied on the decision in *Ramji v Ghamau* I L R, 6 Bom, 498 But that decision is not applicable to the present case because in that case the adoption was in a joint family In the present case Sakharam and Atmaram were not joint Their families were separate Sakharam's consent to the adoption would make it valid, but it cannot deprive other persons of the property which was vested in them

**Farran, C J** —This was a suit filed in the Court of the Subordinate Judge at Devgad in the Ratnagiri District The plaintiff [322] claiming title through the official assignee and assignee of the estate of one Balvant Sakharam sought to redeem a mortgage executed in favour of Anaji the father of the defendants Nos 1—3, by one Atmaram Govind on the 28th May 1863. The question for determination is in whom the equity of redemption is vested.

The facts as found by the lower Court though there is a mistake, probably clerical, in the statement of them by the Assistant Judge are these — Sakharam and Atmaram Govind were divided brothers The property in question belonged to Atmaram, who, as above stated, mortgaged it to Anaji with possession in 1863 Atmaram had a son Govind who died before his father without issue, leaving a widow Gangabai Atmaram died in 1865, leaving his daughter in law Gangabai and his separated brother Sakharam surviving him Sakharam had at that time two sons Balvant and Mahadev. The exact date does not appear but very soon after the death of Atmaram, Sakharam gave his son Mahadev in adoption to Gangabai and the latter duly adopted him It is beyond doubt that Gangabai adopted Mahadev to continue the line of Atmaram through her husband Govind

A suit in which Sakharam was the plaintiff and Atmaram was a defendant was pending at Atmaram's death (Suit No 275 of 1865) Gangabai was placed upon the record of it as a defendant in his place She died soon afterwards, and Sakharam on the 16th December 1865 informed the Court of her death and had Mahadev Govind put upon the record to represent Atmaram The Subordinate Judge thus deals with this part of the case

" According to the established rule of inheritance of the Hindu law in force in this Presidency the daughter in law does not succeed to the estate of her father in law in preference to the enumerated heirs She comes in as a *gotraja* and her position will have to be determined in each case Here Sakharam being one of the enumerated heirs was the heir of Atmaram in preference to Gangabai Atmaram's estate vested in Sakharam at Atmaram's death Sakharam's son Mahadev younger than the defendant Balvant it is said was adopted by Gangabai for her husband This adoption unless it was made by Sakharam's consent would have been void * * * Sakharam's consent to the adoption of Mahadev by Gangabai cannot under the circumstances detailed now be disputed and by his consent and sole consent because [323] he thereby divested himself of the estate already vested in him, the adoption became valid—*Ramji v Ghamau* I L R 6 Bom 498 Mahadev Govind thus succeeded to the estate of Atmaram "

This view of the law was assailed before us by the pleader for the respondent It was however adopted by the Assistant Judge and we think rightly so We continue the statement of facts before giving our reasons for this conclusion

Mahadev married Mathurabai He died childless in 1870 or 1872, leaving her as his heir She survived until 1886 Sakharam died prior to 1880, and in that year Balvant filed his petition and schedule in the Insolvent Court of Bombay when his estate vested in the official assignee He was then the next reversionary heir to Mahadev after Mathurabai. The official assignee sold

Balvant's interest in the property in question to the plaintiff, who after the death of Mathurabai filed the present suit to redeem it from the defendants

The Assistant Judge relying upon the decision in *Jamiyatram* v. *Bai Jamna*, 2 Bom H C Rep, 11, differing from the Subordinate Judge has held that Balvant had at the time of his insolvency an estate vested in remainder upon the death of Mathurabai That decision, however, rested upon a misapprehension of Hindu law and has since been overruled by *Lakshmibai* v *Ganpat Moroba*, 5 Bom H C Rep 128 at pp 139 and 140, and cannot now be accepted as law At the date of his insolvency Balvant had only a *spes successionis* which could not vest in the official assignee and the plaintiff took no interest in the property in suit under his purchase from the official assignee This was indeed conceded by the learned pleader for the respondent He, however, contended that the property had never been vested in either Mahadev or Mathurabai and was, in fact, Balvant's property at the time of his insolvency He argued that it vested in Sakharam on the death of Atmaram and that the adoption of Mahadev by Gangabai though it might be valid for other purposes, could not operate to divest the property which had already vested in Sakharam He distinguished the case of *Pamji* v *Ghamin* I L R 6 Bom, 498, on the ground that there the adoption was into a joint family and not by a widow in a separated [324] branch The adoption in that case was held to be invalid for want of the assent of the co parceners in whom the estate was vested and so cannot be said to be an authority upon the question though the Court doubtless assumed that if the adoption had been with consent, the adopted son would as regards the family estate have stood in the shoes of the father to whom he was adopted More directly in point are the decision in *Sri Raghunadha* v. *Sri Brozo Kishore* L R 3 I A 154 and *Rupchand* v *Rakhmabai*, 8 Bom H C Rep A C J 114 at p 117 In the latter it was held that the adoption of Badridas by Sayibai the widow of Anandram who had pre deceased his brother Sobharam had the effect of divesting the estate which had then vested in Rakhmabai the widow of the latter and making Badridas the heir to the property of both Anandram and Sobharam The adoption was with the assent of Rakhmabai This authority was followed in *Venkaji* v *Datto* Reg Ap 129 of 1893 decided on the 18th of September 1895 by the present Bench The facts in the Privy Council case above referred to are still stronger The person whose estate was there divested was a male full owner

We are unable upon principle to distinguish these decisions from the case before us The effect of an adoption by a widow must always, whether the adoption take place in a united or separated family operate to divest to some extent an estate vested elsewhere That is, therefore on principle no objection to the giving to the adoption by a widow its full effect That effect is more striking when the estate has passed out of the immediate family of the adopting widow and has vested in a member of another family, but the principle is, we think, in each case the same

The case before us differs in some respects from those which we have referred to, in that the estate never vested in Govind by reason of his not having survived his father, but was vested in Atmaram when he died That, however, in our opinion does not affect the conclusion The father's line is, we think, continued in the person of the boy adopted (with the assent of those capable of giving the validating assent) by his son's widow to her husband just as though the latter had left a natural son born in his life [325] time or a posthumous son The adoption when made enures for the benefit not of the adoptive father alone It benefits also the immediate ancestors of the adoptive father. For the purposes of inheritance the adoption may be considered as

relating back to the death of the adoptive father divesting all estates which have during the intermediate period become vested as it were conditionally in another See *Raje Vyankatrav* v *Jayavantrav*, 4 Bom H C Rep., A C J., 191, Mayne's Hindu Law pl 171 Mahadev, on his adoption became, we think, not only the son of Govind but also the grandson and heir of Atmaram. Having been adopted with the assent of Sakharam the adopted grandson of Atmaram divested the estate in Atmaram's property which had vested in Sakharam Sakharam by giving Mahadev in adoption to Gangabai while divesting Mahadev of the right to inherit as his heir invested him with the right to inherit Atmaram's estate

We must, therefore, reverse the decree of the Lower Appellate Court and restore that of the Subordinate Judge with costs both of this and of the Lower Appellate Court on the respondent

*Decree reversed*

**NOTES.**

[The current of authority is in favour of the view that the power to adopt terminates in such cases once for all and is not revived by subsequent vesting or by the consent of those in whom it is vested —See *Trevelyan's Hindu Law* (1912) p 100—101 see also (1896) 22 Bom, 416, 551 ((1904) 28 Bom 461 (1903) 3 Mad ...; contra (1896) 23 Bom 230 327

As regards the extent to which title relates back, see also (1903) 8 C W N 261 (1902) 26 Mad 143 ]

[ 21 Bom 325 ]

## APPELLATE CIVIL

*The 9th December 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR JUSTICE STRACHEY

Vishnu Ramchandra and another (Original Plaintiffs) Appellants

*versus*

Ganesh Appaji Chaudhari and others (Original Defendants) Respondents *

*Practice—Procedure—Wrong issue framed by lower Court—Finding on the point raised by correct issue clear from judgment No remand—Second appeal—Limitation Act (XV of 1877) Sch II Art 127 Partition suit—Limitation*

Where the Lower Appellate Court framed a wrong issue for decision but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed the High Court in second appeal refused to remand the case for a new finding on that issue

The fact that the plaintiffs were not excluded from their share in part of the joint property does not prevent article 127 schedule II of the Limitation Act (XV of 1877) from operating in respect of another part from which they had been excluded to their knowledge

[326] SECOND APPEAL from the decision of Venkatrao K Inamdar, Assistant Judge of Bijapur with Full Powers amending the decree of Rao Saheb T V. Kalsulkar, Second Class Subordinate Judge of Muddebihal

In 1890 the plaintiffs brought this suit for partition claiming a third share of certain inam land (No 200) and of certain occupancy lands (Nos 561 and 567) which they alleged to be ancestral property

Defendants Nos 1—4 denied the plaintiffs right and claimed to be the owners of the land which had been in their exclusive possession for more than twelve years They pleaded that the plaintiffs were barred by limitation

* Second Appeal, No 596 of 1894.

The Subordinate Judge awarded to the plaintiffs a third share in all the lands in dispute

On appeal by the defendants the Judge framed two issues, *viz*, (1) have the lands in question still remained joint between plaintiffs and defendants, and (2) have plaintiffs enjoyed their share in their profits within twelve years His findings on the above issues were in the negative so far as part of the land (No 200) was concerned, and in the affirmative with respect to remainder (Nos 561 and 567) He therefore amended the decree by dismissing the claim with respect to land No 200 The following is an extract from his judgment —

"On the whole although plaintiffs might have had good claim to land No 200 and that they might have been in possession thereof in years gone by I do not think that there is any evidence to show that their possession continued after 1870 and I find that point accordingly Their possession was totally denied in 1874 under an alleged adverse claim and this indicates that defendants had adverse possession since 1874 at least if not since before, and as this adverse possession was more than twelve years when the suit was instituted in 1890, plaintiffs title if any to the land was extinguished at that time

The plaintiffs preferred a second appeal

*Mahadeo V Bhat* for the Appellants (Plaintiffs) —The suit being one for partition the Judge wrongly framed the second issue under article 144*, schedule II of the Limitation Act (XV of 1877) The suit is for partition The Judge wrongly framed the issue under article 144 of the Limitation Act The issue ought to have been framed under article 127† as to whether the **[327]** plaintiffs had been excluded to their knowledge from the joint family property for twelve years Our claim as to land No 200 cannot be barred by defendant's adverse possession, because we have received payments out of the joint rents and profits That being so, the defendants cannot be in adverse possession of a part of the family property

*Narayan G Chandavarkar* for the Respondents (Defendants) —The issue framed was no doubt a wrong one Article 127, schedule II of the Limitation Act is applicable, the suit being one for partition Nevertheless the Judge's finding satisfies the requirements of article 127 The framing of a wrong issue was merely an irregularity which did not affect the merits of the case The Judge has come to a right conclusion and, therefore section 578 of the Civil Procedure Code (Act XIV of 1882) is applicable

**Farran C J** The Assistant Judge F P has in this case laid down the wrong issue for decision He has worded it Have plaintiffs enjoyed their share in the profits for twelve years, whereas the issue ought to have been "Have the plaintiffs been excluded from No 200 and their share of its profits to their knowledge for twelve years In considering the issue which it has laid down the Court has however come to the conclusion that the defendants

* [Art 144 —

| Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|
| For possession of immovable property or any interest therein not hereby otherwise specially provided for | Twelve years | When the possession of the defendant becomes adverse to the plaintiff ] |

† [Art 127 —

| | | |
|---|---|---|
| By a person excluded from joint family property to enforce a right to share therein. | Do | When the exclusion becomes known to the plaintiff ] |

have had adverse possession of No. 200 for twelve years, by which we must, we think, having regard to the framing of the issue which had been laid down, understand that the plaintiffs have been excluded from No. 200 and their share of its profits for twelve years. There is no finding that such exclusion has been to their knowledge, but it is clear that the Judge so intended, as he speaks of there having been disputes between the parties about this survey number since 1874. It would be too technical, we think, to hold that there has not been a substantial finding to the effect required by article 127, and it would be useless to send down an issue to have the same finding again recorded, but in different words, on a correctly worded issue.

It cannot, we think, be successfully argued that article 127 of the Limitation Act does not afford a defence to the plaintiffs' claim in so far as No. 200 is concerned if its provisions are [328] satisfied. The fact that the plaintiffs were not excluded from their share in other fields does not prevent, we think, the statute from operating in respect of the field from which they have been excluded to their knowledge. The argument on this part of the case has not been pressed. Our view accords with the judgment in *Pudha Mall* v. *Bhugwan Das*, Panj. Rec. No. 86 of 1886, cited by Mr. Starling in his work on the Limitation Act, page 254 We confirm the decree with costs.

*Decree confirmed.*

[ 21 Bom. 328 ]

## APPELLATE CIVIL.

*The 10th December, 1895.*

PRESENT :

CHIEF JUSTICE FARRAN AND MR. JUSTICE STRACHEY.

Chunilal Hajarimal by Mukhtyar Multanmal Lachhiram............(Original Plaintiff) Appellant

*versus*

Sonibai kom Hajarimal.. .........(Original Defendant) Respondent.*

*Civil Procedure Code (Act XIV of 1882), Secs. 503, 505 and 622—Receiver—Appointment of a receiver—Nomination by Subordinate Courts with grounds of nomination—Sanction of the District Judge - Order passed by the District Judge—Ex-parte order—Review—Appeal.*

The District Judge made an *ex-parte* order for the appointment of a receiver under section 505 of the Civil Procedure Code (Act XIV of 1882). Subsequently it having been shown to the Judge that the nomination made by the Subordinate Judge on which the order was passed was incorrect, the District Judge made an order admitting a review. The plaintiff appealed to the High Court. Without deciding whether an appeal would lie against the order of the District Judge, the High Court dismissed the appeal, holding that the order of the District Judge having, in the first instance, been *ex-parte*, he had clearly the power to review it.

APPEAL from the decision of W. H. Crowe, District Judge of Poona, in Miscellaneous Application No. 193 of 1895.

The plaintiff filed a suit in the Court of the First Class Subordinate Judge of Poona against his adoptive mother as administratrix of his property, and applied for the appointment of a receiver. The Court under section 503 of the Civil Procedure Code (Act XIV of 1882) ordered that a receiver

* Appeal, No. 38 of 1895 from order.

should be appointed to manage the money-lending business of the estate In submitting the name of a receiver for the sanction of the District Judge under section 505 of the Code the Subordinate Judge in [329] his report referred to the whole of the property in dispute instead of only to the money-lending business The District Judge having sanctioned the nomination made by the Subordinate Judge, the receiver attempted to take possession of the whole of the property in dispute The defendant thereupon applied for review of the order granting the sanction pointing out that the terms of the report made by the Subordinate Judge being at variance with his order, the sanction granted by the District Judge was illegal and praying that the sanction having been granted *ex parte* without giving her an opportunity of being heard, was contrary to law, and should be set aside

The Judge granted the application for review

The plaintiff appealed from the order granting the application for review

*Shivram V Bhandarkar*, for the Appellant (Plaintiff) —The Judge was wrong in granting a review of his order Section 505 of the Code does not relate to the propriety of the order passed for the appointment of a receiver What is to be taken into consideration under that section is the propriety of the nomination of the receiver The Judge's order is purely a ministerial order passed on the report of the Subordinate Judge The Judge has confounded the Subordinate Judge's judgment and his report The order nominating the receiver is his judgment, and his communication asking for the Judge's sanction for the nomination is his report The Judge cannot sit in appeal as to the report He had therefore, no power to review the order passed on the report The words "pass such other order as it thinks fit" in section 505 of the Code mean that the Judge may approve or disapprove of the appointment, or suggest the name of any other person

It was not necessary to issue a notice to the respondent because she had notice in the Subordinate Judge's Court The Judge's order being purely ministerial no notice was necessary

*Mahadeo B Chaubal* for the Respondent (Defendant) — Section 629 of the Civil Procedure Code (Act XIV of 1882) prescribes the grounds on which an appeal can be preferred The objections now urged cannot be made the grounds of appeal under [330] that section The Judge had authority to go into the question of the propriety of the order appointing the receiver—*The Bombay Persia Steam Navigation Company Limited* v *The S S "Zuary"* I L R, 12 Bom, 171 *Brajan* v *Ram Churn*, I L R 7 Cal, p 719

With respect to notice we submit that both the parties should be heard when an order is to be passed

**Farran, C J** —It is contended that this appeal will not lie from the order admitting a review The contention is probably correct —*The Bombay and Persia Steam Navigation Company, Limited* v *The S S "Zuary,"* I L R, 12 Bom 171 It is not however necessary for us actually to determine the question whether the appeal lies or not as it is open to us, if the Court had no jurisdiction to act as it did, to deal with the case under section 622 of the Civil Procedure Code and upon the merits the law seems to be clear Section 503 gives power to civil Courts in certain cases to appoint a receiver That however, is a power which subordinate Courts are forbidden by section 505 to exercise without sanction Such Courts can only make a nomination with the grounds for the nomination and upon that the District Judge can authorize the Subordinate Judge to appoint the person so nominated, or pass such order as he thinks fit. The latter words give full discretion, we think, to the District

Judge to pass such order as the circumstances of the case considered in all their bearings require. He may give the proper directions to the Subordinate Court. Nomination in section 505 seems to be equivalent to the conditional appointment of a receiver which the District Court can accept or reject or modify. We agree entirely on the above points with the judgment of the Calcutta High Court in *Birajan* v. *Ram Churn* I L R, 7 Cal, p 719

It is not necessary to consider in this case whether an appeal will lie to the High Court or not when the Court has passed its order We shall deal with that question when it arises

The order of the District Judge having in the first instance been made *ex parte*, he has clearly the power to review it Appeal dismissed with costs

*Appeal dismissed*

NOTES

[See however (1896) 18 All 153 and (1897) 21 Bom 34 In the C P C 1908 sec 505 is omitted ]

[331] APPELLATE CIVIL

*The 10th December 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR. JUSTICE STRACHEY

Vinayakrao Gopal Deshmukh (Original Judgment debtor) Appellant

*versus*

Vinayak Krishna Dhebri (Original Decree holder) Respondent *

*Limitation Act (XV of 1877) Sch II Art 179 Cl 4 Execution of decree Application by decree holder for leave to bid at the auction sale Step in aid of execution*

An application by a decree holder for leave to bid at the sale of his judgment debtor's immoveable property is an application to the Court to take a step in aid of execution of the decree and falls within the words of article 179 clause 4 of the Limitation Act (XV of 1877)

SECOND APPEAL from the decision of E C O Beaman District Judge of Thana, reversing the order passed by Rao Saheb B S Joshi Subordinate Judge of Pen, in an execution proceeding

On the 21st December 1889 Vinayak Krishna Dhebri obtained a decree against Vinayakrao Gopal Deshmukh awarding him possession of certain land and mesne profits He obtained possession of the land on the 3rd June 1890 On the 20th February 1891, he applied in execution to recover the mesne profits and costs from the judgment debtor and on his failure to pay the same to realize them by the sale of the judgment debtor's immoveable property, and if the proceeds of sale should be insufficient, then to realize the deficiency by sale of his moveable property On the 6th August 1891 he applied for permission to bid at the auction sale of the immoveable property and the Court granted the permission The immoveable property was accordingly sold The proceeds of the sale being insufficient, the decree holder paid the process fees for the attachment and sale of the moveable property, and the Court made the necessary order on the 24th November 1891, but no further steps were taken On the 26th February 1894, the decree holder again applied for the execution of the decree

* Second Appeal, No 585 of 1895

The Subordinate Judge rejected the application as barred by limitation, not being made within three years from the 20th February 1891, the date of the last previous application

[332] On appeal the Judge reversed the order, holding that when the decree holder paid the process for the attachment and sale of the moveable property there must have been made an oral application to execute the decree, and if not, such an application should be implied from the fact of the payment of the process fee

The judgment debtor preferred a second appeal

*Trimbak R Kotval* for the Appellant (Judgment debtor) —There is nothing on the record to show that the decree holder made an application for execution when he paid the process fees in November 1891 An application for execution cannot be implied, because he paid those fees He must set the Court in motion by an application—*Dhairanamma* v *Subba*, I L R, 7 Mad 306, *Kunhi Mannan* v *Seshagiri Bhakthan*, I L R, 5 Mad, 141, *Ali Muhammad Khan* v *Gur Prasad* I L R 5 All 344 *Tore Mahomed* v *Mahomed Mabood Bux* I L R 9 Cal, 730 *Rajkumar Banerji* v *Raj Lakhi Dabi*, I L R, 12 Cal, 441

*Gangaram B Rele* for the Respondent (Decree holder) —Our application is within time In our first application there was a prayer that if the proceeds of the sale of the immoveable property were not sufficient the moveable property should be sold Our subsequent payment of the fees for the attachment and sale of moveable property was tantamount to applying for execution

Next we contend that our application on the 6th August 1891, for permission to bid at the sale of the immoveable property was a step in aid of execution —*Bansi* v *Sikree Mal* I L R, 13 All 211

**Farran C J** — It will not be necessary for us to determine whether the District Judge was correct in implying an application for sale of the moveable property of the defendant by the plaintiff when he paid the process fee on the 30th November 1891, because it has been pointed out to us that the decree holder made an application for leave to bid at the sale of the immoveable property on 6th August 1891 within three years of his present application That application it appears to us, falls within the very words of the article 179, clause 4 It is an applica[333]tion to the Court to take a step in aid of execution of the decree viz to grant leave to the decree holder to bid

We agree with the decision of the Allahabad High Court in *Bansi* v *Sikree Mal* I L R 13 All 211 on this point which dissents from the expression of opinion of the Calcutta High Court in *Tore Mahomed* v *Mahomed Mabood Bux* I L R 9 Cal, 730 on this question, and accordingly confirm the order of the Lower Appellate Court with costs

*Order confirmed*

NOTES

[ Leave to bid is a step in aid of execution — (1900) 22 All 399 (1905) 8 O C 161 According to the Calcutta and the Punjab view it is a question of fact in each case — (1903) 30 Cal 761 (1905) 10 C W N 203 (1908) 12 C W N 621 (1912) P R, 60, see also (1914) 16 M L T 108 ]

[21 Bom. 333]

## APPELLATE CIVIL

*The 10th December, 1895.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE CANDY.

Maruti. . . (Original Defendant) Appellant
*versus*
Rama . . (Original Plaintiff) Respondent.

*Hindu law—Partition—Partition made under a bona fide mistake as to property subject to partition—Re-partition.*

The parties to a partition under a *bona fide* mistake included in the division certain property which did not belong to the family but was held in mortgage from a third person who subsequently brought a suit for redemption and recovered it from the party to whom it had been allotted at the partition.

*Held* that the party who had lost his share was entitled to claim a re-partition.

SECOND APPEAL from the decision of Rao Bahadur N. G. Phadke, Joint First Class Subordinate Judge, A. P., of Sholapur, in Appeal No. 61 of 1893.

Suit for partition. The family to which the parties to this suit belonged was possessed of certain joint property consisting (*inter alia*) of two *malas* (or orchards).

At a partition made about twenty years before suit one of the *malas* was assigned to the plaintiffs' predecessor in title and the other *mala* to the defendants' predecessor. At the time the partition took place all the parties *bona fide* believed that the *mala* assigned to the plaintiffs' predecessors was family property, but as a matter of fact it was only held in mortgage, it having been mortgaged to the family at a very remote period.

**[334]** In 1885 the mortgagor's descendants brought a suit for redemption of the *mala* in question, and obtained a decree for possession, the Court finding that the mortgage debt had been paid off out of the usufruct. In execution of this decree the plaintiffs were dispossessed of the *mala*.

The plaintiffs thereupon brought this suit to recover their share in the other *mala* by its equal division between themselves and the defendants.

The Subordinate Judge rejected the plaintiffs' claim, holding that the property could not be partitioned again.

This decision was reversed, on appeal, by the First Class Subordinate Judge, A. P.

The defendants thereupon preferred a second appeal to the High Court.

*Manekshah Jehangirshah* for the Appellants.

*Ghanasham Nilkanth* for the Respondents.

**Parsons, J.**—An interesting point arises in the decision of this appeal. The family to which the parties belong thought that they owned absolutely two *malas* (orchards), and at a partition made some twenty years ago one *mala* was assigned to the defendants' and one to the plaintiffs' predecessors in title. Very recently a suit was brought against the parties by a third person to obtain possession of the *mala* that had been assigned to the plaintiffs, and it was decided that the *mala* was held by the family on an ancient mortgage, the right to redeem which was still subsisting, and that the mortgage money had been paid off from

* Second Appeal, No. 707 of 1894.

the usufruct the plaintiffs consequently lost their *mala*, and they now bring this suit to make the defendants contribute towards the loss they have sustained, in other words, for a re partition No fraud is alleged at the time or in the mode of the partition There was a *bona fide* mistake shared in by all parties as to the ownership of the *mala* The Judge says It is beyond all doubt that the parties to the division made it in ignorance of the mortgage and under the idea that the mortgaged property was absolutely theirs and that their interest in it was limited at all Under these circumstances we think that the plaintiffs are [335] entitled to the relief they ask In his work on Hindu Law, at p 232, Sir T Strange says Whenever from any cause not understood at the time the division proves to have been unequal or in any respect defective, it may be set to rights notwithstanding the maxim Once is partition of the inheritance made' In the case of *Davloba* v *Lavagavda* P J for 1883, p 227, a person claiming by a paramount right came in after partition and took away one half of the property The learned Judges decided that in such a case the parties were bound to bear that loss equally They had divided under such a misapprehension of the true state of the case that the Hindu law, like common equity would correct the error by distributing the existing but unknown burden evenly where it was placed on one only of the sharers The principle of that decision applies exactly to the present case We confirm the decree with costs

*Decree confirmed*

NOTES

[ See also (1906) P L R ]

[ 21 Bom 335 ]

TESTAMENTARY JURISDICTION

*The 21st August 1896*

PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE, AND MR JUSTICE FULTON

Ghellabhai Atmaram (Original Plaintiff) Appellant

*versus*

Nandubai . (Original Defendant) Respondent *

*Executor— Will —Arbitration —Power of executor to refer the question of execution of a will to arbitration —Evidence Evidence to explain written document Evidence Act (I of 1872) Secs 92 and 94 —Practice*

*Semble* An executor against whose application for probate a caveat has been entered, cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased

An executor having propounded a will and applied for probate, a caveat was filed denying the execution of the alleged will and the matter was duly registered as a suit The executor and the caveatrix subsequently referred the dispute to arbitration, signing a submission paper which was as follows —

'To Bhangaldas Kalidas Ramji Written by us the undersigned By this instrument we give to you in writing as follows —In the matter of an application presented by Ghellabhai Atmaram Tambuwala to obtain power (probate) from the High Court for the administration and enjoyment between us two persons of the property of Bai Godawari, widow of Darji (tailor) Bhowan Deva Dave and Nandubai the [336] wife of Mulji Mala,

* Testamentary Suit, No 21 of 1898, Appeal No 907.

having raised an objection have got a caveat registered in the High Court In the matter thereof we the said plaintiff (and) defendant have appointed you an arbitrator to bring about a settlement of the said dispute As to whatever award you may make and give on arriving at a decision, the same is to be agreed to and abided by us two persons In this matter we each other agree and consent to act according to your award This submission paper we of our free will and pleasure and in our sound mind and consciousness have made and delivered after having read and understood the same It is agreed to and approved of by us, and our heirs and representatives in Court (and) the Durbar Bombay The English date the 30th of October in the year 1893 "

Before the arbitrator the parties were represented by solicitors witnesses were called and examined and the arbitrator made an award finding that the alleged will had not been executed The executor nevertheless subsequently proceeded with his application for probate. The caveatrix contended that he was bound by the award He held that the parties had never really intended to refer the question of the execution of the will to arbitration and tendered evidence to prove this

*Held* that the evidence was admissible The language of the submission paper was not so plain in itself nor did it apply accurately to existing facts as to prevent the evidence being given —Section 94 of the Evidence Act (I of 1872)

APPEAL from CANDY, J (I L R 20 Bom 238) The plaintiff applied for probate of the will of one Godawaribai alleging himself to be the executor according to the tenor of the said will The defendant filed a caveat denying that Godawaribai had executed any will The matter of the application was duly registered as a suit (see section 83 of Act V of 1881)

While the said suit was pending, the parties on the 30th October 1893, referred the dispute between them to arbitration

The submission paper was as follows

"To Bhangsali Kalidas Ramji Written by the undersigned By this instrument we do you in writing as follows —In the matter of an application presented by Ghella bhai Atmaram Lambuwala to obtain power (probate) from the High Court for the administration and enjoyment between us two persons of the property of Bai Godawari widow of Tarpuri (?) Bhowan Deva Dave I Nandubai the wife of Mulji Mala having raised an objection have got a caveat registered in the High Court In the matter thereof we the said plaintiff (and) defendant have appointed you as arbitrator to bring about a settlement of the said dispute As to whatever award you may make and give on arriving at a decision, the same is to be agreed to and abided by us two persons In this matter we each other agree and consent to act according to your award This submission paper we of our free will and pleasure and in our sound mind and consciousness have made and delivered after having read and got read and understood the same It is agreed to and approved of by us and our [337] heirs and representatives in Court (and) the Durbar Bombay The English date the 30th October in the year 1893

The parties appeared before the arbitrator and were represented by solicitors After hearing the evidence the arbitrator on the 18th April 1894, published his award whereby he found that the alleged will was not executed by Godawaribai The award was as follows —

"To all to whom these presents shall come I Bhangsali Kalidas Ramji of Bombay, send greetings Whereas by a suit in the High Court of Judicature at Bombay being Suit No 21 of 1893 wherein one Ghellabhai Atmaram who had applied to the said High Court on its Testamentary Side for probate of the will of Bai Godawaribai widow of Bhowan Deva Dave, dated the 3rd day of April 1890, was plaintiff and applied for probate of the said will, and one Nandubai, wife of Mulji Mala, who had filed a caveat to the said application for probate, was defendant and disputed the said will and whereas by an instrument in writing dated the 30th day of October 1893, and under the respective hands of the said Ghellabhai Atmaram and Nandubai it was referred to me as a single arbitrator to bring about a settlement of

the said dispute Now know ye that I the said Bhangsali Kalidas Ramji, having taken up on myself the burthen of the said reference and having heard what was alleged by or on behalf of the parties respectively and having heard and considered all such evidence, oral and documentary as hath been produced before me and having duly weighed and considered all matters and things to me referred as aforesaid do make and publish this award in writing and concerning the matter as follows That is to say I do award and determine that Bai Godavari the widow of Bhaiji Devi Das did not execute the said will dated the 11th day of April 1890 which was produced and put in evidence before me by the said Ghellabhai Atmaram In witness &c

Notwithstanding the said award the plaintiff subsequently proceeded with his suit to obtain probate of the will He contended that he was not bound by the award and he tendered evidence objected to by counsel for defendant but provisionally admitted to show that when he signed the submission paper he was under the impression that the arbitrator would merely determine what sum of money should be paid to the defendant to buy off her opposition to the issue of probate

The defendant pleaded that the award was binding and that until set aside, the plaintiff could not proceed with the suit

CANDY J dismissed the suit holding that the award was binding (I L R 20 Bom 338)

*Branson and Macpherson* for the Appellant (Plaintiff) We contend that an executor cannot refer the question of the genuineness [338] of a will to arbitration That question can only be determined by the Court The point does not seem to have arisen hitherto The evidence shows that the award was fraudulent and it is therefore not binding on the appellant They referred to Act V of 1881 section ...

*Scott and Russel* for Respondent (Defendant) The award is binding on the plaintiff It does not affect others who are not parties to it, so that the beneficiaries under the alleged will are not prejudiced They can prove the will if they please There is no reason why an executor should not refer such a question to arbitration He can compromise a suit *Brown v Saunders* 30 L J (Pr & M) 151 *The Viscount Strathmore v Dunlop* 2 Sw and T 611 *Eadnell v Carter* 3 Sw and T 121 *Norman v Strains* 50 L J (Pro & M) 39 6 P D 219 *Harrison v Hart* 1 2 Sw and T, 602

The evidence given in the lower Court as to what the plaintiff intended to refer to the arbitrator ought not to have been admitted and cannot be considered —Evidence Act ... 91 and 92 *Thubron v Lime* L R, 2 C P, 381

**Farran C J** The questions which we have to determine upon this appeal though of a technical nature are important The circumstances under which they arise are these

On the 27th September 1893 the plaintiff Ghellabhai applied for probate of the will of a widow named Godavaribai From that application it appears that the alleged testatrix left her surviving an unmarried daughter Ambabai said to be imbecile, her husband's sister Nandubai and the petitioner, alleged to be a paternal cousin of her husband The will which has been propounded purports to provide for the maintenance of Ambabai and for her funeral ceremonies and for the maintenance of a boy named Krishna whom Godavaribai had brought up and maintained Subject to the maintenance of Ambabai and the testatrix's ... it gives two houses to her caste and provides for various charities and ceremonies It recites that Nandubai had given Godavaribai a release and had no title or interest in the property, but it gives her a legacy of Rs 5,000 and [339] concludes as follows —

And after my death my true heir is my husband's brother Ghellabhai

Atmaram He is the mukhtyar of all the said property and he shall personally carry on the management and after him the whole caste shall carry on the same" The will purports to bear a large number of attestations

On the 27th October 1893, Nandubai entered a caveat, but filed no affidavit in support of it A few days later the petitioner and caveatrix signed a submission paper in favour of one Kalidas Ranji in the following terms —

'In the matter of an application made by Gokuldas Atmaram Kanji to obtain 'power' from the High Court for the administration and management between us two persons of the property of Bai Godawaribai the widow of Dulji Bhawan Davidas Nandubai, the wife of Mulji Malu having raised a dispute and having entered a caveat registered in the High Court In the matter thereof we the abovenamed had dispute and have appointed you an arbitrator to bring about a settlement of the said dispute In the matter whatever award you may make and give in writing shall be considered as agreed to and abided by us two persons

There is a question between the parties as to what the dispute referred to in that submission really was I shall revert to that matter hereafter, merely stating here that the plaintiff alleges that the existence of the will by the testatrix was not a matter in dispute and that he never intended to refer and did not refer that question to arbitration

Several witnesses to prove the will were examined before the arbitrator No witnesses were called by the caveatrix On the 18th of April 1894, Kalidas made an award which determined that Bai Godawaribai did not execute the will of which probate was sought After this the plaintiff proceeded with his application for probate Nandubai, whose caveat had been dismissed as no affidavit had been filed in support of it obtained leave to restore it and put in an affidavit setting out the grounds for her caveat In it she contended that Godawaribai had no right to make a will as the property of which she purposed to dispose was the ancestral property of her husband and she relied upon the award as conclusive against the plaintiff's application for probate and denied that the applicant was related to the husband of Godawaribai

[340] Assuming for this purpose that the applicant by the submission which he signed referred the subject of the execution of the will to arbitration the first question which we have to determine is the general one, viz Does an award made in the course of a proceeding without the intervention of the Court between an executor and a caveatrix, that the will propounded had not been executed by the testatrix preclude a Court of probate from considering an application by such executor for probate?

I agree with the Division Bench in its view that if such an award can be pleaded in bar of the application, the Probate Court is the tribunal which must determine the plea even though in doing so it has incidentally to decide on the *factum* and validity of the award The Probate Court is the only Court to determine whether probate of an alleged will shall issue generally or shall issue to the executor named in it Before coming to a determination on that point it has often to decide upon questions incidentally arising such as the domicile of the testator, whether he has left assets whether the executor has renounced and other cognate matters Whether the existence of an award precludes an executor from obtaining probate appears to me to be one of such cognate matters which a Court of Probate must determine for itself We have therefore, to consider whether the above is a valid legal plea

A preliminary difficulty which presents itself to giving effect to such a plea is this It is admitted that such an award is not binding upon the beneficiaries who claim under the will Application to prove the will can still be made by the persons entitled under section 18 of the Probate Act to make such

an application including the legatees Upon such an application being made, and the will being proved, administration cannot be granted with the will annexed until the executor has been called upon to accept or renounce (section 16) If the executor does not submit to the award, it is clear that he will not renounce If he does not renounce, probate must go to him An *impasse* is thus brought about The difficulty though technical in its nature is nevertheless real It can only I think, be got over by treating the submission and award as an implied renunciation, but that would be [341] adding a new mode of renunciation to those prescribed by the Probate Act (section 17)

The Division Court has not intimated in its judgment under what provision of the Civil Procedure Code it has dealt with the plea which I am considering There is no section of the Code which specially enables a Court to take cognizance of a submission to arbitration of a matter in issue in a suit made pending the suit (other than a submission through the Court) or of an award made upon such a submission Such submission and award can only I apprehend, be taken cognizance of in the same suit as an adjustment of the suit under section 375 of the Civil Procedure Code as was done in *Samubai* v *Premji*, I L R 20 Bom, 301 Section 375 however only enables the Court to take cognizance of a lawful agreement This directly raises the question whether a submission by an executor as to the execution of the will appointing him is a lawful agreement for an executor to enter into The Division Court has assumed that it is There are I think, grave difficulties in the way of such an assumption No authority bearing directly on the subject has been cited to us and I have not been able to find any I feel therefore some hesitation in coming to a conclusion upon it The position of an executor is a peculiar one His office being a private one of trust named by the testator and not by the law, the person nominated may refuse though he cannot assign the office Williams on Executors, (9th Ed), p 225 If he accepts the trust and intermeddle in the estate of the testator, he cannot afterwards retract, but is bound to proceed and prove the will—*Mordaunt* v *Clarke*, L R 1 P & D 592 Williams on Executors, (9th Ed), p 227 The duty therefore of an executor appears to be first to consider whether the will appointing him is the will of the testator and then whether he will act in the trust committed to him Having determined these questions in the affirmative his next proceeding ought, I think to be to prove the will in the Court to which the Legislature has granted exclusive jurisdiction in such matters It is, I think, a plain violation of his duty to entrust to any other tribunal the determination of the question of the *factum* of his own appointment If the arbitrator decides against the will it appears [342] to me, that if the executor still believes, as he alleges that he does here that the will is the will of the testatrix, his duty to prove the will still subsists An executor I think has no right to place himself in such a position as to preclude him from performing the duty which the law casts upon him It must be borne in mind that an executor applying for probate is not an ordinary litigant He is in the position of a trustee performing a duty He represents both the testator whose will he is carrying out and is in the position of a trustee for the objects of the testator's bounty He is not dealing with a matter which concerns himself exclusively, though he may be personally interested in it It appears to me that where it is conceded that his action in referring the *factum* of the will to another does not bind the beneficiaries under the will, it follows that his action is not authorized either by the mandate which he has received from his testator or by the trust which he is under to the beneficiaries Whence, then it may be asked, comes his authority to refer?

It is, I think, a fair test of the lawfulness of the executors' action in such a matter to consider whether the Court will itself in such a case refer the *factum*

of the will to arbitration under section 508 of the Civil Procedure Code (Act XIV of 1882) In my opinion, it would have no authority to do so Clearly it would not refer such a matter in which beneficiaries were interested without their consent and here none of them consented, and one of them, Ambabai, could give no consent Again, assume that the arbitrator pronounced in favour of the will It is clear to my mind that the Probate Court could not grant probate on such a vicarious finding It must I think, be itself satisfied by admissible evidence that the will is the will of the testator In my opinion section 508 of the Civil Procedure Code is not applicable to probate proceedings The provisions of section 69 and of other sections of the Probate Act (V of 1881) appear to me to preclude the possibility of a Probate Judge referring the question of the execution of a will to arbitration, unless possibly all the beneficiaries appeared before him and consented to that course and even then I doubt whether the Court could refer it If a Judge could not himself refer such a question to arbitration, it follows I think that he cannot act upon an award which the executor and [343] caveator have otherwise than through the Court submitted to The following cases though not actually in point support I think the above conclusions — *Norman* v *Strains* 6 P D 219 *Harpinnes* v *West* 2 S and T, 602 *Wytcherley* v *Andrews* L R 2 P & D 327 Counsel for the appellant rely in support of their appeal upon the absence of all precedent for such a plea as the one under consideration being set up in a Probate Court I think that they are justified in doing so and the absence of all authority upon the question is an argument against its validity It leads to the inference that it is an unusual if not an unprecedented proceeding for an executor to adopt such a course and that a Court has not before sanctioned it

Mr Scott contends that there is nothing unusual in a compromise being entered into in the course of probate proceedings and that a reference to arbitration is only one mode of compromise I have looked at all the cases of compromise which he has cited in addition to those above referred to In each case [except in *Evans* v *Saunder* 30 L J (P and M) 181 where no facts are given] it appears that the result of the compromise was that probate of the will issued opposition being abandoned They therefore shed no light on the present case — *The Viscountess Hawarden* v *Dunlop* 2 Sw and T 614 *Wadnight* v *Carter*, 3 S and T 421

There can be, of course no doubt that a caveator can withdraw upon terms his opposition to the will

It is said that if an executor cannot refer the question of the *factum* of the will to arbitration, it follows that he cannot withdraw from a suit for probate even if he finds that the will which he has propounded is not the will of the testator That is I think a fallacy A forged will imposes no obligation upon the executor named in it or on any one else When the so called executor finds that he has not been nominated by a testator, he is bound to withdraw from the position which he has unwittingly taken up But it is I think the duty of the executor of a genuine will to prosecute a probate suit notwithstanding opposition, and he is I think, bound to do so if he has intermeddled with the [344] estate He can only legitimately escape from his position by renouncing it if he still has it in his power to renounce

For these reasons I am strongly of opinion that notwithstanding the award, the Division Court ought to have tried the issue as to the genuineness of the will, but in view of the conclusion which I have come to on the remaining part of the case, it is not necessary for me finally to decide that point

Turning to the next question which is, whether the applicant referred the *factum* of the will of his testatrix to arbitration, we have in connection with it

to consider how far parol evidence is admissible in the case. There is no doubt as to the law upon this subject. Though parol evidence is not admissible to contradict, vary, add to or subtract from the terms of the submission which has been by the parties reduced to writing, such evidence is admissible to show in what manner the language of it is related to existing facts—Evidence Act (I of 1872), section 92. Thus if an undescribed dispute is referred to arbitration, evidence is admissible to show what the actual dispute was at the time of the submission. A qualification of the above rule is contained in section 94 of the Act, which provides that when the language used in the document is plain in itself and accurately applies to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

In this case the evidence of the plaintiff and his witnesses which the Division Court has believed proves in my opinion, to demonstration that the plaintiff was informed by postcard (Exhibit A) that Kalidas had brought proposals with regard to Nandubai matter saying that Nandubai might be brought round and the matter might be thus settled and that Nandubai wanted Rs 5,000 (it must be remembered that Nandubai was the sister of Godawaribai's husband and his nearest heir) but Kalidas said that an amount to the extent of Rs 2,000 might be named and paid to her and that after settling the matter he might be taken before the Das. The applicant says that he was willing to settle upon these terms and that with a view to do so he signed the submission paper. If this is to be believed the only matter in dispute at the date of the submission was the amount to be paid [346] to Nandubai. This is established further by the letter (Exhibit G) written by the instructions of Nandubai's agent Narayan, the day after the signing of the submission paper by the applicant stating that "Nandubai had no intention of proceeding further with the *caveat* filed on her behalf and had therefore not put in any affidavit in support thereof. She will therefore have no objection to your client's proceeding with the petition for probate of the will of the deceased and obtaining probate thereof." If this evidence is admissible, it establishes almost conclusively that Nandubai had through Kalidas proposed that her claim should be bought off and that the applicant agreed to that being done and that the only dispute at the time of the submission was as to the amount which was to be paid to her.

The application of the law to the facts is the main difficulty in this case. Is the language of the submission paper so plain in itself and does it apply so accurately to existing facts as to preclude evidence of the fact which I have referred to being given? This is the question to be determined. If the nature of the objections made by Nandubai had been shown in an affidavit in support of her caveat, it would have solved the difficulty. Was it an objection made on the ground that her rights as next heir of Godawaribai's husband had been ignored (which is put in the forground of her present affidavit), or was it an objection that the will propounded had not been executed by Godawaribai? If it had been the latter, we should, I think, have expected that the specific point would have been referred to the arbitrator. The language of the submission paper, "we * have appointed you an arbitrator to bring about a settlement of the said dispute" points rather to an objection of the former kind. Reading the submission in the light that has been given by the evidence which I have referred to, it appears to me that it is clear that it was an objection based upon the heirship of Nandubai which the parties had in view. The submission paper does not appear to me to be so plain in its language as to show accurately what was the nature of the dispute referred to arbitration and to exclude further evidence. That further evidence being given, I am satisfied

that the question of the *factum* of the will was not the dispute which the parties had in mind when they respectively [346] signed the submission. The caveatrix, it is true, has not given evidence, but the letter (Exhibit G), which we must take to have been written under instructions, is cogent proof of what her view of the dispute was. Although it is true that an objection to the will on the ground that the testatrix as a Hindu widow had no power to dispose by will of the property left by her husband is not one which a Court of probate would (except in a very extreme case) entertain, yet such an objection is so often in this Court put in as the only foundation for a caveat that I do not think that its inutility as a ground of *caveat* militates against the view which I have above expressed, as to the dispute which was really referred.

The Division Bench would apparently have come to the same conclusion, but considered that the subsequent action of the solicitors of the respective parties precluded the Court from acting on that view. They appear to have been in ignorance of the real subject of reference and to have appeared before the arbitrator to argue the execution of the will. Assuming that the dispute was at the time of reference that which I have indicated, there was nothing to prevent the parties from subsequently enlarging its terms or altering its character — Russell on Awards Part I, Chapter III, section 1. This the Division Court appears to have thought was done in this case. This, however, could only be done with the consent of the plaintiff and caveatrix and it is clear that the plaintiff in this case did not agree to it. He was absent in Surat and knew nothing of what was being done. He appears to have been astonished when he saw the contents of the award, and went at once and told his solicitors that he had been swindled. I am, therefore, of opinion that the award decided a matter which was not originally or subsequently referred to arbitration, and that the finding upon it is not binding upon the applicant.

It is unnecessary to consider the further question as to whether the arbitrator was guilty of misconduct. The Division Bench thinks that though there may exist suspicion upon the point, corruption is not proved. The arbitrator, if Ghellabhai is to be believed, knew exactly what was referred to him. It is possible [347] that the conduct of the solicitors subsequently misled him, but I have great difficulty, upon the evidence, in believing that it was an honest award. However, I need not come to a positive conclusion upon that point. For these reasons I would reverse the decree and remand the case for retrial upon the fifth issue. Costs to be dealt with by the Probate Court.

**Strachey, J.** —I am of the same opinion. As to whether an executor against whose application for probate a caveat has been entered can lawfully submit to arbitration the question whether the will propounded by him was duly executed by the deceased, and whether an award made upon such submission against the will would preclude a Court of probate from considering the application, there seems to be a complete absence of direct authority, and I cannot say that I am entirely free from doubt. But I can see no answer to the reasoning of the Chief Justice, and I therefore concur in his judgment on the point. Whatever else such a submission to arbitration may be, it appears to me to involve an agreement by the executor in a certain event to renounce the executorship. He virtually undertakes, in the event of the arbitrator deciding against the will, not to make or proceed with the application for probate, and to treat the will as invalid in accordance with the award. Whether the award that the will is invalid is binding on the executor and the Court of probate, depends on whether a submission by the former involving such an agreement is lawful and constitutes a valid adjustment of the probate suit within Section 375 of the Code of Civil Procedure. If, at the time of the

submission, the executor has intermeddled with the estate, he could not lawfully renounce the executorship, and the agreement to renounce it in a certain event would be bad as an agreement to do something which he could not lawfully do. If at that time he has not intermeddled with the estate, the result of treating the submission and award as precluding him from making or proceeding with an application for probate would be to give an agreement to renounce when followed by an award the effect of an actual renunciation, which, under section 194 of the Succession Act, 1865, and section 17 of the Probate and Administration Act, 1881, should be made either orally in the presence [348] of the Judge or by a writing signed by the person renouncing. I do not doubt that an executor may exercise his own judgment as to the execution and validity of the will, and is not bound to prove or carry out the provisions of a will which he believes to be a forgery. I do not think, however, that he can delegate the exercise of his judgment to another, and, whatever his own opinion may be as to the will, and whether or not he has intermeddled with the estate, bind himself to treat the will as a forgery if an arbitrator so decides.

As regards the rest of the case, I agree with the Chief Justice that evidence was properly admitted by the Division Court and may be considered by us to show what was the dispute to which the submission related; and that the dispute was not as to the execution of the will but as to the amount to be paid to the caveatrix in consideration of her withdrawing her opposition. That being the dispute originally submitted to arbitration, and the scope of the arbitration not having been subsequently altered by agreement of the parties, the arbitrator was not competent to determine the question of the execution of the will, and his award was consequently *ultra vires*, and not binding on the executor. The principle referred to by the Division Court that "the parties, knowing the risk they ran, chose their tribunal, and they must abide by the result" has no application where the tribunal decides a matter which they have not submitted for its decision. I concur in the decree proposed by the Chief Justice.

*Decree reversed and case remanded*,

Attorneys for the Appellant (Plaintiff).—Messrs. *Chitnis, Motilal and Malvi.*

Attorney for the Respondent (Defendant):—Mr. *K. J. Mantri.*

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**NOTES.**

[This was followed in (1903) 31 Cal., 357 (a case of compromise); (1910) 12 C. L. J., 91; (1910) 14 C. W. N., 924 : 12 C. L. J., 185. See also (1900) 24 Mad., 326; (1901) 26 Bom., 76; (1908) 33 Bom., 69.]

[349] ORIGINAL CIVIL

*The 21st and 28th August, 1896*

PRESENT

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR JUSTICE STRACHEY.

Tribhovandas Mangaldas and another ... ... (Original Plaintiffs) Appellants

*versus*

F. Yorke Smith and others ...... (Original Defendants) Respondents.*

*Hindu law—Undivided family—Ancestral property—Self acquired property made ancestral by agreement—Operation of such agreement—Effect of such agreement on accumulations and accretions of the property*

APPEAL from B TYABJI, J The plaintiffs (appellants) brought this suit against the executors of the will of Sir Mangaldas Nathubhoy praying for a declaration that the said will was inoperative and void as far as it purported to dispose of certain ancestral property and for a declaration that certain immoveable properties specified in the plaint and all their accumulations and accretions were ancestral property and devolved upon the plaintiffs and their heirs according to Hindu law irrespectively of the said will and for an account of such accumulations and accretions, and for a declaration that as against the plaintiffs and their heirs the said accumulations and accretions did not form part of the self-acquired property of the said Sir Mangaldas Nathubhoy, and that no part thereof was or could be validly disposed of by the will of the said Sir Mangaldas Nathubhoy

The plaintiffs, who claimed the said properties and their accumulations as ancestral, were the two eldest sons of Sir Mangaldas Nathubhoy It appeared that in 1881 they had entered into a certain agreement with their father, in the recitals to which Sir Mangaldas had expressly admitted that the said properties were ancestral This agreement had remained in force, and its terms had been duly observed by the plaintiffs, up to the death of Sir Mangaldas on the 9th March 1890.

In the interval, however, *viz*, in 1886, by a decree made by the High Court in a partition suit brought by a third (the youngest) son of Sir Mangaldas, the said immoveable properties had been [350] declared to be not ancestral property but the self-acquired property of Sir Mangaldas

In 1890 Sir Mangaldas died, and by his will, which was dated 27th January 1888, he left the residue of his self acquired property to the University of Bombay

The main question in the suit was as to the effect of the agreement of 1881 The plaintiffs contended that the properties thereby admitted to be ancestral continued to be ancestral or at all events then became ancestral property in the hands of Sir Mangaldas, and that being ancestral all their accumulations and accretions were also ancestral, and that being so they were not included in the residue of his property bequeathed to the University

The lower Court (B TYABJI, J) held upon this point that under the agreement only the *corpus* of the properties in question were ancestral property and that the accumulations and accretions thereof passed as self-acquired property under the residuary bequest in the will The lower Court dismissed the suit The case is fully reported in I L R, 20 Bom., 316

* [illegible] No. 114 of 1895, App[illegible] [illegible]

The plaintiffs appealed, and the Appeal Court ... and STRACHEY, J.) reversed the decree, holding that all accumulations and accretions to the properties in question subsequent to the agreement of the ... 1881, were ancestral property and passed, as such, to the ... of Sir Mangaldas Nathubhoy at his death. An account was ordered to be taken of such accumulations and accretions.

Attorneys for the Appellants (Plaintiffs) :—Messrs. *Nanu and Hormasji*.

Attorneys for the Respondents (Defendants) :—Messrs. *Little and Co.*, Messrs. *Boughton and Byrne*, and Messrs. *Craigie, Lynch and Owen*.

## [351] ORIGINAL CIVIL.

*The 4th, 7th and 8th September, 1896.*

PRESENT :

MR. JUSTICE STRACHEY.

Chandulal Khushalji............Plaintiff

*versus*

Awad bin Umar Sultan Nawaz Jung Bahadur............Defendant.*

*Civil Procedure Code (Act XIV of 1882), Sec. 433—Ruling chief, suit against—Consent of Governor-General in Council—Consent given subsequent to institution of suit—Insufficient consent—Practice—Procedure—Waiver by defendant of objection to consent.*

Under section 433 of the Civil Procedure Code (Act XIV of 1882) a consent given by the Governor-General in Council after the commencement of a suit against a ruling chief—a consent not to the suit being instituted, but to its being proceeded with—is not a sufficient consent. If the consent has not been obtained before the commencement of the suit, the Court should dismiss the suit or allow the plaintiff to withdraw it with liberty to bring a fresh suit under section 373 of the Civil Procedure Code (Act XIV of 1882).

Where an insufficient consent has been obtained by the plaintiff, the defendant may by his conduct waive the defect, so that notwithstanding the absence of a valid consent under the section the suit can be heard and determined on its merits.

TRIAL of a preliminary issue as to whether the Court had jurisdiction to try the suit.

The defendant, who was the Chief of Shihr and Mokalla in Arabia, was the owner of a dockyard situate at Mazgaon in Bombay. On the 23rd March 1893, the plaintiff brought this suit against him in the High Court of Bombay, claiming Rs. 1,50,000, damages for breach of an alleged contract to give him (the plaintiff) a lease for five years of the said dockyard at a rent of Rs. 4,000 a month. In August 1893, the defendant filed his written statement in which he denied the alleged contract and made a counter claim against the plaintiff.

Various proceedings in the suit subsequently took place. In November 1893, the defendant filed his affidavit of documents and in the same month he obtained an order that the plaintiff should do the same. Subsequently the suit appeared several times in the list for hearing, but was postponed. On the 23rd December 1893, the defendant obtained an order for a commission for the examination of himself and certain witnesses at Hyderabad.

[352] In the month of April 1894, the defendant's solicitor while at Hyderabad, where the defendant was then residing, ascertained that the

* ... No. 107 of 1893.

defendant was "the Jemadar of Shihr and Mokalla on the southern coast of Arabia, holding a protectorate treaty with the British Government ratified on the 26th February 1890." As such under section 433 of the Civil Procedure Code (Act XIV of 1882), he could not be sued without the consent of the Governor General in Council No such consent had been obtained by the plaintiff, and accordingly the defendant filed an additional written statement submitting that the Court had no jurisdiction to hear the suit, and alleging that it was only in the month of April 1894, that he became aware of the provisions of section 433 of the Civil Procedure Code, and that he had filed his first written statement in ignorance

On the 7th July 1894, an order was made upon a summons taken out by the defendant that the suit should be set down for hearing upon the preliminary issue as to the jurisdiction of the Court to hear it Shortly after this order was made the plaintiff sent a petition to the Government of India stating the nature of the suit and applying for the consent of the Governor General in Council as required by section 433 of the Civil Procedure Code (Act XIV of 1882), and on the 28th August 1894 a certificate purporting to be under that section, was granted to the plaintiff in the following terms -

"This is to certify that under the provisions of section 433 of the Code of Civil Procedure the Governor General in Council consents to Chandulal Khushalji proceeding against His Highness the Sultan Nawaz Jung in Suit No 147 of 1893 instituted in the High Court at Bombay or in any suit based on the same cause of action which the said Chandulal Khushalji may hereafter institute against His Highness the Sultan Nawaz Jung in the said Court

It appeared that the above sanction was granted upon a statement made by the plaintiff that the defendant carried on trade within the jurisdiction of the High Court of Bombay The defendant denied that statement and the Government of India thereupon suspended the certificate pending an inquiry into the facts Ultimately on the 6th November 1895, the Government of Bombay informed the plaintiff's solicitors that the Government of India had decided that the certificate granted by them under [358]section 433 of the Civil Procedure Code authorizing the institution of civil suits in the High Court at Bombay by Chandulal Khushalji against His Highness Sultan Nawaz Jung Bahadur of Shihr and Mokalla should now be allowed to take effect '

On the same date, however, (6th November 1895) the Chief Secretary to the Government of Bombay wrote also to the defendant's solicitors as follows -

'I am directed to inform you that the Government of India are of opinion that the point whether His Highness Sultan Nawaz Jung of Shihr and Mokalla does or does not carry on trading transactions in Bombay appears arguable and may conveniently be left for the decision in a court of law and that they have accordingly decided that the certificate granted by them under section 433 of the Code of Civil Procedure authorizing the institution of civil suits in the High Court at Bombay by Chandulal Khushalji against His Highness the Sultan, should now be allowed to take effect

The material parts of the correspondence which took place relating to the grant of the sanction of this suit by the Government of India are set forth at length in the judgment of the Court

The case now came on for hearing upon the preliminary issue as to whether, having regard to the provisions of section 433 of the Civil Procedure Code (Act XIV of 1882), the Court had jurisdiction

*Macpherson* (with *Branson*), for Plaintiff —This Court has jurisdiction. The necessary consent under section 433 has been obtained The sanction may be given at any time Compare clause 12 of the Letters Patent, 1865. But in any case the defendant has clearly waived his privilege under section 433—*Mighell v. Sultan of Johore* (1894) 1 Q. B. 149.

*Scott* (with *Lang*, Advocate-General), for the Defendant:—This suit was brought without the necessary consent of the Governor-General. This consent is not merely a privilege given to ruling chiefs which may be waived by them; it is a condition necessary to give the Court jurisdiction—*Sarnam Tewari* v. *Sakina Bibi*, I. L. R., 3 All., 417. The language of section 433 plainly shows that the consent must be given before the suit is brought. The phrases "may be sued" (clause 1), "desiring to sue" (clause 2a), "is to be sued" (clause 2c) show this—*Ladkuvarbai* v *Ghoel Shri* [354] *Sarsangji*, 7 Bom. H. C. Rep., 150 (O. C. J.), *Kambhai* v. *Himatsangji*, I. L. R., 8 Bom., 415, *Phumman Lal* v. *Raja Samsher Parkash*, 10 Punjab Rec., pp. 218, at p. 221; *Jwala Pershad* v. *H. H. the Rana of Dholepore*, S. D. A. (N. W. P.), 1863, Part I, p. 579; *Beer Chunder* v *Ishan Chunder*, 3 Cal. L. R., 417, Foot's International Law, p. 131.

The consent here given is to a suit already instituted. The Government had no power to give such a consent. Moreover, their letter of the 6th November to the defendant's solicitors shows that the Government was not satisfied that the defendant was trading within the jurisdiction. It could not, therefore, give a consent. This Court can inquire into the validity of the consent—*Beer Chunder* v *Raj Coomar Nobodeep*, I. L. R., 9 Cal., 535. There was no waiver by the defendant. He could not waive a right of which he was ignorant.

*Macpherson* in reply—Section 433 does not relate to jurisdiction. The jurisdiction of this Court depends on the Letters Patent. Section 433 merely relates to procedure. Compare Act XIII of 1868, section 2, and see *Begum Bibee* v *The King of Oude*, 11 Cal. W. R., 116. See also Act XVIII of 1848, and sections 12, 13, 14, 424, 430, 433, 435, 440-2 of the Civil Procedure Code. *Municipal Committee of Moradabad* v *Chatri Singh*, I. L. R., 1 All., 269, *Flower* v *Local Board of Law Leyton*, 5 Ch. D., 347 at p. 350, *Bateman* v *Poplar District Board of Works*, 33 Ch. D., 360 at p. 387, *Beni Ram* v *Ram Lal*, I. L. R., 13 Cal., 189, *Ramayyangar* v *Krishnayyangar*, I. L. R., 10 Mad., 185, *Ledgard* v *Bull*, L. R., 13 I. A. 134 at p. 145, *Mayor of London* v *Cox*, L. R. 2 H. L., 239 at p. 283, *Broad* v *Perkins*, 21 Q. B. D., 534, *Beer Chunder* v *Ishan Chunder*, 3 Cal. L. R., 417. It was possible for the plaintiff to waive his right and he did so. The consent is not a condition precedent. The language of the section shows that section 433 is for the guidance of the Government of India. This Court cannot question the consent—*Beer Chunder* v *Raj Coomar Nobodeep*, I. L. R., 9 Cal., at p. 554.

[355] **Strachey J**—This suit has been set down for trial of the preliminary issue, whether the Court has jurisdiction to try it. The issue involves questions of considerable importance upon the construction of section 433 of the Code of Civil Procedure, regarding suits against sovereign princes and ruling chiefs. The affidavits show, and it has not been contested by the plaintiff, that the defendant, though ordinarily residing at Hyderabad, is the Jamadar of Shihr and Mokalla on the southern coast of Arabia, and a ruling chief within the meaning of the section. He can, therefore, be sued only with the consent of the Governor-General in Council. In the present suit the plaintiff claims to recover from him Rs. 1,50,000 as damages for breach of a contract to lease for five years, at a monthly rent of Rs. 4,000, the Mazgaon Dockyard in Bombay, of which the defendant is the owner, and a further sum of Rs. 4,000, being one month's rent paid in advance by the plaintiff as a deposit. At the time when the suit was filed, the consent of the Governor-General in Council under section 433 had not been obtained or applied for, but it was given more than a year afterwards.

One of the questions to be decided is whether a consent given after the [illegible] the suit—a consent [illegible] to the suit being instituted, but to [illegible]

its being proceeded with—is a sufficient consent within the meaning of the section. Another question is, whether, assuming it to be insufficient, the defendant has by his conduct waived the defect, so that, notwithstanding the absence of a valid consent under the section, the suit can be heard and determined on the merits.

To decide the question of waiver it is necessary to see exactly what the defendant has done in the suit since its commencement. The suit was instituted on the 23rd March 1893. The defendant was served with the writ of summons and filed an appearance in the following June. On the 21st August 1893, he filed his written statement. In it he raised no plea with reference to section 433, or his status as a ruling chief, but contested the claim solely on the merits. He denied the breach of contract alleged in the plaint, asserted that it was the plaintiff and not himself who had broken the contract, and claimed by way of set-off to be entitled to a decree for Rs. 49,900 on account of the damages he had suffered from the breach. On the 22nd August 1893, he obtained a Judge's order under section 129 of the Code [356] calling upon the plaintiff to make an affidavit of documents; on the 18th November he filed his own affidavit; and on the 21st November he obtained a further Judge's order directing the plaintiff to file his affidavit by a specified date, and to pay the costs of and incidental to the summons. On the 10th June and the 7th October 1893, the suit was on the board, but was on both occasions postponed by consent, as the affidavits of documents had not then been filed. On the 4th December it was again on the board, and was called on for hearing and final disposal, when the defendant's counsel applied for a further postponement on the ground that his client had not completed inspection of the plaintiff's documents. Upon this application Mr. Justice PARSONS made an order postponing the hearing until the 11th December, directing that the suit should be set down on the trial board for that day, and ordering the defendant to pay the costs of the motion. On the 12th December the suit was a third time on the board, but was postponed by consent pending the determination of a summons which the defendant had taken out on the 9th for the issue of a commission to Hyderabad for the examination of himself and his witnesses. This summons was issued upon an affidavit by the defendant's agent Abdulla Habib bin Abdulla stating, among other things, that the defendant was a permanent resident of Hyderabad, that his witnesses also resided there, and that he was now advised that he could not safely proceed to a hearing in the absence of his own and their evidence. On the 23rd December an order was made for a commission and for the examination *vivâ voce* of the defendant and his witnesses, the commission to be returned executed within two months from the date of its despatch. The order was made after reading another affidavit of the same date by the defendant's agent which set forth the nature of the evidence which the Hyderabad witnesses were likely to give, denied the plaintiff's allegation that the commission was applied for merely to delay the suit, and ended with these words:—"I lastly say that the defendant is the Sultan of Shihr and Mokalla and entitled to a salute of twelve guns under the order of the Government of India, and claims the privilege of exemption from attendance in Court." Although the defendant thus asserted his position as Sultan of Shihr [357] and Mokalla, the whole affidavit, taken in connection with the application for a commission which it supported, can only have meant that he desired that evidence should be taken and the suit decided upon such evidence and upon the merits, and did not desire to claim any exemption or privilege other than exemption from personal appearance in Court, under section 641 of the Code. The next proceeding appears to have been a consent order on the 15th March 1894 including the names of two other witnesses in the commission. Considerabl[illegible]

delay, for which each party throws the blame upon the other, took place in the despatch of the commission, and at last on the 21st May 1894, the plaintiff took out a summons before the vacation Judge calling upon the defendant to show cause why the order of the 23rd December 1893, for the issue of the commission should not be revoked, and why the defendant and his witnesses should not be examined *de bene esse* before the Prothonotary. That summons was issued upon an affidavit of the same date affirmed by the plaintiff, alleging that the defendant had been delaying the despatch of the commission with a view to harass him and compel him to settle the suit, that the defendant and his three witnesses were then staying in Bombay, and that the application for a commission was a mere pretext to put off the hearing. Upon the same date as the summons, the defendant's attorneys, Messrs. Crawford, Burder and Co., wrote a letter to the plaintiff's attorneys in which they asked whether the plaintiff had obtained the consent of the Governor-General in Council under section 433 before filing the suit, requested an appointment or inspection of the consent if obtained, and observed that, it it had not been obtained, the suit must of course be dismissed That letter written on the 21st May 1894, when the defendant was being pressed with an application for revocation of the commission and for the immediate personal examination of himself and his witnesses, was the very first suggestion made on his behalf since the institution of the suit in March 1893, that the suit was defective for non-compliance with section 433. In opposition to the summons two affidavits were, on the 23rd May 1894, filed on behalf of the defendant. The first was made by his agent, denying the truth of the statements in the [358] plaintiff's affidavit, and alleging, among other things, that the commission was being despatched that same day. The second was made by Mr. Burder, and among other statements it contained the following: "I say that, whilst I was in Hyderabad, I ascertained that the defendant, though sued as Awad bin Umar Sultan Nawaz Jung Bahadur of Hyderabad, is the Jamadar of Shihr and Mokalla on the southern coast of Arabia holding a protectorate treaty with the British Government ratified on the 26th February 1890, and, as such, under section 433 of the Civil Procedure Code, cannot be sued without the consent of the Governor-General in Council. On my return to Bombay at the beginning of the present month, I having ascertained that such consent had not been obtained, received instructions to take the necessary steps for having the suit dismissed, but owing to the absence of the counsel retained for the defendant, and as there was no immediate hurry to justify an application during the vacation, I have not yet taken out the summons to that effect." Mr. Burder does not mention when it was that he ascertained at Hyderabad that the defendant was the Jamadar of Shihr and Mokalla, and as such entitled to the privilege of section 433. At the time when he made that affidavit he must have forgotten the last paragraph of the affidavit made by his client's agent as far back as the 23rd December 1893, in support of the application for a commission, in which it was expressly stated that the defendant was the Sultan of Shihr and Mokalla, and as such entitled to be exempted from personal appearance in Court.

The summons to revoke the order of the 23rd December 1893, came on for hearing before Mr. Justice BAYLEY, but that learned Judge postponed passing orders upon it until after the vacation. During the interval the defendant on the 31st May 1894, wrote to the local Government stating that in a suit filed against him in the High Court he was advised to plead to the jurisdiction of the Court, as the plaintiff had filed the suit without the sanction of Government as required by section 433 of the Code of Civil Procedure, and applying for a formal certificate that he was recognized by the British

Government as the chief of a foreign independent State In reply [359] to this Mr W. Lee Warner, then Secretary to the Government of Bombay, wrote on the 16th June 1894 that section 433 required that the plaintiff should obtain the consent of the Governor General in Council to the defendant being sued, and that the Government should await an application from the suitor On the 23rd June 1894 the defendant took out a Judge s summons calling upon the plaintiff to show cause why the suit should not be set down for trial upon the preliminary issue as to the jurisdiction of the Court to hear and determine it The summons was issued upon an affidavit of Abdulla Habib bin Abdulla which contained the following passage I say that the defendant did not take the above point before because he did not know he was exempt from being sued and that it is only recently that he happened to discover that under section 433 of the Civil Procedure Code no suit can be brought against him without the previous consent of the Governor General in Council and the defendant brought the fact of his being the ruling chief of the said Shihr and Mokalla to the notice of his solicitor Mr Barder by producing to him the eleventh volume of the Treaties published in 1892 by Mr C U Aitchison, the Under Secretary to the Government of India in the Foreign Department, wherein the treaty made by the defendant with the British Government appears and Mr Barder was convinced of the defendant s position as chief by the perusal of the said treaty Upon the same date as the Judge s summons, the defendant filed an additional written statement formally submitting that the Court had no jurisdiction to hear and determine the suit and adding the defendant says that he became aware only in the latter part of the month of April 1894 of the provisions of the said section 433 and he filed his first written statement in ignorance thereof On the 7th July 1894 the summons came on for hearing before Mr Justice STARLING who ordered that the suit should be set down for trial upon the preliminary issue as to jurisdiction on the 10 h September following In fixing that date Mr Justice STARLING appears to have intended to allow sufficient time for the plaintiff to apply to the Governor General in Council for a consent to the suit under section 433 A further Judge s order of the 19th July 1894 directed that execution of [360] the commission should be postponed and all proceedings in the matter stayed until the question of jurisdiction should be disposed of On the 30th August 1894 the defendant made an application under section 235 of the Code for execution of the Judge s order of the 21st November 1893 awarding him the costs of the summons directing the plaintiff to file an affidavit of documents On the 13th September this was followed by the issue of a warrant of attachment under section 269 and ultimately the costs payable under the order and the costs of execution awarded under the warrant were paid by the plaintiff

I have now stated all the facts bearing upon the question of waiver What follows will show the manner in which the consent of the Governor General in Council was at last given Shortly after the order of the 7th July 1894 the plaintiff addressed a petition to the Government of India in which he stated the nature of the suit and its history up to that time and applied for the consent of the Governor General in Council under section 433 of the Code On the 28th August 1894, a certificate signed by one of the Secretaries to the Government of India was granted in the following terms This is to certify that under the provisions of section 433 of the Code of Civil Procedure the Governor General in Council consents to Chandulal Khushalji proceeding against His Highness the Sultan Nawaz Jung in Suit No 147 of 1893 instituted in the High Court at Bombay, or in any suit based on the same causes of action which the said Chandulal Khushalji may hereafter institute against

His Highness the Sultan Nawaz Jung in the said Court." Soon after this, the defendant addressed a memorial to the Government of India protesting against this consent, which, according to a letter from the Government of India to the Bombay Government of the 24th October 1894, was granted on the strength of the plaintiff's statement that the defendant carried on a large trade and business within the local limits of the jurisdiction of this Court. The defendant denied the truth of that statement, and the Government of India thereupon "suspended" the certificate which it had granted, pending an inquiry into the alleged trading, while the defendant gave an undertaking to take no stepts in the meantime to obtain the dismissal of the suit on the [361] ground of the absence of consent. Accordingly from the 24th October 1894, to the 6th November 1895, the question whether the defendant in fact traded within the local limits of the jurisdiction was under investigation by the Government of India through the local Government for the purpose of determining whether the consent already granted but afterwards suspended should be confirmed or cancelled In the course of this inquiry the plaintiff forwarded a petition to the Government setting forth the particulars of the defendant's trading operations on which he relied A copy was furnished to the defendant; and he submitted a rejoinder and memorials in which he denied the existence of the alleged trading Ultimately, on the 6th November 1895, the Acting Chief Secretary to the Bombay Government addressed a letter to the plaintiff's attorneys in which he said: "I am directed to inform you that the Government of India have decided that the certificate granted by them under section 433 of the Code of Civil Procedure authorising the institution of civil suits in the High Court at Bombay by Chandulal Khushalji against His Highness Sultan Nawaz Jung of Shihr and Mokalla should now be allowed to take effect." That is, in terms, an unqualified confirmation of the consent given on the 28th August 1894. On the same date, however, the Acting Chief Secretary also wrote a letter to the defendant's attorneys as follows:—"I am directed to inform you that the Government of India are of opinion that the point whether His Highness Sultan Nawaz Jung of Shihr and Mokalla does or does not carry on trading transactions in Bombay appears arguable, and may conveniently be left for decision in a Court of law, and that they have accordingly decided that the certificate granted by them under section 433 of the Code of Civil Procedure authorising the institution of civil suits in the High Court at Bombay by Chandulal Khushalji against His Highness the Sultan should now be allowed to take effect." It has been suggested on behalf of the defendant that the two letters are inconsistent, that the second letter shows that the Government of India were unable to come to any conclusion as to the defendant's alleged trading, and consequently gave no such consent as section 433 contemplates, but virtually left it to the Court to decide whether the [362] defendant was entitled to the protection afforded by the section In my opinion, there is no force in this suggestion. To see whether consent to the plaintiff's suit was given or not, the letter of the Government to the plaintiff and not their letter to the defendant must be looked at. The letter to the plaintiff simply confirms the previous consent without any sort of qualification. The letter to the defendant merely informs him of the confirmation, and in effect tells him that the Court is competent to go behind the consent to determine for itself upon evidence whether the defendant trades in Bombay, and, if it should find that he does not, to treat the consent as invalid. To say that the question of trading is "arguable" is not to say that the Government have arrived at no conclusion in regard to it. To say that it may conveniently be left for decision in a Court of law is not to say that the Government are unable to decide it, or do not decide it, but that their decision under section 433 is not final or binding upon

the Court. Whether that is a correct construction of section 433 is a question upon which I need not express an opinion. At all events the Government say that they have decided that the previous consent should now be allowed to take effect. I must presume that they would not have so decided unless in their own opinion the requirements of the section had been fulfilled, and I have no doubt that their letter to the plaintiff terminated the "suspension" of the previous certificate and left it whatever force it had when originally granted. The defendant himself in a letter to the Government of India of the 29th November 1895, and in a memorial of the 27th January 1896, called the Government's attention to this point suggested that they had left undetermined the question which under section 433 they were bound to determine before giving their consent, and prayed that the consent might be withdrawn. However, on the 15th June 1896, the Bombay Government informed the defendant "that the Government of India saw no reason for withholding the consent accorded by them to the institution in the High Court of Bombay of the suit filed against His Highness by Chandulal Khushalji." The result is that the consent of the Governor-General in Council to this suit must now be taken to have been given on the 28th August 1894.

**[363]** That is, in terms, a consent to a suit which had previously been instituted without consent "proceeding," against the defendant. Is that a consent which, having regard to the terms of section 433 of the Code, can make a suit maintainable against a ruling chief? Upon this question there appears to be no direct authority. There are many provisions both in the Code and in other enactments which require the consent of the Court or of some other authority as conditions under which alone suits may in certain cases be maintained, and in connection with which the question has arisen whether the consent must be obtained before the institution of the suit or may be obtained afterwards. No general principle, however, can be extracted from the cases decided upon these provisions. In each case the question depends upon the intention of the Legislature as expressed in the particular section. Sometimes it is obvious that the consent must be obtained at the outset, as in section 2 of Act XIII of 1864, which provides that suits brought against the King of Oudh cannot be "commenced or prosecuted" without the consent of the Governor-General in Council "first had and obtained." Section 12 of this Court's Letters Patent, requiring that where the cause of action arises only partly within the local limits, the leave of the Court must be "first obtained" has been held to imply that leave must be granted at the time of the acceptance of the plaint and not afterwards. So, too, section 55 of Bengal Act IX of 1879, which provides that "no suit shall be brought" under the Act without the sanction of the Court of Wards, has been held to require the obtaining of the necessary sanction before the suit is filed, and section 18 of Act XX of 1863 providing that "no suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit" would probably be construed in the same way. In the Code of Civil Procedure a similar construction has been placed on section 17 requiring the leave of the Court for the institution of certain suits, where some of the defendants do not reside or carry on business or personally work for gain within the jurisdiction, and section 30, which allows one or more of numerous parties having the same interest, to sue, with the permission of the Court, on behalf of all parties interested. On the other hand, it has been **[364]** held under section 440, providing that "a suit shall not be instituted" on behalf of a minor by any person other than his guardian "except with the leave of the Court;" and section 3 of Act XL of 1858 (which corresponds with section 2 of Act XX of 1864 relating to

Bombay), that although the obtaining of permission should either precede or be contemporaneous with the institution of the suit, the course which should always be taken where a suit is brought in violation of these provisions is to return the plaint in order that the error may be rectified In *Ziaulnisa Begam v Motiram* I L R 12 Bom, 496, it was held that in section 1 of the Nawab of Surat Act, XVIII of 1848, providing that no writ or process shall be sued forth or prosecuted unless with the consent of the Governor of Bombay in Council first obtained, the expression sued forth implied that the consent was not a condition precedent to the filing of the suit and that a consent subsequently given did not vitiate the proceedings The Court at the same time suggested that under section 11 of the Nawab Nazims Debts Act, XVII of 1873 and section 2 of the Prince of Arcot's Privilege Act XX of 1873 the consent of the Government would be a condition precedent and must be given before the suit is commenced Again in *Nawab Mahammad Azmat Ali Khan v Mussamat Ladli Begam* L R 9 I A 8 the Privy Council held, upon the construction of sections 4 and 6 of the Pension Act XXIII of 1871, that a suit relating to a grant of property within the meaning of the Act need not be dismissed because the certificate of the Collector had not been obtained before its commencement but that the Court was justified in going on with the suit when the certificate was received Upon the analogy of this decision the Madras High Court held in *Ramayyangar v Krishnayyangar*, I L R, 10 Mad 185 that notwithstanding the terms of section 539 of the Code allowing persons to institute suits relating to public charities having obtained the consent in writing of the Advocate General a consent obtained after the institution was good It is cited back I agree however with the judgments in *Tulsiram Anant Joshi* [365] v *Vithu Joshi* I L R 13 Bom 6 6 and *Dinesh Chunder Roy v Golam Mostapha* I L R 16 Cal 89, that the decision of the Privy Council lays down no general principle of construction but depends upon the special language of the Pensions Act Another case in which leave to bring an action was required by statute but in which it was held that leave might be obtained after action brought is *Rendall v Blair*, 45 Ch D 139 That case was decided upon section 17 of the Charitable Trusts Act 1853, which provided that before any suit petition or other proceeding relating to a charity shall be commenced the leave of the Charity Commissioners must be obtained It was unanimously held by the Court of Appeal dissenting from Mr Justice KAY that although these words showed that the consent ought to be applied for before the action was begun, other expressions in the section implied that in the absence of the consent the suit should not be dismissed but stayed until the consent should be obtained As Lord Justice LOWES expressed it they indicated that "the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action and not a bar to the original institution of the suit

These cases shew that there is no general principle applicable to the question, and that it must be decided exclusively with reference to the terms of section 433 itself The conclusion at which I have arrived is that the consent of the Governor General in Council must be obtained before the institution of the suit The language of the section seems inconsistent with any other view The consent is necessary to enable a sovereign prince or ruling chief to be sued in any competent Court "Sued includes every part of a suit every step in it including the filing of the plaint, and, therefore, the filing of the plaint must require consent as much as any other and later proceeding Again, a sovereign prince or ruling chief may be sued with the consent of the Governor General in Council' but not without such consent" Consequently the filing of the plaint and every other step taken in the suit

before the consent has been obtained is suing "without such consent" and, therefore, a violation of the section. Further, I agree with the argument [366] of Mr. Scott that the language of clauses (a) and (c) of sub-section (2) points to the same conclusion. The expression in clause (a) "the person desiring to sue him" and the expression in clause (c) "is to be sued" refer to something to be done in the future not something which has been done in the past. If the consent might be given after suit brought the Legislature would have said that it should not be given unless the prince or chief has instituted a suit in the Court against the person suing or desiring to sue him or "is in possession of immoveable property ... and is being sued or is to be sued with reference to such possession."

If then the consent ought to be but has not been obtained before the commencement of the suit what is the consequence of the defect? Ought the Court to adjourn the suit to enable the consent to be obtained and to proceed with the suit when it has been obtained? There is nothing in section 433 of the Code, as there is in section 6 of the Pension Act and in section 17 of the Charitable Trusts Act 1853 in England which would justify such a course. I think that it would be inconsistent with the intention of the Legislature, and that a ruling chief who has not precluded himself from raising the objection is entitled to apply for the dismissal of the suit on the ground that it is barred by the section. I think that in such a case the Court should dismiss the suit or perhaps allow the plaintiff to withdraw it with liberty to bring a fresh suit under section 373.

The result of this view is that the consent of the Governor General in Council given in August 1894 and confirmed in November 1895 to the plaintiff proceeding against the defendant in a suit instituted in March 1893 is not a consent within section 433 of the Code, and that it is unnecessary to consider the other objections which have been urged against its validity. The suit must therefore be dealt with upon the footing of no consent having been obtained under the section. Still it remains to consider whether that is an objection which is necessarily fatal to the suit. That depends upon the further question whether the objection is one which can be and which has been waived by the defendant. Is the absence of consent a defect in the juris- [367] diction of the Court to hear and determine the suit, a defect not curable by any consent or waiver on the defendant's part? Or is it an irregularity in procedure in the exercise of jurisdiction, a bar to the suit fatal if properly pleaded, but in the nature of a personal privilege which the person entitled to it may waive by submitting to the jurisdiction and electing that the suit shall be tried on the merits? In my opinion it has nothing to do with jurisdiction except in the loose sense in which jurisdiction is continually confounded with procedure. At all events if it can properly be called a question of jurisdiction, it is not so in the sense in which it is true that consent cannot confer jurisdiction, or that defects of jurisdiction cannot be waived. Here is a suit which, as regards its nature and class, is undoubtedly within the general jurisdiction of this Court, a suit for damages for breach of contract for which the cause of action arose in part beyond the local limits, the leave of the Court was first obtained under clause 12 of the Letters Patent. The Court has thus jurisdiction over the subject matter, but in the exercise of that jurisdiction a particular rule of procedure requires the consent of the Governor General in Council before the suit can be entertained against this particular defendant. The absence of consent was, therefore, a good ground of objection to the hearing, a special defence which the defendant was entitled by the section to plead as a bar to the

suit. The fact, however, that a particular defence is allowed by statute in a suit within the general jurisdiction of the Court, and may be fatal to the suit *in limine*, does not in that event withdraw the suit from the Court's jurisdiction. I infer from a passage in the judgment of the Calcutta High Court in *Beer Chunder Manikkya* v. *Raj Coomar Nobodeep Chunder Deb Burmono*, I. L. R., 9 Cal., 535, at p 556, that the learned Judges were of opinion that section 433 created a privilege which might be waived, and that in an unreported case a Division Bench of the same Court refused on appeal to allow a ruling chief to take the plea of no jurisdiction, because he had not taken it in the lower Court It appears to me that the principle which governs this case is stated in the following passage in the judgment of the Privy Council in *Ledgard* v. *Bull*, L R., 13 I A, 134, at p 145: —"The District Judge was perfectly competent to entertain and try the [368] suit, if it were competently brought, and their Lordships do not doubt that, in such a case, a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit. The present case does not come strictly within these authorities, because the defendant's plea was stated before issue was joined on the merits, and, in reliance on that plea, he objected to the case being tried and withheld his objections to the validity of the patent It is, therefore, necessary to consider the facts from which their Lordships are asked to infer that the defendant did, in point of fact, waive all objection to the competency of the suit, and engage that the cause shall be tried on its merits by the District Judge"

In the present case, the Court is "perfectly competent to entertain and try the suit if it were competently brought," the Judge has "inherent jurisdiction over the subject matter of the suit," the cause is one which he is "competent to try" The terms of section 433 providing that a ruling chief may, with the consent of the Governor-General in Council 'but not without such consent, be sued in any competent Court' imply that the giving of the consent is one thing and the competency of the Court another: that the Court may still be "competent," though by want of consent the defendant is protected The defendant, therefore, "may be barred by his own conduct from objecting to "irregularities in the institution of the suit" The absence of consent is such an irregularity it exactly corresponds to their Lordships' description of "irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal [369] of the suit' If the defendant by filing a written statement directed entirely to the merits, and allowing the suit to be actually three times on the board for hearing and final disposal, did not in strictness "join issue and go to trial upon the merits," the question still remains whether at all events it is not to be inferred from the facts that he waived all objection to the competency of the suit, and engaged that the "cause should be tried on its merits." In *Moore* v *Gamgee*, 25 Q. B D, 244, the same principle was applied to a case more nearly resembling the present in this respect, that the "initial irregularity" was the absence of a consent required by statute for the bringing of an action. That was an application by the defendant for a prohibition directed to the

Judge of the County Court in which the action was brought to prohibit the proceedings By section 74 of the County Courts Act 1888 as the defendant did not at the time of commencing the action dwell or carry on business within the district of the County Court but had carried on business there within six months before the commencement the action could only be brought against him in that Court by the leave of the Judge or Registrar The plaintiff without obtaining the necessary leave brought his action which was an ordinary action for specific performance of a contract which the County Court was competent to try The defendant appeared by a solicitor, and the case was heard and partly determined, and adjourned to a future day At the hearing on the second day, the solicitor for the defendant for the first time took the objection that the Court had no jurisdiction to entertain the action as no leave had been obtained to bring the action in that Court The Judge held that the defendant by appearing and contesting the action had waived the objection and he proceeded with the hearing The defendant's application for a prohibition came before Mr Justice CAVE and Mr Justice A L SMITH They held that the County Court Judge was right In his judgment Mr Justice Cave says (pp 246 247)

There are two sorts of cases in which it may be said that there is no jurisdiction to entertain an action first where under no circumstances can the Court entertain the particular kind of action as in cases within section 56 of the Act that is, libel slander [370] seduction or breach of promise of marriage secondly there are the cases provided for by section 74 when under certain circumstances leave can be given to bring an action which the Court could not otherwise entertain In these cases there is no want of jurisdiction over the subject matter of the action but leave is required in the particular case before the Court can entertain the action and it is an objection which may be taken at the hearing of the action that the defendant does not dwell or carry on his business within the jurisdiction and leave has not been obtained In the present case the plaint was issued and the case was heard and partly decided before the objection was taken There is always [illegible] difficulty in drawing an analogy between proceedings in the High Court and proceedings in the County Court because the High Court has jurisdiction by the common law whereas the jurisdiction of the County Court is entirely created by statute but there is some analogy between such a case as the present and a case in the High Court where it is sought to serve a writ on a defendant who is resident abroad In such a case in the High Court if the defendant is served and takes any step in the action except moving to set aside the service he waives the objection of want of jurisdiction, and cannot [illegible] but a conditional appearance is allowed, which has not the effect of waiving the defendant's right to object to the jurisdiction In my opinion the case is exactly the same in the County Court Part III of the County Courts Act 1888 is headed Jurisdiction and Law and Part IV which includes section 74 is headed Procedure and Trial It seems, therefore that cases which are within section 74 would come under the head of procedure rather than under the head of jurisdiction although no doubt this Court would have power to issue a prohibition in a proper case I think, therefore that the objection to the jurisdiction of the Court may be waived by taking any step in the proceedings before applying to dismiss the action, and this view is borne out by a case which was not cited in argument *In re Jones v James* 19 L J (Q B) 257 That was a case in which ERLE J, held that an objection to the validity of an order granting leave to the plaintiff to sue a summons against the defendant was waived by the conduct of [371] the defendant, after being served with the order and summons in appearing before the County Court and giving notice to the clerk of his intention to set up the statute of limitations as a bar to the plaintiff's claim

The distinction drawn by Mr. Justice CAVE between cases where there is a want of jurisdiction over the subject matter of the action, where "under no circumstances can the Court entertain the particular kind of action," and cases where, jurisdiction over the subject-matter existing, "leave is required in the particular case before the Court can entertain the action," exactly corresponds with the distinction drawn by the Privy Council in *Ledgard* v *Bull* between the absence of inherent jurisdiction over the subject matter and initial irregularities in the institution of a suit which the Court is competent to try The present is not a case "where under no circumstances can the Court entertain the particular kind of action,' but "leave is required in the particular case before the Court can entertain the action" The absence of such leave is "an objection which may be taken to the hearing of the action" In the Code of Civil Procedure, just as in the County Courts Act, 1888 the section requiring leave does not come under the heading of jurisdiction, but under a heading referring to procedure: it is not, as if it were a kind of proviso to section 10 or illustration to section 11, placed in Chapter I which specifically relates to 'the jurisdiction of the Courts," but in Chapter XXVIII which is included in Part III "Of suits in particular cases," and clearly relates to procedure If Mr Justice CAVE'S principle applies, an objection to the jurisdiction based on the absence of consent under section 433 would be waived by taking any step in the proceedings before applying to dismiss the suit, even, if the decision in *In re Jones* v *James* is right, such a step as formally declaring an intention to rely upon a particular technical defence other than the absence of consent *A fortiori*, it would be waived by formally pleading to the merits

There is another point of view from which the question may be regarded What section 433 does is to create a personal privilege for sovereign princes and ruling chiefs and their ambassadors and envoys It is a modified form of the absolute privilege [372] enjoyed by independent sovereigns and their ambassadors in the Courts in England, in accordance with the principles of international law The difference is that while in England the privilege is unconditional, dependent only on the will of the sovereign or his representative in India it is dependent upon the consent of the Governor General in Council which can be given only under specified conditions This modified or conditional privilege is however, based upon essentially the same principle as the absolute privilege the dignity and independence of the ruler, which would be endangered by allowing any person to sue him at pleasure and the political inconveniences and complications which would be the result If then section 433 constitutes a modification of the international rule for Indian purposes and if the absolute privilege given by that rule may be waived by the independent sovereign it seems to follow *a fortiori* that the modified privilege given by the section may be waived by the ruling chief In the recent case of *Mighell* v *The Sultan of Johore*, (1894) 1 Q B, 149, the Court of Appeal were agreed that an independent sovereign may, when sued, waive his privilege and elect to submit to the jurisdiction by appearance to a writ, and in *Taylor* v *Best*, 14 C B, 487, it was held that an ambassador who, in an action brought against him, appeared, pleaded, joined issue, and obtained a rule for a special jury to try the action, was estopped from afterwards setting up his privilege In India, before the enactment of section 433 of the Code of 1877 the privilege of independent sovereign princes stood on exactly the same footing as in England—*Jwala Pershad* v. *The Rana of Dholepore*, S. D A N W P, 1863, Pt 1, p. 579, *Phummun Lal* v *Raja Shamsher Parkash* 10 Punjab Record, p 218, and *Ladkuvarbai* v *Ghoel Shri Sersangji Pratabsangji*, 7 Bom. H C. Rep, 150, where the Court, at p 160 of the report, distinctly implied that the defendant might have

waived his privilege by acquiescence in the jurisdiction of the Court No doubt the question of privilege now depends on the construction of section 433, and I am alive to the danger of pressing too far an analogy between a rule of international law and a specific enactment of the Legislature But is there anything in the [373] section which suggests that the Legislature for the first time in 1877 intended that the privilege of a ruling chief an ambassador, or an envoy, could not be waived however willing or even anxious he might be that a suit brought against him should be decided on the merits ? In such a case it might happen that none of the conditions specified in clauses (*a*) (*b*) or (*c*) of the section existed, and that, therefore the consent of the Governor General in Council could not legally be given Such a suit as that in *Mighell* v *The Sultan of Johore*, if brought in India, would be an instance If in such a suit the privilege could not be waived, the result would be to fasten upon a ruling chief, ambassador, or envoy an absolute incapacity for being sued which neither he nor the Governor General in Council could get rid of, and thus to impose a far greater correlative disability on persons dealing with him than that imposed by the corresponding privilege in England I do not believe that the Legislature intended section 433 to have such results or desired to be more anxious for a ruling chief's dignity and interests than the ruling chief himself On the contrary, clauses (*a*) (*b*) and (*c*) imply that a ruling chief who becomes a suitor, or a trader or a land holder in our territories may fairly be subjected to the incidents of the position he has chosen to assume Why should not a ruling chief who goes still further and assumes the position of voluntarily submitting to the jurisdiction in a suit brought against him be fairly subjected to the incidents of that position ? At one time I felt some difficulty on account of the words in section 433 but not without such consent which suggested an absolute prohibition Upon consideration however I do not think that these words affect the question of waiver their effect apart from waiver is to make the consent of the Governor General in Council necessary before any step can be taken in the suit

The question, then is whether the defendant before raising this objection took any step in the proceedings from which it should be inferred that he waived all objection to the competency of the suit and engaged that the cause should be tried on the merits To this question only one answer is possible From the filing of his written statement on the 21st August 1893 to [374] his attorney's letter of the 21st May 1894 he never made the remotest suggestion that he disputed the jurisdiction of the Court on the ground of want of consent or otherwise His written statement was directed exclusively to the merits, to a denial of the claim and an assertion of a set-off He filed his affidavit of documents obtained a Judge's order compelling the plaintiff to do the same and took steps in execution of that order as to costs after his additional written statement objecting to the jurisdiction had been filed He allowed the suit to be three times on the board for hearing and it would have been actually heard and disposed of, but for consent orders for its postponement to enable him to complete inspection of the plaintiff's documents and to apply for a commission to examine witnesses His application for the commission and the affidavits supporting it implied throughout that he was anxious that the suit should be tried on the merits and in one of those affidavits he asserted his position as Sultan of Shihr and Mokalla not for the purpose of defeating the suit for want of jurisdiction but as a ground for his examination, as in previous suits on commission and not in Court As late as March 1894 he took steps for adding the names of other persons to be included in the commission, and it was not till near the end of May, when, being pressed by the plaintiff's

application for the revocation of the commission and for the examination of himself and his witnesses on the ground that the commission was a mere pretext for delay, that he at last objected to the Court's jurisdiction. At the time when that objection was first raised, the whole of the costs of the suit prior to the actual hearing had been incurred. For nearly a year, he acted in every possible way as a litigant anxious for a decision of the Court on the merits; if ever a litigant engaged that a cause should be tried on the merits he has done so; and it would, in my opinion, be inequitable to the last degree to allow him now to recede from that position and to avoid a trial of the issue raised by himself whether it is he or the plaintiff that has broken the contract between them. I am of opinion that he cannot do so.

Mr. Scott did not contend that, if the absence of consent under section 433 could be waived, such acts as the defendant's would not amount to waiver. In some of the affidavits, however, and **[375]** in the additional written statement, it is suggested that at the time when the original written statement was filed, the defendant and his advisers were ignorant of the existence of his privilege, and that they pleaded it as soon as they were aware that they could do so. All the facts, however, were necessarily within the defendant's knowledge, and what he seeks to rely on is mistake or ignorance of the law. It is clear from the last paragraph of the affidavit of Abdul Habib bin Abdulla made on the 23rd December 1893, in support of the application for the commission, and from the fifth paragraph of the affidavit of Krishnarao Vinayak made on the 20th September 1894, that on the former date the defendant's attorneys as well as himself must have known that, besides being a resident of Hyderabad, he was the Sultan of Shihr and Mokalla entitled to a salute of twelve guns, and claiming the privilege of exemption from personal appearance in Court. I do not lay stress on the allegation in the sixth paragraph of the plaintiff's affidavit of the 17th September 1894, that, during the argument on the summons for a commission, the defendant's counsel in reply to an observation from the Bench expressly stated that his client did not intend to raise at the hearing an objection to the jurisdiction founded on the plea of sovereignty. That allegation is made upon information and belief; in the affidavit in reply of Krishnarao Vinayak it is denied that the defendant's counsel "ever waived the question of jurisdiction;" and the notes of the learned Judge make no reference to the subject. I observe, however, that Krishnarao Vinayak, so far from meeting with a specific denial the plaintiff's specific statement that on that occasion the defendant's counsel alleged that his client was a sovereign prince and the recipient of twelve guns of honour, says that "the counsel for the defendant was obliged to state the position in life held by the defendant as the ground for the defendant's exemption from personal appearance in Court." In the additional written statement, the defendant says that it was only in the latter part of April 1894, that he became aware of the provisions of section 433 of the Code. A similar plea was raised by the defendant in *Moore* v. *Gamgee*, where it was contended, in reference to the question of waiver, that "the objection was taken as soon as the defend-**[376]**ant's solicitor became aware of the want of jurisdiction." In dealing with that objection, Mr Justice CAVE said: "The defendant knew as a matter of fact that he lived out of the jurisdiction, and, therefore, he ought to have known as a matter of law that there was a want of jurisdiction unless leave had been obtained." So here the defendant knew as a matter of fact that he was the ruling chief of Shihr and Mokalla, and, therefore, he ought to have known as a matter of law that there was a want of jurisdiction unless the consent of the Governor-General in Council had been obtained. For these reasons, I am of opinion that the defendant has waived the objection to

the jurisdiction, that the preliminary issue as to the jurisdiction must be decided in favour of the plaintiff, and that the suit must be heard and determined on the merits.

Attorneys for the Plaintiff —Messrs *Framjee, Moos, and Mehta.*

Attorneys for the Defendant —Messrs *Crawford, Burder, & Co*

NOTES

[See also (1909) P R, 21, (1903) P R 10 (1912) 17 C W N, 406, (1913) 25 M. L. J., 621. In (1896) 21 Bom., 784, the case of permission under the C P C., 1882, sec 30, was distinguished.]

[21 Bom 376]

## APPELLATE CIVIL.

*The 10th December 1895*

PRESENT

CHIEF JUSTICE FARRAN AND MR. JUSTICE STRACHEY

Harilal Pranlal and others.... ....(Original Defendants) Appellants

*versus*

Bai Rewa......... ..(Original Plaintiff) Respondent *

*Reversioner —Right accruing after the death of widow—Adoption—Invalid adoption by widow—Suit by reversioner after widow's death—Limitation—Limitation Act (XV of 1877), Sch II, Arts 118, 141—Will—Construction—Bequest to wife—"Take possession of and enjoy"—Direction that she was to be owner just as testator was owner—Life-interest*

A claim by a reversioner to recover his share of the property of a Hindu who has died leaving a widow accrues from the death of the widow, and as to immoveable property, article 141† of Act XV of 1877 allows twelve years within which to bring a suit. An adoption to the deceased taking place in the meanwhile does not curtail such period or impose upon the reversioner the necessity of filing a suit to have it declared invalid during the life time of the widow under pain of losing the inheritance upon the widow's death Article 118 of Act XV of 1877 does not operate to give validity by lapse of time to an invalid adoption if no suit is brought by the reversionary heirs within six years of its taking place to obtain a declaration that it is invalid

[377] Where a Hindu by his will directed that after his death his wife was to take possession of and enjoy his property, and in another passage declared that "just as he was the owner so she was to be the owner," but there were no words of inheritance used, nor did he directly give his wife any power of disposition over the property.

*Held*, that she took only a life interest in the property,

The Courts have always leaned against such a construction of the will of a Hindu testator as would give to the widow unqualified control over his property

APPEAL from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad One Pranlal Narotam died on the

*Appeal No 100 of 1894

†[Art. 141 —

| Description of suit. | Period of limitation | Time from which period begins to run. |
|---|---|---|
| Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female | Twelve years. | When the female dies ] |

17th May 1875, leaving a widow Ujam, and three daughters, *viz.* Rewa (the plaintiff), Bai Parvati (defendant No. 2), and Bai Kashi (defendant No. 3). Parvati was his daughter by his wife Ujam. Rewa and Kashi were his daughters by other wives who predeceased him.

By his will Pranlal directed that after his death his wife Ujam should take possession as owner. Then after making certain provision for his daughters Kashi and Parvati he again directed his wife to take possession after his death, and added "Just as I am the owner of the property at present, in the same way after my death my wife Ujam is the owner."

Ujam died on the 26th March 1890, and on the 5th April 1893, the plaintiff brought this suit to recover her share of her father Pranlal's property. She alleged that under Pranlal's will Ujam had enjoyed the property during her life and that on her death the property so far as it had not been specifically disposed of by Pranlal's will was divisible among his three daughters and heirs.

The defendants denied that Pranlal had made a will, and contended (*inter alia*) that the will alleged by the plaintiff was forged; that defendant No. 1, who was the only son of Parvati, had been adopted by Ujam on the 8th November 1882; that the plaintiff had had full knowledge of the adoption; that any claim to set aside the adoption was barred by limitation; that according to the custom of the caste to which the parties belonged, an only son and a daughter's son could be adopted, and that Ujam got a certificate of administration independently of the will.

The Subordinate Judge held the alleged adoption to be invalid, and that the will was proved and that the plaintiff was entitled to recover.

[378] Defendants appealed.

*Gokaldas K. Parekh* appeared for the Appellants (Defendants):—The adoption of defendant No. 1 by Ujam may be invalid, but the plaintiff cannot now question it. She ought to have sued to set it aside within six years after 1882—Limitation Act (XV of 1877), article 118. She knew of the adoption in that year. She is now barred by limitation, and the adoption stands.

Next we contend that under Pranlal's will Ujam took the property absolutely. Her daughter Parvati, therefore, is the only person entitled to succeed to the property as her heir. The plaintiff has no claim.

*Govardhanram M. Tripathi* appeared for the Respondent (Plaintiff):—The plaintiff sues as reversionary heir of Pranlal entitled to his property on the death of his widow Ujam. She died in March 1890 and our cause of action then arose, and from that date we have twelve years in which to sue. The alleged adoption of the first defendant has been found invalid. An invalid adoption does not affect the right of the reversionary heir. Such an adoption cannot become valid against her by lapse of time. As to the will, it did not give Ujam the property absolutely under it. She takes only a widow's estate for life.

**Farran, C. J.**—This is an appeal from the decree of the Subordinate Judge, First Class, at Ahmedabad. The property in suit belonged to one Pranlal Narotam. He died at Nadiad on the 17th May 1875, leaving a widow Ujam and three daughters, the plaintiff Rewa, and the defendants Kashi and Parvati. The last named defendant was the daughter of Pranlal by his wife Ujam. Rewa and Kashi were his daughters by other wives who predeceased him.

It is the case of the defendants (other than Kashi) that Ujam adopted Parvati's only son, the defendant Harilal, on the 8th November 1882. The Subordinate Judge, without recording any finding as to the *factum* of the alleged adoption, has decided against its legal validity. The correctness of his decision

on that point has not been questioned before us. Ujam died on the 26th March 1890, and since then, if not before, the defendants Harilal and Parvati have been in possession of the property.

[379] The plaintiff Rewa filed the present suit to recover her share of her father's estate on the 5th April 1893. Her case is that her father Pranlal left a will (Exhibit 54), and that Ujam in accordance with its terms enjoyed the property of Pranlal during her life-time, and that now, in so far as that property is not specifically disposed of by the will, it is divisible amongst the three daughters and heirs of Pranlal. The Subordinate Judge has found in favour of the will. The parties have not objected here to that finding.

The only points urged before us are: - (1) That the suit is barred by limitation. (2) That on the true construction of the will, Pranlal's widow Ujam took an absolute interest in the residue of his property, which on her death devolved upon her heir, her daughter Parvati, to the exclusion of the other daughters of Pranlal.

As to limitation, we consider that the suit is not time-barred. The plaintiff's claim to recover her share of the residue of her father's property accrued on the death of Ujam, and as to the immoveable property, which alone has been decreed to her, she had, under article 141 of the Limitation Act (XV of 1877) twelve years within which to sue for her share in it. The alleged adoption, if it in fact took place, did not, we think, curtail that period, or impose upon the plaintiff the necessity of filing a suit to have it declared invalid during the life-time of Ujam under pain of losing her inheritance upon Ujam's death. Whatever may have been the law under the earlier Act (IX of 1871), article 118 of the present enactment (Act XV of 1877) does not, we think, operate to give validity by lapse of time to an invalid adoption, if no suit is brought by the reversionary heirs within six years of its taking place to obtain a declaration that it is invalid. Upon this point there has been a *consensus* of opinion in most of the High Courts, and it must now, we think, be taken to be concluded by authority. We refer to the cases cited below.* Were, however, the question still open, we do not think [380] that in this case the knowledge of the defendant Harilal's alleged adoption by Ujam has been satisfactorily brought home to the plaintiff, nor does Harilal appear to have had any such exclusive possession of the property during the life-time of Ujam as would have thrown upon the plaintiff the necessity of taking action under article 118 in order to protect her reversionary rights. We proceed to consider the construction of the will.

When Ujam applied for a certificate of administration to the estate of Pranlal she ignored the will; but the District Court on the application of the plaintiff and the defendant Kashi held it proved and granted a certificate to Ujam under it. In the present suit the defendants other than Kashi contested its execution in the lower Court and did not there contend that it gave power to Ujam to dispose of the residue after her death, or that its terms conferred upon her an absolute interest. That construction of the will has been for the first time contended for before us in appeal. The scheme of the will is this:—The testator states his object in making it to be that his property may not be misappropriated and that his funeral and obsequial ceremonies may be performed and that some portion of his property may be spent in charity. He then gives a description of his possessions of which he declares himself to be the owner as long as he lives, and directs that after his death his wife Ujam is

* *Lala Parbhu* v. *J. Mylne*, I. L. R., 14 Cal., pp. 401 and 410; *Basdeo* v. *Gopal*, I.L.R., 8 All., 644; *Ganga Sahai* v. *Lekhraj Singh*, I. L. R., 9 All., pp. 253 and 267; *Natthu Singh* v. *Gulab Singh*, I. L. R., 17 All., 167; *Padajirav* v. *Ramrav*, I. L. R. 13 Bom. pp. 160 and 165; *Kalgavda* v. *Lingavda*, P. J. for 1889, p. 86; *Fannyamma* v. *Manjaya*, P. J. for 1895, p. 395, *ante* p. 159.

to take possession as owner After this he makes provision for the maintenance of his widowed daughter Kashi and directs Ujam to give a house and some *ordas* to Parvati and Rewa upon (as we read it) his death He then again directs that his wife is to take his property into her possession after his death and adds "Just as I am the owner of the property at present, in the same way after my death my wife Ujam is the owner" Then he directs certain ceremonial and charitable outlays to be made by her, appoints trustees to see that they are carried out, and finally directs that his wife is to enjoy the remaining property

His main objects appear to be the protection of his property and the maintenance of his wife and children His wife is *to take possession of and enjoy* the property but he adds to this no words of inheritance, nor does he directly give her any power of disposition over it The Courts have always leaned against such **[381]** a construction of the will of a Hindu testator as would give to his widow unqualified control over his property By the use of such expression as "my wife is the owner after me" or "my wife is the heir" it is usually understood that the testator is providing for the succession during the life time of the widow and not altering the line of inheritance after her death In the present case the testator is no doubt very emphatic in his declarations that his wife is to be the owner after his death, in one passage stating that just as he is the owner so she is to be the owner The phrase is however, ambiguous It may mean that he intended emphatically to protect her peaceable possession and management during her life time against the claims of the husbands of his daughters and their own or it may be intended to confer as full ownership and power over the property as he had The latter construction did not, however, occur to the parties or to the Court below It is suggested here for the first time in appeal If it were the clear and only construction of the will we should have been forced to give effect to it even now, but it is not We entertained during the argument and still entertain doubts as to what the testator really intended, but the appellant's pleader has failed to convince us that the construction put upon the will by the lower Court is erroneous We confirm, therefore, its decree with costs

*Decree confirmed*

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**NOTES**

[1 As regards limitation see the notes to 21 Bom, 159 *supra*

2 As regards *malik* see also (1906) 8 Bom L R 482, (1910) 35 Bom., 279 13 Bom. L R, 471 (1899) 27 Cal, 44 (1900) 27 Cal, 649 ]

[ 21 Bom 381 ]

## APPELLATE CIVIL

The 11th November, 1895

PRESENT

MR. JUSTICE PARSONS AND MR JUSTICE CANDY

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Ganpati............(Original Plaintiff) Appellant

*versus*

Gangaram and others...... .. .(Original Defendants) Respondents *

*Land Revenue Code (Bom Act V of 1879), Secs 56, 57 150 and 153—Sale for arrears of assessment Confirmation of sale by Collector —Forfeiture—Declaration of forfeiture —Sale not invalid although no declaration of forfeiture*

A sale of a holding for default of payment of assessment is not invalid although prior to the sale there has been no declaration of forfeiture by the Collector This declaration is not so essentially a necessary preliminary of a sale that without it the sale would be illegal and invalid The fact that a sale has taken place is *prima facie* evidence that forfeiture had been declared.

[382] SECOND APPEAL from the decision of A Steward District Judge of Ahmednagar, confirming the decree of Rao Saheb G N Kelkar, Subordinate Judge of Sangamner

On the 21st February 1880, certain land of which one Mukta Vithu was the registered occupant was sold for arrears of assessment due to Government Mukta was then in possession of part of the land the rest was in the possession of other persons who were apparently not the registered occupants At the sale one Yeshvant became the purchaser and he afterwards resold one third of it to Mukta and assigned the remaining two thirds to the plaintiff

In 1892 the plaintiff sued the defendants to recover possession of the two-thirds share assigned to him, alleging that they were in possession but he did not know under what title

The defendants answered (*inter alia*) that their land was never sold to their knowledge, that they had never been out of possession, and that they had no knowledge of the assignment by Yeshvant to plaintiff The Subordinate Judge dismissed the suit

On appeal by plaintiff the Judge raised only one issue, *viz*, as to the validity and binding effect of the revenue sale He held that the sale was invalid and not binding on the defendants and he confirmed the decree The following is an extract from his judgment —

"This sale took place in 1880, and Government Resolution No 4000 dated 31st July 1879 the last day of the revenue year directs that failure in payment of land revenue makes the occupancy liable to forfeiture The Collector is empowered to declare the occupancy forfeited at any time after the arrears is due Forfeiture takes place when the Collector declares it. He can declare it at the end of the period named in the notice There is nothing to show that in this case the holding was forfeited before it was sold for default in payment of assessment, there was no declaration of forfeiture by the Collector I agree with the Subordinate Judge in holding that the sale is not valid or binding on respondents Assuming, however, that the sale was valid and binding it rather appears to me as it does also to the Subordinate Judge, that there was some collusion between Mukta and Yeshvant Sonwani, the purchaser at the revenue sale I think that Yeshvant Sonwani was merely the nominal purchaser, and this would appear to be the case from the fact that the *status quo ante* remained, and

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* Second Appeal, No. 780 of 1894.

that no attempt was made for eleven years to oust those who had occupied the land before the revenue sale Yeshvant Sonwani afterwards disposed of his right such as it was under the revenue sale to the present plaintiff What his object in doing this was does not appear, more especially as he admits [383] having resold to the khatedar Mukta his share of the land in dispute though it was included in the revenue sale This lends belief to the theory that at the revenue sale the purchase by Yeshvant Sonwani was collusive at any rate as regards Mukta The plaintiff brought this suit in the twelfth year to recover possession, if possible of his two thirds share in the land which was conveyed to him by Yeshvant Sonwani He could not gain more by his assignment than Yeshvant had gained in his purchase at the revenue sale and that was nothing as the sale was invalid This fact also renders the suit time barred, for the adverse occupation of defendants extended back for some time before the revenue sale and for eleven years afterwards, the defendants have clearly been in possession of the land in their own right for more than twelve years As I agree with the Subordinate Judge in considering the sale invalid because prior to it there was no declaration of forfeiture by the Collector, I confirm the decree "

The plaintiff preferred a second appeal

*Ghanasham N Nadkarni* for the Appellant (Plaintiff) —The Judge did not raise proper issues There is no dispute as to the sale having taken place for arrears of assessment The first question that ought to have been determined is whether the entire holding was sold, or whether only a share therein was sold We contend that as the sale was effected against Mukta the registered occupant of the holding the entire holding was sold free of incumbrances Even if there be nothing on the record to show that there was declaration of forfeiture prior to sale, still as the sale did actually take place, forfeiture must be presumed But we submit that there is no provision of the Land Revenue Code which makes it incumbent upon the Collector to declare a forfeiture in the case of every sale The Code provides for forfeiture but does not lay down that a sale without forfeiture shall be invalid Whether there was a forfeiture or no, the property having been sold for crown debt, the purchaser acquired title to it

*Gangaram V Rele* for the Respondents (Defendants) Under the provisions of the Land Revenue Code forfeiture prior to revenue sale is necessary The provision as to forfeiture in the Code would be nugatory if sales without prior forfeiture were upheld We rely on *Govind* v *Bhiwa*, P J for 1895, p 70 The Judge has found that the sale was collusive

**Parsons J** —The Judge of the lower Court evidently is of opinion that a sale duly confirmed by a Collector of a holding [384] for default of payment of assessment is invalid if prior to the sale there was no declaration of forfeiture by the Collector I can find no authority for such a proposition The cases cited *Venktesh* v *Mhalbai* I L R, 15 Bom 67, and *Dasharatha* v *Nyahalchand* I L R, 16 Bom 1 4, do not decide this Section 56 of the Land Revenue Code enacts that a failure to pay arrears of land revenue makes the holding liable to forfeiture whereupon, that is to say in which case, the Collector may sell the holding Section 153 enacts that the Collector may declare the holding to be forfeited to Government and sell or otherwise dispose of the same A declaration of forfeiture may be necessary for some purposes, *e g*, it was admitted I will not say whether rightly or wrongly, to be necessary to extinguish existing incumbrances in *Govind* v *Bhiwa*, P J for 1895, p 70 at p 72 but I cannot hold that it is so essentially a necessary preliminary of a sale that a sale without it would be altogether illegal and invalid.

Again, the only reason why the lower Court has held that there was no declaration of forfeiture is because there is no written declaration of such filed

among the sale proceedings. This is quite insufficient to justify a finding in the negative on a point that was not taken by the defendants and on which there was no issue. It is nowhere said in the Act that the declaration must be in writing, and I think that evidence ought to have been taken by the Court before the point was decided in the negative. The fact that a sale has taken place is to my mind strong *primâ facie* evidence that forfeiture had been declared. The Division Bench in *Govind* v. *Bhiwa*, P. J. for 1895, p. 70 at p. 72, apparently was of a contrary opinion. The point is not one of any importance, since by proper enquiry it can be definitely determined in each case whether a forfeiture has been declared or not. In the present case such a determination is unnecessary. Had it been necessary I should have ordered further enquiry.

The decision, then, of the District Judge as to the invalidity of the sale being wrong, his decree must be reversed and the appeal remanded for disposal on the merits. I do not wish in any way to prejudge those merits, but the remarks that he has made **[386]** oblige me to say that the chief point for determination is whether the whole occupancy holding or only Mukta's rights in it were sold, and this has to be found from the sale proceedings Unless the sale was brought about fraudulently by the collusion of Mukta and Yeshvant, collusion between them at the sale or afterwards would hardly affect the position of the plaintiff, who is apparently a *bonâ fide* purchaser for value from Yeshvant. Then as to limitation, it seems to me that the plaintiff clearly has twelve years from the date of the sale within which to bring his suit, and that the possession of the defendants prior to the sale cannot possibly be added to their possession after the sale.

We reverse the decree of the Lower Appellate Court and remand the appeal for disposal on the merits with reference to the above remarks Costs to be costs in the cause

**Candy, J.**—Mukta was the registered occupant of a certain survey number. He was in possession of part of the land, the rest being in possession of other persons, but those other persons were apparently not registered occupants or recognised in the village records The occupancy was sold by the revenue authorities on 21st February 1880, for arrears of assessment due for 1878 79. The sale certificate (3) and Exhibit 34 show that the Mamlatdar reported that owing to disputes among the sharers the assessment had not been paid. One Yeshvant purchased the occupancy, and the sale was confirmed by the Assistant Collector. Yeshvant did not attempt to take possession of his purchase, but conveyed to Mukta for consideration the one-third share of the field which Mukta was cultivating. Yeshvant assigned his rights in the remaining two-thirds to plaintiff, who filed this suit in January 1892, to recover possession of the two-thirds.

The Subordinate Judge dismissed the suit for several reasons. Plaintiff appealed to the District Judge, who framed one issue only, *viz.*, whether the revenue sale in 1880 was valid and binding He found that it was invalid and not binding. He also made some remarks on other points in the case, assuming that the sale was valid and binding. But he gave no finding on those points.

**[386]** Plaintiff has made a second appeal to this Court; and the only point argued before us was whether the District Judge was wrong in holding that the revenue sale in 1880 was invalid and not binding because there was nothing to show that the holding was forfeited before it was sold for default in payment of assessment. He found, in short, that Yeshvant bought "nothing, as the sale was invalid." In my opinion the District Judge was wrong.

Under sections 150, 153 of the Land Revenue Code the Collector may recover an arrear of land revenue by forfeiture of the occupancy in respect of which the arrear is due, and selling the same under the provisions of sections 56, 57. Here the revenue records show that the "occupancy" of Mukta was sold for default of payment of assessment due on that occupancy. It could not be sold without forfeiture, because it was the occupancy in respect of which the arrear was due. Under section 155, Mukta's occupancy of any other land could have been sold without forfeiture. But when the occupancy of the defaulting occupant in the land in respect of which the arrear was due was sold, then *ex hypothesi* the occupancy was forfeited. There is no provision in the Land Revenue Code that in the case of such a sale of an occupancy there must be a formal written declaration of forfeiture, and there is no form for such in the Act or in the Rules under the Act. It is not analogous to attachment under the Civil Procedure Code, which is necessary to render a sale valid. By section 56 failure in payment of arrears of land revenue makes the occupancy liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy In the present case the District Judge does not deny the liability to forfeiture of the occupancy, whereupon the sale of the occupancy has taken place. But because there is not on the record a declaration of forfeiture by the Collector, the sale is held not valid.

I cannot agree with that view. Mr. Rele referred us to the decision of this Court in *Govind* v. *Bhiwa*, P. J. for 1895, p. 70. No doubt in that case the purchaser of an occupancy which was sold for arrears of assessment and given into the possession of the purchaser was ejected by the Court at the suit of an incumbrancer of the pre-[387]vious occupant, on the ground that in the absence of evidence of an actual forfeiture the Court was bound to hold such forfeiture unproved. But it is to be noted that the Judges in that case did not express any opinion as to the presumption to be drawn from a sale taking place subsequent to the liability to forfeiture. They said that the existence of forfeiture "could not properly be assumed as a fact from the mere legal consequence of failure to pay arrears of assessment." But they did not say that forfeiture could not be presumed to have taken place when the Collector proceeded to sell the occupancy, his right to do so being founded on the liability of the occupancy to forfeiture and sale. Of course if in any case there is direct evidence that the Collector omitted or refused to declare a forfeiture, and yet proceeded to sell, the validity of the sale and of the consequences, which would follow from a valid sale, may well be questioned. But I have confined myself to the present case, and for the reasons given am of opinion that we cannot hold the sale invalid simply because there is no written declaration of forfeiture. I have not touched upon the several important questions raised by the Subordinate Judge. These no doubt will be duly considered by the District Judge when he rehears the appeal.

*Decree reversed and case remanded.*

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[ 21 Bom 387 ]

# APPELLATE CIVIL.

*The 11th December, 1895.*

PRESENT

CHIEF JUSTICE FARRAN AND MR. JUSTICE STRACHEY.

Vishnu Ganesh Joshi and another. . . . . .(Original Plaintiffs) Applicants

*versus*

Yeshavantrao and another . . . . . (Original Defendants) Opponents.*

*Small Cause Court—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887), Sec. 25, Sch II, Arts 4 and 13 —Hereditary allowance— Immoveable property— Registration Act (III of 1877), Secs 3 and 17—General Clauses Act (Bom Act III of 1886)—Civil Procedure Code (Act XIV of 1882), Sec. 622*

Plaintiffs sued in the Court of Small Causes at Poona to recover Rs 400 for arrears alleged to be payable to them under an agreement by the defendant's father to pay Rs 150 per annum, of which Rs 50 were for maintenance of plaintiffs' mother and the residue was to be applied towards defraying the expenses of a temple The terms [388] of the agreement showed that it was intended that the payment for the expenses of the temple should be continued in perpetuity The Judge dismissed the suit, holding that being for a hereditary allowance, it was a claim for immoveable property and came under clauses (4) and (13) of Schedule II of the Provincial Small Cause Courts Act (IX of 1887) He also held that the claim came within the meaning of section 3 and 17 of the Registration Act (III of 1877) and that the document creating it required registration and not being registered, was inadmissible in evidence On application by the plaintiffs to the High Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887),

*Held*, reversing the decree, that the suit was not for possession of immoveable property or recovery of an interest in such property within the meaning of article 4, nor did it come within the purview of article 13 of Schedule II of the Act The Small Cause Court had, therefore jurisdiction to entertain the suit

*Held*, further, that the document did not require registration, as it was not an instrument purporting or operating to create or declare an interest in immoveable property within the meaning of section 17 or create an hereditary allowance in the sense in which that expression is used in section 3 of the Registration Act (III of 1877)

APPLICATION under the extraordinary jurisdiction of the High Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887) against the decision of Khan Bahadur M. N Nanavati, Judge of the Court of Small Causes at Poona.

The plaintiffs sued in the Small Causes Court of Poona to recover rupees four hundred from the defendants under an agreement dated the 18th June 1882, which was passed by the defendants' father to the plaintiffs and their brother The following is the translation of the agreement —

"To RAJESHRI HARI, NARAYAN, VISHNU GANESH JOSHI

"From SHRIMANT SAMBHAJIRAO YESHAVANTRAO AVAD, of Malthan, &c , &c.

"Your father the late Ganpatrao Kaka Joshi was of great use in various ways to me, during my infancy, and also after I attained majority in my private concerns and business, and also as a pleader and in other things He also assisted my mother during my minority in business and in the shape of money, and was of use to her For these reasons when

* Application No. 191 of 1895 under the extraordinary jurisdiction.

Ganpatrao Kaka was alive, it had been agreed to give a perpetual allowance (*nemnuk*) towards the expenses of the idol in the temple of Shri Vishnu Panchayatan built by him But owing to the death of your father and my having gone to Dhar, it (the agreement) was not carried out I have now come here from Dhar and having thought of carrying out to completion my former intention, the allowance (*nemnuk*) as specified below is given —

"Rs 100 0 0 To be given to you from year to year in perpetuity from generation to generation in the shape of a charitable endowment for the expenses of the idol in the temple of Shri Vishnu Panchayatan built by your father Ganpatrao Kaka Joshi at Poona peth Sadashiv, Kalavavar

[389] "Rs 50 0 0 To be given every year to your mother Ganga Bhagirathi Sarasvatibai during her life time for her expenses in the shape of a pension

"Thus in all Rs 150 during your mother's life time and Rs. 100 thereafter every year from the current year * * and thereafter from year to year will be paid to you at Poona in perpetuity from generation to generation You should have *vahiwat* as aforesaid There will be no obstruction in the way of paying the same to you either from me or my heirs in any way

The defendants pleaded that this agreement being unregistered was inadmissible in evidence that it was without consideration and was passed under mistake and misrepresentation They contended that they were not bound by it alleging that the deceased left no property of his own They also contended that the Court had no jurisdiction to entertain the suit

The Judge dismissed the suit He held that he had no jurisdiction, the claim being for an hereditary allowance, which was immoveable property He was also of opinion that the agreement sued on being unregistered was not admissible in evidence and was not binding on the defendants

The plaintiffs applied under the extraordinary jurisdiction of the High Court, and obtained a rule *nisi* calling on the defendants to show cause why the decision should not be set aside

*Mahadeo B Chaubal* appeared for the Applicants (Plaintiffs) in support of the rule —The Judge was wrong in holding that the allowance is immoveable property It is not charged on any immoveable property, nor is it to come out of the income of any such property Under the agreement the donor has merely created a personal liability which bound him during his life time and his assets in the hands of his heirs after his death Section 3 of the Registration Act (III of 1877) defines immoveable property, and the definition clearly shows that a hereditary allowance is a benefit arising out of land The definition of immoveable property given in clause (16), section 3, of the General Clauses Act is also similar The allowance then not being immoveable property, the Judge was wrong in holding that he had no jurisdiction to try the suit and that the agreement required registration under section 17 of the Registration Act We submit that the agreement is admissible, and the Judge should decide the case on the [390] merits The defendants will be liable only if they have got assets of their father in their hands

*Gangaram B Rele* appeared for the Opponents (Defendants) to show Cause —Under article 13, Schedule II, of the Provincial Small Cause Courts Act (IX of 1887) the Judge had no jurisdiction to try the suit Assuming that the allowance in dispute is moveable property, still as it is hereditary and given for the benefit of a temple, it is taken out of the jurisdiction of the Small Cause Court by the above article But we contend that the allowance is immoveable property according to the definition given in the Registration Act The expression *hereditary allowances* in the definition is to be taken by itself, and not read with the words "*any other benefit to arise out of land*" All hereditary allowances do not arise out of land. Some are charged on land and

some are personal. The allowance being immoveable property, the agreement regarding it required registration, and the Judge was right in holding that under article (13), Schedule II, of the Provincial Small Cause Courts Act he had no jurisdiction to entertain the suit.

**Farran, C J.**:—This is an application under section 25 of the Provincial Small Cause Courts Act to set aside the decree of the Poona Small Cause Court Judge dismissing the suit. The plaintiffs' claim was to recover Rs. 400 for arrears alleged to be payable to the plaintiffs under an agreement by the defendants' father to pay Rs. 150 per annum to the plaintiffs' father, of which Rs. 50 were for the maintenance of the plaintiffs' mother and the residue was to be applied towards defraying the expenses of a temple. The terms of the agreement appear to show that it was intended that the payment for the expenses of the temple should be continued in perpetuity. Such a suit is not, in our opinion, a suit for the possession of immoveable property or for the recovery of an interest in such property within the meaning of article (4) of Schedule II to the Act nor does it come within the purview of article (13). It is clearly not a suit for immoveable property or an interest in it as defined in the Bombay General Clauses Act (III of 1886) or within the ordinary meaning of the term, nor is the annual payment which the plaintiffs seek to enforce, an allowance called *malikana* or a fee called *hakk*. It is simply an **[391]** annual sum which the father of the defendants bound himself by agreement to pay It does not, in our opinion, alter its character that the defendants' father purported to promise to pay or have it paid in perpetuity. The Small Cause Court had, therefore, jurisdiction to entertain the suit.

The document further we consider is not an instrument purporting or operating to create or declare an interest in immoveable property within the meaning of section 17 of the Registration Act It cannot, we think, be said to create a "hereditary allowance" in the sense in which that expression is used in section 3 of the Act It is not an allowance by Government or secured in such a way as can constitute it an hereditary allowance. If enforceable at all after the death of the contractor, it can only be enforced against his general estate in the hands of his legal representative, so long as that estate remains undistributed. It is a mere personal obligation which the contractor has undertaken, not secured in any way whatever.

The suit lastly will not (as held by the Judge of the Small Cause Court) lie against the heirs of the grantor directly. The plaintiffs' claim is only, as we said, enforceable, if enforceable at all, against the general estate of the deceased under section 252* of the Civil Procedure Code (Act XIV of 1882).

We set aside the order dismissing the suit upon the above preliminary grounds, and direct that it be heard upon the merits. Costs to be costs in the case.

*Order set aside.*

**NOTES**

[ See also (1911) 36 Bom., 94 (nature of *Nibandha*), (1899) 2 O. C., 276. ]

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Decree against representative of deceased for money to be paid out of deceased's property.

* [ Sec. 252.—If the decree be against a party as the legal representative of a deceased person, and the decree be for money to be paid out of the property of the deceased, it may be executed by the attachment and sale of any such property

If no such property remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.]

# [392] APPELLATE CIVIL

*The 12th December, 1895*

PRESENT

MR JUSTICE PARSONS AND MR JUSTICE CANDY

Lala (Original Plaintiff) Appellant

*versus*

Narayan and another .. (Original Defendants) Respondents *

*Civil Procedure Code (Act XIV of 1882), Secs 328 and 331 – Execution of decree—Obstruction to the delivery of possession Complaint made more than a month from the time of the obstruction—Claim numbered and registered as a suit—Objection with respect to limitation in appeal*

Although no appeal lies against an order passed under section 331 of the Civil Procedure Code (Act XIV of 1882) numbering and registering as a suit a complaint made at a time beyond a month from the time of the obstruction in an application under section 328, such order can be objected to when the final order which is appealable as having the force of a decree under section 331 is appealed against The Judge in appeal is bound to entertain the objection that is then made and to dismiss the application when he finds that it has been wrongly admitted

SECOND APPEAL from the decision of Rao Bahadur N G Phadake, First Class Subordinate Judge of Sholapur with appellate powers, reversing the decree of Rao Saheb G B Lagbate, Subordinate Judge of Karmala

The plaintiff obtained a decree against one Ravji for possession of certain land, and in execution he was obstructed by the defendants on the 3rd April 1891 The Court executing the decree was closed on account of the summer vacation from the 14th April to the 1st June 1891 On the 12th June 1891, the plaintiff applied for the removal of the defendants obstruction, and his application was numbered and registered as a suit under section 331 of the Civil Procedure Code (Act XIV of 1882)

The Subordinate Judge allowed the claim and directed removal of the defendants obstruction

On appeal by the defendants the Judge reversed the decree and dismissed the suit, on the ground that the application for the removal of the obstruction not having been made within thirty days from the date of the obstruction, it was time barred under article 167†, Schedule II, of the Limitation Act (XV of 1877)

The plaintiff preferred a second appeal

* Second Appeal No 746 of 1894

† [Art 167 —

| Description of application | Period of limitation | Time from which period begins to run |
|---|---|---|
| Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree or of dispossession in the delivery of possession to the decree holder or the purchaser of such property. | Thirty days | The date of the resistance obstruction or dispossession.] |

*Mahadeo B. Chaubal* for the Appellant (Plaintiff) :—The Judge was wrong, in going behind the order of the first Court which [393] numbered and registered our application for the removal of the defendants' obstruction as a suit—*Namdev* v. *Ramchandra*, I L R, 18 Bom, 37. Assuming that the application was barred on the date on which it was made, the Judge should not have raised the point of limitation of thirty days, as it was not raised by the defendants.

*Purushottam P. Khare*, for the Respondents (Defendants) —Under article 167 of the Limitation Act the plaintiff was bound to make the application for the removal of our obstruction within thirty days from the date of the obstruction. In our appeal we had raised the point, and an issue in connection with it was raised in the appeal The Judge was, therefore, right in deciding that the plaintiff's application was time barred

**Parsons, J.** —The appellant complained to the Court under section 328 of the Code of Civil Procedure (Act XIV of 1882) at a time beyond a month from the time of the obstruction, nevertheless the Subordinate Judge numbered and registered the claim as a suit under section 331, and passed an order in favour of the appellant It does not appear that the respondent took the objection in that Court that the application had been presented beyond time He did so, however, when he appealed from the order, and the Judge of the appellate Court finding that the application had been presented after the time allowed by law passed an order rejecting it We are of opinion that the Judge was right Although no appeal lay against the order admitting the application, that order could be objected to when the final order which was appealable from as having the force of a decree under section 331, was appealed against (section 591) The Judge was bound to entertain the objection that was then made, and he was equally bound to dismiss the application when he found that it had been wrongly admitted This is not a case in which an appellate Court takes an objection of limitation of its own motion to which the cases cited by Mr Starling at page 12 of his work on Limitation would apply In the case of *Namdev* v *Ramchandra* I L R, 18 Bom, 37, the application was made within time We confirm the decree, dismissing the application with costs

*Decree confirmed*

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## [394] APPELLATE CIVIL.

*The 13th December, 1895*

PRESENT

MR JUSTICE PARSONS AND MR JUSTICE CANDY

Gopalrao Krishna Rajopadhe . (Original Plaintiff) Appellant

*versus*

Mahadevrao Ballal Mule.... . . .(Original Defendant) Respondent *

*Landlord and tenant—Inamdar—Permanent tenant—Notice to pay enhanced rent or quit the land—Denial of landlord's right to enhance rent—Suit to recover enhanced rent—Limitation—Limitation Act (XV of 1877), Sec 23*

An inamdar gave his permanent tenant notice to pay enhanced rent or quit the land on a certain date. The tenant denied the liability to pay enhanced rent and, stating that he held the land on payment of Government assessment only, refused to quit The inamdar

* Second Appeal No. 119 of 1895.

more than twelve years after the date mentioned in the notice sued the tenant to recover enhanced rent

*Held*, that the plaintiff's (inamdar's) right to enhance the rent and to recover the land in default of payment of such rent was barred by limitation, the tenant so far as the right was concerned having been holding adversely to him for more than twelve years.

*Held*, also, that section 23* of the Limitation Act (XV of 1877) had no application to the case.

SECOND APPEAL from the decision of Rao Bahadur Chintaman N. Bhat, First Class Subordinate Judge of Satara with appellate powers, reversing the decree of Rao Saheb V P Deshapande, Second Class Subordinate Judge of Tasgaon.

The plaintiff, an inamdar of the village of Vasambe, served the defendant, who was a permanent tenant of certain land in the village, with a notice dated the 5th September 1879, to pay enhanced rent at the rate of one hundred and twenty five rupees per annum or to quit the land on or before the 10th April 1880

The defendant in reply, by a notice served on the plaintiff on the 6th October 1879, denied the plaintiff's right to enhance the rent

The plaintiff subsequently continued to receive from the defendant the rent previously paid

On the 6th July 1892, he brought this suit to recover Rs 294 13 9 on account of the balance of the enhanced rent for three years preceding the suit.

[395] The defendant denied the plaintiff's right to claim enhanced rent and contended (*inter alia*) that the claim for enhanced rent was now barred, as he had denied the plaintiff's right to enhance more than twelve years before suit.

The Subordinate Judge found that the plaintiff was entitled to enhance the rent, that rupees seventy-five per annum was the proper amount chargeable for rent and that the claim was not time barred He awarded to the plaintiff Rs. 144 13 9 as the balance of the enhanced rent

On appeal by the defendant the Judge reversed the decree and dismissed the claim, holding that it was time barred

The plaintiff preferred a second appeal

*Balaji A Bhagavat*, for the Appellant (Plaintiff) —The suit being for the recovery of rent, it is governed by article 110†, Schedule II, of the Limitation Act (XV of 1877) The right to recover rent is a recurring right under section 23 of the Limitation Act (XV of 1877) and, therefore, it cannot be barred by the defendant's refusal in 1877 to pay enhanced rent The right recurs every year, and we are entitled to recover three years' enhanced rent—*Vithalbowa* v *Narayan*, I L R, 18 Bom, 507

*Mahadeo R Bodas*, for the Respondent (Defendant) —Article 144, Schedule II, of the Limitation Act is applicable to the case, and not article 110 The right to enhance rent is an interest in immoveable property and is liable to be barred after twelve years The notice was served by us on the plaintiff on the 6th October 1879, by which we denied the plaintiff's right to claim enhanced rent. The present suit was not brought until July 1892, that is, more

*[ Sec 23 —In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues ]

Continuing breaches and wrongs

† [ Art 110 —

| Description of suit | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| For arrears of rent, | Three years | When the arrears become due.] |

than twelve years after we denied the plaintiff's right The claim is, therefore, time-barred. The right to demand rent at the usual rate may be a recurring right, but the claim to demand enhanced rent is not a recurring right.

**Parsons, J.** :—This is a suit by an inamdar to recover rent at an enhanced rate from the defendant, who is a permanent tenant. The lower Court has held the suit time-barred. It appears that the plaintiff in September 1879 gave the defendant a notice [396] that he was to pay enhanced rent or quit the land on or before the 10th April 1880 The defendant replied that he was not liable to pay enhanced rent, that he held the land on payment of the Government assessment only, and that he could not be ejected, and he refused to quit. He did not quit on the 10th April 1880, and he has continued to hold on ever since, paying the assessment only.

The plaintiff's present suit was brought on the 6th July 1892, that is, more than twelve years from the 10th April 1880 The defendant, therefore, so far as the right of the plaintiff to enhance the rent and to evict the defendant in default of payment is concerned, has been holding adversely to the plaintiff for more than twelve years, and the plaintiff's right to enhance the rent and to recover the land in default of payment of such rent has become lost by operation of the law of limitation. Section 23 of the Limitation Act (XV of 1877) has no application to the present case We confirm the decree with costs.

*Decree confirmed.*

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**NOTES.**

[ See also (1903) 27 Bom., 515 The possession may be adverse from the *determination* of the tenancy ;— (1910) 8 M. L T , 258, 37 Mad 1 ]

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**[ 21 Bom 396 ]**

APPELLATE CIVIL

*The 17th December, 1895.*

PRESENT :

CHIEF JUSTICE FARRAN AND MR JUSTICE PARSONS

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Babaji.......... ..(Original Plaintiff) Applicant

*versus*

Magniram and others. ...... ..(Original Defendants) Opponents.*

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*Mortgage—Redemption—Mortgagee – Mortgagee taking other land in exchange for mortgaged land—Land so taken in exchange is subject to the mortgagor's right to redeem—Forest Act (VII of 1878), Sec. 10, Cl (d)—Land Revenue Code (Bom. Act V of 1879), Sec 56* †

[397] In 1876, one Babaji mortgaged certain land (Survey Nos 51 and 52) to Sangapa, who died, and his brother Gautapa succeeded him. The Forest Department being desirous of

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* Application, No. 166 of 1895

† Section 56 of the Land Revenue Code (Bom. Act V of 1879). -

56. Arrears of land revenue due on account of land by any landholder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land, or permanently fastened to anything attached to the land, liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors in title, or in any wise subsisting as against such occupant, or holder, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214.

acquiring the mortgaged land entered into negotiations with Gautapa, who admitted that he was only a mortgagee. Babaji (the mortgagor) had left the village and could not be found. Under these circumstances it was arranged that Gautapa should allow the assessment to fall into arrear, upon which Government would forfeit the holding and that Gautapa should receive other land (Survey No. 105) in exchange. This arrangement was actually carried out; Gautapa received Survey No. 105 in exchange for the mortgaged land. In the order giving the land in exchange, Gautapa was styled mortgagee. The heir of Babaji (the mortgagor) subsequently brought this suit to redeem Survey No. 105 from the mortgage of 1876. The defendant contended that this land was not subject to the mortgage and that by the exchange Gautapa had acquired the full ownership in it.

*Held*, that the plaintiff was entitled to redeem Survey No. 105. The mortgagee, Gautapa, had lost the mortgagor's equity of redemption in the mortgaged land by fraud, and the land (Survey No 105) which he obtained in exchange was, therefore, subject to the mortgage. He held the equity of redemption in this land as trustee for the mortgagor.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of C. H. Jopp, Special Judge under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) reversing the decree of Rao Saheb Ramchandra Vyankatesh Patki, Subordinate Judge of Sholapur.

In 1876, one Babaji mortgaged certain land (Survey Nos 51 and 52) to Sangapa. Sangapa died, and his brother Gautapa entered into possession of the land. The Forest Department subsequently desired to acquire the mortgaged land (Survey Nos 51 and 52) and entered into negotiations with Gautapa, who admitted he was only the mortgagee. Babaji, the mortgagor, had left the village and could not be found. Under these circumstances it was arranged between Gautapa and the Forest Department that Gautapa should allow the assessment to fall into arrear, upon which Government would forfeit the holding, and then Gautapa should receive other land (Survey No. 105) in exchange [Forest Act VII of 1878, section 10, clause (*d*).] This arrangement was carried out, and Survey No. 105 was given to Gautapa in exchange for the mortgaged land.

The present suit was brought by the heir of Babaji (the mortgagor) to redeem the land so acquired by Gautapa (Survey No. 105) from the mortgage of 1876.

[398] The defendants (mortgagees) contended (*inter alia*) that Survey No. 105 was not subject to the mortgage, and that Gautapa had become absolute owner of the land obtained by him in exchange for the mortgaged land.

The Subordinate Judge allowed the claim. The defendant under section 54 of the Dekkhan Agriculturists' Relief Act applied for revision to the Special Judge who reversed the decree and rejected the claim. The Special Judge framed six issues for decision, the fourth of which was as follows:—

"4. If Survey Nos 51 and 52 were mortgaged by Babaji to Sangapa, can plaintiff sue to redeem No. 105?"

On this issue the finding was—

"4. Even if Survey Nos 51 and 52 were mortgaged by Babaji to Sangapa, plaintiff cannot sue to redeem No. 105."

The plaintiff applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* requiring defendant No. 4 to show cause why the decision of the Special Judge should not be set aside.

*Purushottam P. Khare*, appeared for the Applicant (Plaintiff) in support of the rule:—Gautapa, the mortgagee, could not defeat the rights of the mortgagor by any arrangement made with the Forest Department—*Balkrishna* v.

*Madhavrav*, I. L. R., 5 Bom., 73. The mortgagee must make over to the heirs of the mortgagor the property he acquired by way of compensation for the loss of mortgaged property.

*Ganesh S. Daudavate*, appeared for the Opponent (Defendant) to show cause:—The mortgaged lands were forfeited to Government and Government now stands in the place of the mortgagee. The plaintiff should sue Government for redemption. He has no claim against Survey No. 105.

**Parsons, J.**:—The finding of the Special Judge on his fourth issue would be right if Gautapa transferred to Government his rights as mortgagee only in Survey Nos. 51 and 52 and if Government were now in the position of mortgagee. The Judge has not found this. The history of the case shows the contrary.

**[399]** The Survey Nos. 51 and 52 had been mortgaged by Babaji to Gautapa's deceased brother. The Forest Department wanted to acquire these lands and entered into negotiations with Gautapa. Gautapa admitted he was only the mortgagee. The mortgagor had left the village and could not be found. Under these circumstances, it was arranged between Gautapa and the Forest Department that Gautapa should allow the assessment to fall into arrears, upon which of course Government would forfeit the holding, and that then Gautapa should receive Survey No. 105 in exchange. Such compensation could be given under section 10, clause (*d*), of the Forest Act, 1878. This arrangement was actually carried out Gautapa did not pay the assessment. Under section 56 of the Land Revenue Code, Survey Nos. 51 and 52 were entered as Government waste land, and Survey No. 105 was given to Gautapa It is to be noted that in the order giving him the land he is styled the mortgagee Gautapa. Under these circumstances, it is impossible to hold otherwise than that Gautapa received Survey No 105 as compensation for his own rights as mortgagee of Survey Nos 51 and 52 and for the rights of the mortgagor, their occupant. By non-payment of the assessment, the whole holding became liable to forfeiture, and the forfeiture that ensued extinguished the rights of the mortgagor who could no longer maintain his equity of redemption against Government in whom the land became vested Had the holding been sold, the purchaser would have taken an absolute title. If, however, Gautapa had been the purchaser, as the forfeiture was the result of his own fraud and default, he could not have claimed to hold as other than trustee for the mortgagor. See *Balkrishna* v. *Madhavrav*, I. L. R., 5 Bom., 73. The fact that there was no sale but that the Government took the land itself and gave Gautapa Survey No. 105 in lieu thereof does not, in our opinion, alter the position of Gautapa. He is a trustee for the mortgagor of the latter's equity of redemption which he had caused to be lost out of his hands by his own fraud. He obtained Survey No. 105 as the compensation or price of Survey Nos. 51 and 52, and as the rights of the parties in the latter numbers are transferred to the former he obtained the **[400]** former to hold just as he held the latter, *viz.*, as mortgagee for the occupant Babaji and his heirs See *Viraragava* v. *Krishnasami*, I. L. R., 6 Mad., 344 at p. 347. The Special Judge, therefore, acted illegally in reversing the decree of the Subordinate Judge on his finding on his 4th issue, and we must reverse his order and remand the case to him in order that he may dispose of the other points at issue before him. The opponent must pay the costs of this rule.

*Order reversed.*

[21 Bom. 400]
## APPELLATE CIVIL.

The 19th December, 1895.
PRESENT:
CHIEF JUSTICE FARRAN AND MR. JUSTICE PARSONS.

Navazbai ........ (Original Defendant No. 1), Applicant
*versus*
Pestonji Ratanji ........ (Original Plaintiff), Opponent.*

*Executor—Executrix [illegible] Wife [illegible] institution [illegible] ... Liability [illegible] estate [illegible] ... issue of probate—Receipt [illegible] appoint [illegible] executor—Indian Succession Act [illegible] Act XL of 1858.*

[illegible] taken [illegible]

[illegible] for probate of the will [illegible] decree [illegible] by the [illegible] Rs. 4,178-10 [illegible] Railway Company [illegible] of the [illegible] February 1893 [illegible] Ratanbai [illegible] as executrix [illegible]

*Held* that [illegible] Navazbai [illegible] received the money from the Railway Company [illegible] made [illegible] liable to the plaintiff [illegible]

**[401]** *Held* [illegible] ruary 1892 [illegible] decree [illegible] to the extent of the [illegible]

APPLICATION under the extraordinary jurisdiction of the High Court (section 25 of the Provincial Small Cause Courts Act IX of 1887) against the decision of Khan Bahadur [illegible] Judge of the Court of Small Causes at Surat.

One Jamsetji [illegible] Dalal [illegible] on the 14th October 1891 leaving a will [illegible] 1887 whereby he appointed one Ratanbai Sorabji [illegible] his executrix and bequeathed to her all his estate.

Ratanbai applied for the probate of the will to the High Court and Navazbai, the widow of [illegible], filed a caveat against the grant.

On the 29th February [illegible] decree was passed by the High Court (No. 36 of 1891) between Bai Ratanbai the sole executrix named in the will of the deceased as plaintiff and Navazbai, widow of the deceased as defendant. The decree ran as follows:

"The Court [illegible] consent order and direct that probate of the will of the said Jamsetji [illegible] Dalal deceased do issue to the said plaintiff and that the schedule to the said [illegible] striking out the word [illegible] standing to the deceased's credit at [illegible]

* Application No. 81 of 1895 under the extraordinary jurisdiction.

the time of his death in the Provident Fund in the B. B. & C. I. Railway Company, Rs. 4,200 and this Court doth declare that the plaintiff as executrix of the estate of the said J. J. Dalal deceased is not entitled to [illegible] Rs. 4,178-10 [illegible] other sum or sums of money hereafter to be received from the B. B. & C. I. Railway Company by way of gratuity or otherwise howsoever.

Probate of the will was granted to [illegible] on the [illegible] February 1893.

In 1892 while the proceedings in the High Court were pending, Navazbai, the widow of the deceased applied to the Railway Company and received from the Company's Provident Fund [illegible] sum of Rs. 4,178-10-0. A further sum of Rs. 166 [illegible] paid [illegible] the company in respect of certain arrears of salary [illegible].

In the year 1894 the plaintiff [illegible] Navaz [illegible] in the Court of Small Causes at Surat [illegible] [402] [illegible] of certain loans advanced by him to [illegible] during his lifetime.

The Judge [illegible] the plaintiff [illegible] the status of the [illegible] executrix [illegible] and rendered herself liable to the plaintiff as an executrix de son tort.

Navazbai applied to [illegible] High Court [illegible] calling [illegible] the [illegible] was the [illegible] was [illegible] executrix de son tort [illegible] held that [illegible] he should have [illegible] Court [illegible] the sums of the [illegible] held that the plaintiff's [illegible] the applicant.

*Manekshah J. Taleyarkhan* [illegible] (Defendant Navazbai) in support of the rule. Navazbai [illegible] executrix de son tort, because she obtained the sums of Rs. 4,178-10 and Rs. 166 from the Railway Company. We deny that she [illegible] The consent decree of February 1892 [illegible] the plaintiff has no claim to any part of them. [illegible] L.R. [illegible] 90. At the time she received these [illegible] probate had been made by the consent decree although probate had not actually been issued. But the order for the grant of probate is tantamount to the grant itself. *Muaanram v. Gur ana Nanl* I.L.R. 17 Cal., 317. There was, therefore, an executrix in existence. It is she who is liable to the creditors and Navazbai if she has done wrong is liable to her. But the creditors [illegible] Navazbai [illegible] executrix [illegible].

*Narayan G. Chandavarkar* appeared for the Opponent (Plaintiff) [illegible] Navazbai had no authority under the will [illegible] to the deceased, and having [illegible] she was [illegible] executrix de son tort and is therefore [403] liable to the plaintiff under [illegible] the Indian Succession Act [illegible] 2 [illegible] Rep. 97.

**Farran C. J.** Upon this application we have [illegible] to set aside the decree made by the Provincial Small Cause Court at Surat [illegible] the defendant Navazbai was executrix de son tort [illegible] Jamsetji Rataubai, the executrix of the deceased [illegible] defendant in the suit, and a decree was also passed against her.

It appears to be settled law that an executor de son tort or of his own wrong, as he is styled in the Indian Succession Act [illegible] be sued jointly with the rightful executor.—Williams on Executors p. 217 (9th Ed). No objection has been taken before us to the decree on that ground.

It is, however, contended that there was a rightful executrix in existence when the defendant Navazbai intermeddled with the estate of the deceased by collecting a debt due to him by the Bombay Baroda and Central India Railway Company, and that section 265 of the Succession Act (X of 1865) shows that under these circumstances Navazbai cannot be sued by a creditor of the deceased, the only person to whom she is responsible being the rightful executrix.

The deceased Jamsetji died on the 14th October 1891. Thereafter Ratanbai applied to the High Court for probate of his will. To that application Navazbai filed a caveat. By a consent decree made on the 25th February 1892, the caveat was dismissed, and it was ordered that probate should issue to Ratanbai. Probate did not, in fact, issue until the 3rd February 1893. In the meantime in May or June 1892 Navazbai collected the debt of Rs. 166 from the company. This collection, it is not denied, would constitute Navazbai an executrix *de son tort*, unless there was at the date of its collection a rightful executrix in existence. We are of opinion that there was not then a rightful executrix in existence within the meaning of section 265 of the Succession Act. The following passage from Williams on Executors, (9th Ed.), page 211, explains the law upon this question:—[404] "When the will is proved or administration granted and another person then intermeddles with the goods this shall not make him executor *de son tort* by construction of law, because there is another personal representative of right against whom the creditors can bring their actions, and such a wrongful intermeddler is liable to be sued as a trespasser." In *Jemlin* v. *Peck*, 1 Turn & Russ. 438, Sir Thomas PLUMER, M.R., describes a rightful executor as one deriving his title from the will which he has proved. Probate is, therefore, we think, necessary to complete the title of a rightful executor, and until it is taken out a person by intermeddling with the assets can constitute himself executor *de son tort*.

Probate as defined in the Succession Act means not the mere declaration by the Court that the will has been duly executed, but (section 3) "the copy of the will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator." The provisions of the Succession Act are wholly different from those of Act XL of 1858, and the case of *Mugniram* v. *Gursahai Nand*, I.L.R., 17 Cal., 347, does not, therefore, apply.

In the present case it being admitted that Navazbai received the Rs. 166 it lay upon her to discharge herself from the liability she thus incurred to the creditors of Jamsetji. This she could only do by showing under section 266 of the Succession Act payment of it over to the rightful executor or payment made in a due course of administration. She has not established either of these defences. What she has shown is that by the terms of the consent decree of the 25th February 1892 she was allowed to receive this sum and retain it. This consent decree does not bind the creditors of the deceased, nor does it, in our opinion, free her from responsibility to them to the extent of the assets which she has received. This case does not come within the principle laid down in *Sykes* v. *Sykes*, L.R., 5 C.P., 113, nor within the rule enunciated in *Hill* v. *Curtis*, L.R. 1 Eq., 90. Navazbai does not hold the moneys which she has collected for the executrix, nor has she settled accounts with the latter. To the detriment of the [405] creditors she has been permitted to collect and retain part of the property of the deceased. The Judge finds that she [illegible] so without the knowledge and consent of the executrix. The application must, therefore, be dismissed

with costs We see no grounds, even if we had the power, for directing in what order the decree is to be executed

*Application dismissed.*

**NOTES**

[ See also (1909) 14 C W N 250 ]

[ 21 Bom 406 ]*

INSOLVENCY JURISDICTION

*The 19th October, 1896*

PRESENT

MR JUSTICE STRACHEY

In the matter of James Currie an Insolvent

*Jurisdiction—Insolvent Court of Bombay jurisdiction of—Indian Insolvent Act (Stat 11 and 12 Vict C 21), Sec 5 High Court Charter Clauses 18 and 44—Act V of 1872 Trader at Karachi presenting petition in Bombay—Relation of Insolvent Court to High Court—Acts limiting jurisdiction of High Court limit jurisdiction of Insolvent Court*

*J C* a European British subject residing at Karachi in Sind failed in business in 1895, and on 11th June of that year he filed his petition in the Court for Relief of Insolvent Debtors in Bombay

*Held* that having regard to Act V of 1872* read with clause 18 of the Letters Patent, 1865 the Court had no jurisdiction to entertain the petition

By section 5 of Statute 11 and 12 Vict c 21 the Insolvent Court was given jurisdiction over residents within the jurisdiction of the Supreme Court of Bombay The jurisdiction of the Supreme Court extended over all inhabitants of the town and island of Bombay and over European British subjects in any of the factories subject to or dependent on the Government of Bombay

The jurisdiction of the Insolvent Court as defined by the above section remained unaffected by the establishment of the High Court in the place of the Supreme Court except so far as it may be limited by clause 18 of the Letters Patent 1865

[406] A European British subject residing within the Presidency of Bombay though outside the town and island of Bombay may petition the Insolvent Court of Bombay for relief

The powers and authorities originally of the Supreme Court and now of the High Court given by the Insolvent Act form a branch of the jurisdiction of the High Court and are therefore subject to any legislative restriction of that jurisdiction whether imposed by the Letters Patent or by any subsequent enactment

* Act V of 1872 as amended by Act XX of 1872 —

Whereas it is expedient to remove doubts which have arisen as to the jurisdiction of the High Court of Bombay over the Province of Sind it is hereby enacted as follows —

1 The High Court of Bombay has not and shall be deemed never to have had jurisdiction over the Province of Sindh

2 Nothing herein contained shall be deemed to affect the Administrator General's Act, 1874

3 Nothing herein contained shall be deemed to invalidate the grant of any probate or letters of administration heretofore or hereafter made by the High Court of Judicature at Bombay or to affect the rights powers or duties of any executor or administrator under, or by virtue of, any such probate or letters

4 Nothing herein contained shall be deemed to affect the Criminal Jurisdiction of the said High Court, so far as regards European British subjects of Her Majesty.

The power of the High Court and any Judge of it to exercise the jurisdiction of the Insolvent Court, whatever that jurisdiction may be, is locally limited by clause 18 of the Letters Patent, 1865, to the Presidency of Bombay and cannot be exercised outside that Presidency or outside any area within it to which it may by subsequent enactment be restricted.

The effect of clause 44 of the Letters Patent, 1865, which makes the provisions of clause 18 subject to the legislative powers of the Governor General in Council, must be that any Act of the Governor General in Council, still further limiting the jurisdiction of the High Court and excluding it from any place even within the Presidency, must also still further narrow the jurisdiction of the Insolvent Court, for otherwise the Judge of the High Court presiding as Commissioner would be exercising jurisdiction in a place where his jurisdiction under clause 18, by virtue of which alone he could act as Commissioner, had been abolished. Act V of 1872 is such an Act.

THE insolvent was a European British subject who had carried on business at Karachi in the province of Sind In 1895 his firm failed, and on the 11th June 1895, he filed his petition in the Court for the Relief of Insolvent Debtors in Bombay

At the hearing, counsel for the opposing creditor took the objection that the Insolvent Court at Bombay had no jurisdiction to entertain the petition, the insolvent having resided and carried on business at Karachi and not in Bombay.

*Russell* and *Raikes* for the Opposing Creditor - They referred to the Indian Insolvent Act (Stat 11 and 12 Vict, c 21), sec 5, The High Court's Act (Stat 24 and 25 Vict, c 104), sec 11, Act V of 1872, see *ante*, p. 405.

*Daly* and *Mankar* for the Insolvent - They referred to Letters Patent, 1865, clause 18, *In the matter of Candas Narrondas* v *C A Turner*, I L R., 13 Bom., 520, at p 532, *In re Dorothea Ricks*, 3 Mad H C Rep, 151, *In re Cockburn*, 2 Ind Jur. (N S.), 326, *In re Tutkins*, 1 Beng. L R (O C), 84, *In re George Blackwell*, 9 Bom H. C Rep, 161, Supreme Court Charter, clause 28; Act V of 1872, *Empress* v *Burah and Book Singh*, I. L R., 3 Cal. 63, at p 117.

**[407] Strachey, J.:** This is a petition under section 5 of the Insolvent Debtors' Act (Stat 11 and 12 Vict, c 21) for the benefit of the provisions of the Act, by a European British subject residing at Karachi The question is whether this Court has jurisdiction to entertain the petition

By section 5 an application for the benefit of the Act may be made by any insolvent debtor "who shall reside within the jurisdiction of any Supreme Courts at Calcutta, Madras, or Bombay, respectively" As regards Bombay, the jurisdiction of the Supreme Court extended, under clause 29 of its charter, to all the inhabitants of the town and island of Bombay and, under clause 28, to all European British-born subjects residing "within any of the factories subject to or dependent upon the Government of Bombay" Since the replacement of the Supreme Courts by the High Courts established by Stat. 24 and 25 Vict, c. 104, and the Letters Patent issued thereunder, it has been held that the jurisdiction of the Insolvent Court as defined by section 5 of the Insolvent Debtors' Act remains untouched *In the matter of Dorothea Ricks*, 3 Mad. H. C. Rep., 151,—except so far as it may be limited by clause 18 of the Letters Patent — *In the matter of Intkins*, 1 Beng L R. (O C.), 84; *In re Cockburn*, 2 Ind Jur (N. S), 326, and in Bombay it has always been held that a European British subject residing within the Presidency, though outside the town and island of Bombay, may petition this Court for relief—*In re George Blackwell*, 9 Bom. H. C Rep, 461.

It has, however, been argued by Mr. Raikes for the opposing creditor that by reason of section 11 of the High Courts Act, the material words in section 5 of the Insolvent Debtors Act must now be read "who shall reside within the jurisdiction of any of the High Courts at Calcutta, Madras, and Bombay

respectively," so that, since the passing of the statute of 1861 (24 and 25 Vict, c 104) the jurisdiction of the High Court is defined by that statute and the Letters Patent, and not the jurisdiction of the Supreme Court as defined by its charter, would be the text or measure of the jurisdiction of the Insolvent Court Whether that construction is correct and what would be its [408] consequences if accepted, I need not now consider Nor need I consider whether under clause 28 of the charter the Supreme Court had jurisdiction over European British subjects in Karachi though I may say that no case in which either that Court or the Insolvent Court exercised such jurisdiction has been cited Whatever view of section 5 of the Insolvent Debtors Act is adopted it appears to me that the jurisdiction of this Court to entertain the present petition is excluded by Act V of 1872 read with clause 18 of the Letters Patent of the High Court

This conclusion is based on the following considerations — Although it is clear from the whole of the Insolvent Debtors Act and from sections 2 3 4 73 76 and 86 in particular that the Insolvent Court was a separate tribunal from the Supreme Court and is now equally distinct from the High Court *In re Jamnadas Hurjiwan* I L R 8 Bom 511 at p 519 it nevertheless stands in such a special relation to the High Court that a limitation or exclusion of the High Court jurisdiction may induce the limit or exclusion of its own The Insolvent Court is to be held before a Judge of the High Court the High Court has power to make rules for regulating its proceedings and to appoint and remove its officers the High Court is a Court of appeal from its decision and in certain cases the Insolvent Court may direct judgment against an insolvent to be entered up in the High Court and to be executed there in certain events All the powers of the High Court and its Judges in these respects are included in clause 18 of the Letters Patent the object of which was to define the jurisdiction of the newly established High Court in relation to the Insolvent Court It provides that

The Court for Relief of Insolvent Debtors at Bombay shall be held before one of the Judges of the said High Court of Judicature at Bombay, and the said High Court and any such Judge thereof shall have and exercise within the Presidency of Bombay such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India

This shows first that all the powers and authorities under the Insolvent Debtors Act originally of the Supreme Court and now of the High Court to which I have referred and including [409] the power to sit in and hold the Insolvent Court as its Commissioner form a branch of the jurisdiction of the High Court just as much as its powers under clause 17 as to infants and lunatics and are therefore subject to any legislative restriction of that jurisdiction whether imposed by the Letters Patent themselves or by any subsequent enactment Secondly that the power of the High Court or any Judge of it under clause 18 to exercise the jurisdiction of the Insolvent Court whatever that jurisdiction may be is locally limited by the clause within the Presidency of Bombay and therefore irrespective of section 5 of the Insolvent Debtors Act cannot be exercised outside the Presidency nor outside any area within the Presidency to which the scope of the clause may by subsequent enactment be restricted

This view of the jurisdiction of the High Court as including as one of its branches the power to exercise the jurisdiction of the Insolvent Court is supported by section 638 of the Code of Civil Procedure (Act XIV of 1882) which speaks of "any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court" and by the judgment of the Privy Council in *Navivahu* v *Turner*, L R, 16 I A, 156, where their Lordships held that the insolvency powers of the

High Court under clause 18 formed part of its ordinary civil jurisdiction. *In the matter of Tietkins* Mr. Justice MARKBY decided that assuming Sir LAWRENCE PEEL to have rightly held in an unreported case of 1851 that the word "jurisdiction" in section 5 of the Insolvent Debtors' Act meant, as regards European British subjects, the whole Presidency, still the effect of clause 18 of the Calcutta Letters Patent of 1865 was to "narrow" the jurisdiction of the Insolvent Court to the Bengal Division of the Presidency of Fort William. He accordingly held that, sitting in the Insolvent Court, he had under clause 18 no jurisdiction to entertain a petition by a European British subject residing at Cawnpore, a place within the Presidency, but outside the Bengal Division of it. Upon the same principle, apart altogether from section 5 of the statute, a Judge of the High Court of Bombay obviously could not, by reason of clause 18, exercise original jurisdiction in insolvency by entertaining a petition by a person residing outside the Bombay Presidency. Upon the same principle the effect [410] of clause 44 making the provisions of clause 18 as well as the rest of the Letters Patent subject to the legislative powers of the Governor-General in Council must be that any Act of the Governor-General in Council still further limiting the jurisdiction of the High Court and excluding it from any place even within the Presidency, must also still further narrow the jurisdiction of the Insolvent Court; for otherwise the Judge of the High Court presiding as Commissioner would be exercising jurisdiction in a place where his jurisdiction under clause 18, by virtue of which alone he could act as Commissioner, had been abolished. Now Act V of 1872 is precisely such an Act. As originally passed, it lays down in the most general terms that "the High Court of Bombay has not and shall be deemed never to have had jurisdiction over the province of Sind." Therefore, the High Court, including every Judge of it, has not and must be deemed never to have had, over the province of Sind, that portion of the High Court's ordinary original civil jurisdiction under clause 18 which consists in exercising the powers of a Commissioner in the Insolvent Court. Thus, by Act V of 1872 the jurisdiction of the Insolvent Court was narrowed to the Bombay Presidency, excluding Sind, just as in Bengal it was narrowed by the Letters Patent of 1865 to the Bengal Division of the Presidency of Fort William. That this is the necessary result of Act V of 1872 is further shown by the amending Act XX of the same year. In the course of a few months it was discovered that the absolute exclusion of the High Court's jurisdiction from Sind effected by the earlier Act was too sweeping; and hence it was in substance provided that nothing in that Act should be deemed to exclude that jurisdiction from Sind in three classes of cases—cases under the Administrator-General's Act, grants of probates and letters of administration, and criminal jurisdiction over European British subjects. The necessary inference from this is that, in the opinion of the Legislature, all these specified kinds of jurisdiction of the High Court would have been excluded from Sind by Act V of 1872 as originally passed, and that all other kinds, including insolvency, not specified and so not saved by Act XX fall within the general exclusion. Assuming, for the sake of argument, that but for Act V of 1872 a Judge of the High Court would, under [411] clause 18 of the Letters Patent, have had power to exercise original jurisdiction in the Insolvent Court over Sind as well as over the rest of the Bombay Presidency, the effect of Act V is exactly as if the following proviso had been added to the clause:—"Provided that the said High Court, and any such Judge thereof, shall not have or exercise, and shall be deemed never to have had, any such powers and authorities within the province of Sind." That would as effectually prevent a Judge of the High Court from entertaining in the Insolvent Court a petition by a European British subject residing at Karachi

as the clause apart from Act V of 1873, would undoubtedly prevent him from entertaining a petition from such a subject residing outside the Presidency.

In any question relative to the jurisdiction of this Court, it is necessary, in my opinion, to have regard not only to that jurisdiction as defined by section 5 of the Insolvent Debtors Act but to the powers of the High Court and its Judges to exercise that jurisdiction under clause 18 of the Letters Patent and any enactment affecting that clause. In this view of the case I need not decide any of the other matters which were argued at the bar regarding section 5 of the Insolvent Debtors Act and [illegible] provisions of the Supreme Court Charter, the High Court Act and the Letters Patent. It must not be inferred from anything in this judgment that I dissent from the decision in *In re George Blackwell* 9 Bom. H. C. Rep. 161,* which is distinguishable on the ground that there the petitioner resided [illegible], or [illegible] to throw doubt on the jurisdiction of this Court [illegible] of Sind to entertain petitions by European British subjects residing anywhere within the Presidency. This petition must be dismissed for want of jurisdiction [illegible] costs.

*Petition dismissed.*

Attorneys for the Opposing Creditor: Messrs. *Bland* and [illegible].

NOTES.

[[illegible] 21 Bom. [illegible]
[illegible] (190[illegible]) 10 Bom. L.R. [illegible] (1900) [illegible] L.R. [illegible]]

## [412] ORIGINAL CIVIL.

*The [illegible] January, 189[illegible].*

PRESENT:

MR. JUSTICE CANDY.

A[illegible] Gulam Husain .......... Plaintiff

*versus*

S[illegible] Albert David Sassoon and others .......... Defendants.*

*Partnership—Death of partner—[illegible] representative [illegible] to sue for a sp[illegible] of the assets—Contract Act (IX of 1872), Sec. [illegible].*

On the [illegible] [illegible] [illegible] of the firm [illegible] firm although the firm [illegible] [illegible] [illegible] all the claims and [illegible] partners willing to satisfy [illegible] brought by the representative of the deceased partner.

THE plaintiff was the administrator in Bombay of one Haji Abdool Cassum of Bushire, who in his lifetime carried on business at Bushire in partnership with his brother Haji Ali Akbar (defendant No. 5).

The firm traded in the joint names of the two brothers and for many years had dealings with the firm of Messrs. David Sassoon and Co. of Bombay, the partners in which were defendants Nos. 1 [illegible] Accounts of these transactions were periodically sent by Messrs. David Sassoon and Co. addressed to the firm at Bushire. Messrs. David Sassoon and Co. held in deposit two lakhs worth of Government promissory notes which belonged to the firm of Haji Abool Cassum and Haji Ali Akbar at Bushire. These notes were included in the accounts furnished from time to time by David Sassoon and Co. to that firm.

* Suit No. [illegible]0 of 1896.

On the 7th February 1893, Haji Abool Cassum died at Bushire, leaving five sons and a daughter, two of the sons, *viz*, Aga Mahomed Karim and Aga Mahomed Ismail had attained majority the rest of the children were minors

At the time of Haji Abool's death, David Sassoon and Co owed his firm a considerable sum of money in respect of the dealings between them An account for the year 1892 had been duly sent to Bushire addressed as usual to the firm and the [413] receipt of the account was acknowledged by a letter signed as usual with the name of the Bushire firm and sent to David Sassoon and Co of Bombay This letter of acknowledgment was dated the 6th February 1893, *i e*, the day before Haji Abool died

The Bushire firm under the surviving partner continued to carry on its business as before notwithstanding the death of the partner Haji Abool Cassum A few further transaction took place between it and David Sassoon and Co of Bombay who continued to furnish their accounts addressed, as before, to the firm No objections were taken to those accounts or had been taken to any of the previous accounts furnished by David Sassoon and Co

In March 1894, and February 1895 Haji Ali Akbar (defendant No 5) the surviving partner in the Bushire firm settled with Aga Mahomed Ismail and Aga Mahomed Karim two of the sons and heirs of his deceased brother and partner Haji Abool Cassum The settlement were respectively reduced to writing and were verified by the Vice Consul at Bushire By these settlements certain property was allotted to these heirs as their respective shares in their deceased father's property

On 8th October 1895, the plaintiff as duly constituted attorney of Aga Mahomed Karim and Aga Mahomed Ismail, the two above mentioned sons of the deceased Haji Abool Cassum obtained from the High Court letters of administration (for their use and benefit and limited until they or either of them should obtain letters of administration) of the property and credits of the said Haji Abool Cassum to have effect throughout the province of Bombay On the 23rd October 1895, as such administrator he called upon Messrs David Sassoon and Co for an account of all moneys &c, belonging exclusively to the deceased Haji Abool Cassum or jointly to him and his brother Haji Ali Akbar The next day David Sassoon and Co furnished an account showing a sum of Rs 1 63 971 standing to the credit of the Bushire firm and referring to the accounts previously rendered to the Bushire firm The plaintiff then demanded copies of the previous accounts furnished by Sassoon [414] and Co, to which the latter replied that accounts had been regularly furnished to the surviving partner to whom he (the plaintiff) might refer for copies

The plaintiff then filed this suit praying

(1) For an account of the dealings between David Sassoon and Co and the Bushire firm and of the securities held by David Sassoon and Co &c

(2) That David Sassoon and Co might be ordered to pay to the plaintiff as administrator to him and Haji Ali Akbar such sum as might be found due on taking accounts and to deliver up all securities, &c

The surviving partner in the Bushire firm (Haji Ali Akbar) took no notice of the letters and notices addressed to him by the plaintiff's solicitors The plaintiff therefore, made him a defendant in the suit (defendant No 5) A summons was served upon him, but he did not appear

In their written statement David Sassoon and Co stated that they were always willing to hand over the money and the securities in their possession to the persons entitled, but for their own protection wished to have it decided who was entitled They alleged that Haji Ali Akbar (defendant No 5), the

surviving partner of the Bushire firm, entirely repudiated and denied the plaintiff's right to the accounts moneys and securities claimed by him and that they had notice of his settlement with two of the heirs of the deceased They also submitted that, in the event of accounts being ordered to be taken by the Court, the accounts which they had rendered to the Bushire firm before and after the death of Haji Abool Cassum to none of which any objection had ever been taken, should be held binding as settled accounts

At the hearing the following issues were raised

1 Whether the plaintiff is entitled to maintain this suit

2 Whether, if so, the accounts rendered by David Sassoon and Co. (defendants Nos 1-4) to the fifth defendant and not objected to, are not binding on the plaintiff

3 General issue

[415] *Kirkpatrick* and *Scott*, for the first four Defendants (Sassoon and Co) — We admit the money claimed is due from us to the Bushire firm We only desire to ascertain to whom to pay it That firm is still carrying on business, and the surviving partner may perhaps demand the money from us The question is whether the representative of a deceased partner of a foreign firm can sue debtors of that firm to recover a specific asset although there is a surviving partner still carrying on the business who does not join in the suit, who desires to manage and to wind up affairs of the firm himself and who is willing to satisfy all the claims of the deceased partner There is no suggestion that the surviving partner here (defendant No 5) desires to commit any fraud upon the estate of his deceased partner or that he and these defendants are in collusion On the contrary it is alleged and is not denied that he has already recognised and settled the claims of the two sons of his deceased partner whose attorney the present plaintiff is Nor is it suggested that the firm's assets now in his hands are not sufficient to meet the claims made on behalf of the deceased partner and his heirs Under these circumstances has the plaintiff a right, independently of the surviving partner and without any necessity shown, to sue persons who owe money to the firm? To give the representative of a deceased partner an independent right to sue, at his pleasure, all or any of the debtors of the firm, puts the firm and the surviving partner at the mercy of a stranger whose proceedings may possibly ruin both

We submit that his right is merely a right to sue the surviving partner for partnership account, and for a share in the final balance when ascertained That is so in England Lindley on Partnership (5th Ed), pp 288, 344

Section 45 of the Contract Act (IX of 1872) will be relied on That section clearly does not apply to partnerships which are dealt with in a separate chapter of the Act The very words of the section itself exclude partnerships, for the mere fact of dealing with a partnership as to which special rules apply, sufficiently shows the contrary intention mentioned in the section *Gobind Prasad* v *Chandar Sekhar*, I L R, 9 All 486 *Ram Narain* v *Ram Chunder*, I L R, 18 Cal, 86, [416] *Imam-ud din* v *Liladhar*, I L R 14 All 524, *Motilal* v *Ghellabhai*, I L R, 17 Bom, 6 *Vaidyanatha* v *Chinnasami*, I L R, 17 Mad, 108

This Court has no jurisdiction to take general partnership accounts of a firm at Bushire *Suganchand Shivdas* v *Mulchand*, 12 Bom H C Rep, 113 at p 125, *Kessowji Damodar* v *Luckmidas Ladha*, I L R 15 Bom, 404 What decree can it give in this suit for a single asset? The plaintiff has no right to the whole, and the part to which he may perhaps be entitled cannot be ascertained without taking general accounts As to the accounts regularly

furnished by the defendants to the Bushire firm, they must be taken as settled accounts. No objection has been taken to them.

*Inverarity* (with *Lang*, Advocate-General), for the Plaintiff:—*Motilal* v. *Ghellabhai*, I. L. R. 17 Bom. 6, practically decides this case, for it assumes that the representatives of a deceased partner can sue. If they could not sue, the question as to the necessity of joining them as parties could not arise. Under section 45 of the Contract Act the right of the deceased co-contractor survives to his representative. If the right survives, there is a remedy. Cunningham and Shephard's Contract Act, notes to section 45. In *Motilal* v. *Ghellabhai*, I. L. R., 17 Bom., 6, FARRAN, J. (at page 11), says: "We cannot doubt but that these sections (*i.e.*, 43 and 45) relate to partners as well as to other co-contractors." From *Rivett Carnac* v. *Goculdas*, I. L. R. 20 Bom., 15, it is also clear that the representative of a deceased partner has a separate and independent right of suit. In that case he was allowed to recover a specific asset from a surviving partner without a general partnership account.

As to the accounts, we are entitled to have accounts from the defendants from the beginning of their dealings—at all events from the end of 1891. The account to 1892 did not arrive at Bushire until after Abool Cassum's death. The defendants, who do not deny their liability to the firm, ought to have paid the amount due into Court.

*Kirkpatrick* in reply. We could not pay into Court. Section 376 of the Civil Procedure Code (Act XIV of 1882) does not [417] apply to such a case as this, and it is the only section which provides for payment into Court.

**Candy, J.**:—Two brothers, Haji Abool Cassum and Haji Ali Akbar, carried on a partnership business at Bushire in Persia in their joint names. In the course of this business they had extensive dealings with the Bombay firm of David Sassoon and Co., who acted as agents for the Bushire firm in purchasing and selling goods and (apparently, as a favour) held Government paper to the extent of two lakhs of rupees on behalf of the said Bushire firm.

It is admitted that David Sassoon and Co. have, at this present time, as the result of their transactions with the Bushire firm, a large sum of money to the credit of that firm, and also they are responsible to the Bushire firm for a large sum of money held by Sassoon and Co. in China to the credit of the Bushire firm.

Abool Cassum died at Bushire on 7th February 1893, leaving him surviving two adult sons, Aga Mahomed Karim and Aga Mahomed Ismail, and two other sons and one daughter, the three being minors. It is clear from the correspondence which has been filed in the case that the surviving brother and partner Haji Ali Akbar claimed to be sole executor of his deceased brother's estate, and he asked David Sassoon and Co. to be his agents and to obtain probate of his brother's will, mentioning that one Aga Gulam Husain was using his influence with the adult sons of the deceased to obtain probate in the name of Mahomed Karim. David Sassoon and Co. pointed out that they could not act as agents for Ali Akbar, but that he should come to Bombay and take all necessary steps after obtaining letters from his grown up nephews to act on their behalf. They also pointed out that the will of the deceased could not be acted upon, as it seems to have been executed (in 1869) for the special purpose of a pilgrimage. Haji Ali Akbar replied that he had come to a settlement with his elder nephews. But he took no steps to come to Bombay, and administer his brother's share of the assets of the partnership in Bombay.

In the meanwhile the above-mentioned Gulam Husain, as the duly constituted attorney of the said Mahomed Karim and [418] Mahomed Esmail, obtained letters of administration (dated 8th October 1895) of the property of

the said Abool Cassum within the Bombay Presidency for the benefit of the said Mahomed Karim and Mahomed Ismail and limited until they or either of them should obtain letters of administration

Armed with these letters Gulam Husain's solicitors wrote on the 23rd October 1895 to David Sassoon and Co for an account of all moneys due by them to the Bushire firm or to Abool Cassum personally D Sassoon and Co's solicitors replied furnishing an account of what in their clients books was shown due to the Bushire firm, and refusing to recognise the right of Gulam Husain to deal with the same except with the concurrence of Ali Akbar They further stated that account had been rendered from time to time to Ali Akbar Gulam Husain's solicitors also wrote (November 1895) to Ali Akbar at Bushire, asking him to join in the administration of the estate of the deceased in recovering what was due from David Sassoon and Co In that letter mention was made of the accounts of the partnership having been made up and settled between Ali Akbar and the two adult sons of the deceased the statement of account being signed by Ali Akbar and the two sons It does not appear that any answer was received to that letter

The present suit was filed on 9th January 1896 by Gulam Husain against David Sassoon and Co and Ali Akbar praying that an account should be taken of all the dealings between Sassoon and Co and the Bushire firm and that David Sassoon and Co should be ordered to pay to him or to him and defendant Ali Akbar the balance found due and the Government paper above mentioned Defendant Ali Akbar has not appeared to plead in the suit It being shown to the Judge in Chambers that service of the summons could not be effected under section 90 of the Civil Procedure Code (Act XIV of 1882) an order was made that the summons should be sent by registered post and that such should be deemed good and effectual service The postal cover has been returned as refused I hold that the summons was duly served The ruling in *Jagannath v J F Sassoon* I L R 1 Bom 606 does not

[419] apply as the defendant is resident in British territory It would be practically impossible in the present case to prove directly that the person to whom the postal official at Bushire tendered the cover and by whom it was refused was the defendant Ali Akbar But there is the direct evidence of the fact that the cover is most clearly addressed to Ali Akbar a person who must be well known in Bushire and there is the affidavit filed before the Judge in Chambers showing that Ali Akbar knows of this suit To hold that there can be no valid service on Ali Akbar or that the present service is ineffectual would amount to a denial of justice assuming that this Court has jurisdiction That is the main question which arises on the written statement filed by David Sassoon and Co and forms the subject of the first issue raised by their counsel whether the plaintiff is entitled to maintain this suit

Mr Kirkpatrick's argument may be put briefly thus There is no authority for the representative of the estate of a deceased partner in a foreign firm (there being a surviving partner of the foreign firm still carrying on the business of that firm) coming into this Court as such representative and claiming to recover a specific asset from a debtor of the firm All he can do in the present case is to sue Ali Akbar for a partnership account in the Court in Persia and if the Persian law allows a receiver to be appointed to obtain such appointment and such receiver could then come here and ask David Sassoon for an account, and recover the specific sum found due Section 45 of the Contract Act does not apply to partnerships even if it does there is here a "contrary intention" impliable from the fact that the promisees were partners,

and the ordinary common law of partnership would thus apply by which the right of action belongs to the surviving partner only As this Court cannot take a general account of the whole partnership of the firm in Bushire, complete justice can not be done here between the surviving partner and the representative of the deceased partner and it cannot entertain the suit for the recovery of specific asset Such in brief is the learned counsel's argument

[420] Now first as to the word foreign this may really be at once eliminated from the argument In this case part of the cause of action certainly arose in Bombay and leave to sue has been obtained under clause 12 of the Letters Patent The fact therefore that the surviving partner who is sued with the Bombay debtor of the firm is a Persian subject not ever living or carrying on business within the jurisdiction of this Court cannot oust the jurisdiction of the Court Eliminating the word foreign the argument then comes to this that the right of the representative of the estate of a deceased partner is limited to a general suit for the partnership account (which in this case would not lie in any Court in British India) and such apparently is the reasoning of Sir J Edge C J in *Gobind Lal v Ganda Lal* 1 L R 9 All 183 where he says The legal representative in this case would not be entitled necessarily to a moiety of the amount recovered in the action his share of the amount recovered would depend on a settlement of accounts on the realization of the partnership assets and it would in my judgment be highly inconvenient and possibly mischievous to allow him to interfere in the realization of the assets unless through the intervention of the Court by the appointment of a receiver in cases in which such interference by the Court might be necessary

But in this Court I am bound by the decision of the appeal Court in *Ruttonchand v Gooculdas* I L R 20 Bom 15 in which case the head quarters of the partnership were at Karachi and the partners all dwelt and worked for gain outside the jurisdiction of this Court On the dissolution of the partnership by the death of one of the partners no adjustment of the partnership accounts was made The surviving partners had however recovered certain assets of the firm which were in Bombay in the hands of an officer of the Court and the suit in question was brought by the representative of the deceased partner against the surviving partners and the holder of the assets to recover those assets on the ground that they belonged wholly to the estate of the deceased partner Leave was obtained under clause 12 of the Letters Patent On the question of jurisdiction the appeal [421] Court were quite unable to feel any doubt (see pp 44 45 of the report) and their Lordships decreed in the terms of para B of the plaint that if necessary for the purposes of the suit the account of the partnership between the estate of the deceased partner and the surviving partner should be taken by this Court

Now here no such general partnership account is asked for or is necessary The representative of the deceased partner simply says to the surviving partner "Join me in recovering an amount due to the firm in Bombay if you refuse, then I must sue alone and join you as defendant The only account at present to be taken is that of the debtor of the firm in Bombay Is it a valid answer to say The Court has no jurisdiction and cannot assist you because the Court cannot recognise you it can only recognise the surviving partner if he chooses to sue to recover this asset or a validly appointed receiver, if such can be appointed by the Courts and law of Persia?" The decision in the case quoted above gives an answer in the emphatic negative

There remains the argument regarding section 45 of the Contract Act That point has been definitely settled by this Court The answer is shadowed

forth in the judgment just quoted at the top of page 43 of the report. But in the previous case of *Motilal* v. *Ghellabhai*, I. L. R., 17 Bom., 6, the Chief Justice (then Mr. Justice FARRAN) with the late Acting Chief Justice laid down clearly that section 45 of the Contract Act does relate to partners as well as to other co-contractors. Not only so, but the *ratio decidendi* of the whole judgment goes to show that in this Court we cannot accept the argument now put forward by Mr. Kirkpatrick, *viz.*, that in India the right to enforce a partnership contract rests with the surviving partner only. It is shown in that judgment that the only logically consistent result of the application of section 45 of the Contract Act to partnerships is that "the right to performance of the contract, as far as the other contracting party is concerned, *rests just as much with the representative of the deceased partner as with the surviving partner*," and that though it is logically inconsistent to allow the surviving partner to sue without joining the representative of the deceased partner as a party to the suit, yet it was not necessary, notwith-[122]standing the provisions of the Contract Act, to change the old practice of the Small Causes Court which permits the surviving partner to sue alone.

Of course, it follows that the representative of a deceased partner can join the surviving partner in a suit, and if the latter does not join as plaintiff then he can be made a defendant, and so a party to the suit. What right have David Sassoon and Co., the debtors of the firm, to raise any objection? It is no answer to say that under section 63 of the Contract Act Ali Akbar could have given them a valid receipt and discharge for their liabilities to the Bushire firm. As a fact they admit that they have not discharged their liability to the firm. On the contrary when they had notice that Ali Akbar had made an adjustment of the accounts of the firm with his two adult nephews, Mohamed Karim and Mohamed Ismail (see the accounts 2, 3 and 4)—in March 1894 and February and May 1895, they refused payment of a draft drawn on them apparently in liquidation of that adjustment. Subsequently, in July 1895, Mohamed Karim and Mohamed Ismail gave a power of attorney to the present plaintiff to obtain letters of administration and so recover the debt due in Bombay to the firm. How far Mohamed Karim and Mohamed Ismail may be bound to Ali Akbar by the alleged settlement of partnership accounts, it is not for this Court now to say. But the fact of that adjustment, if it is a fact, cannot prevent them or the plaintiff on their behalf from recovering the debt due in Bombay from David Sassoon and Co., so long as Ali Akbar is made a party to the suit. Nor can the writ of attachment (Exhibit 11, with which compare the letters O and P) under section 268 of the Civil Procedure Code, or the letter from the Bank of Persia in London to the firm of Sassoon and Co. in London (Exhibit 12), be pleaded by David Sassoon and Co. as a bar to the present suit, that is, to the account being taken in order to show what is due from David Sassoon and Co. to the Bushire firm. The finding on the first issue must, therefore, be in the affirmative.

There remains the question as to the accounts rendered by David Sassoon and Co. to the Bushire firm. Clearly they are not settled, that is, adjusted accounts. But they are stated accounts. There [423] is the evidence of the manager of David Sassoon and Co. that they were never objected to. The last one received by the Bushire firm before the death of Aboor Cassum was received and acknowledged the day before his death. That was up to the end of 1892. It follows that all the accounts rendered up to and including the period up to the end of December 1891, must be taken as stated accounts, no objection having been made thereto within a reasonable time. Those accounts, therefore, must remain in full force and vigour as stated accounts, except so far as they can be

impugned by the plaintiff, who has the burden of proof on him to establish errors and mistakes (Story's Equity Jur., section 523). The fact that the Bushire firm had no agent in Bombay, and no partner of the firm came to Bombay to examine David Sassoon and Co.'s accounts with vouchers, &c., would not make the account less stated accounts. It is for him to surcharge and falsify with regard to the accounts rendered up to and including 1891, and, subsequently, the account must be taken as open and treated accordingly by the Commissioner in the ordinary way. He should include the moneys due on account of the China transaction and referred to in paragraph 4 of the written statement, and also the Government promissory notes with interest held by David Sassoon and Co. on behalf of the Bushire firm. It is unnecessary to pass any decree now regarding those notes, as the interest has always been included in the account, and the final order as to the disposal of the notes can be passed when the final decree is to be made.

There will be a reference to the Commissioner in accordance with the above directions. All costs and further directions reserved.

Attorneys for the Plaintiff.—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the first four Defendants.—Messrs. *Brown and Moir.*

NOTES

[The C.P.C. 1908 O. 30 r. 4 expressly permits such suits; see also (1900) 23 All., 94, (1910) 35 Bom., 213 = 13 Bom. L.R. 323; (1914) 24 I.C. 266 (Burma).]

[424] APPELLATE CIVIL

FULL BENCH

*The 19th December, 1895.*

PRESENT:

MR. JUSTICE JARDINE, MR. JUSTICE CANDY AND MR. JUSTICE RANADE.

Erava and another ........ (Original Plaintiffs) Appellants

*versus*

Sidramappa Pasare ........ (Original Defendant) Respondent.*

*Execution—Decree—Death of judgment debtor after decree but before execution—Legal representatives not made parties to proceedings—Sale in execution without notice to legal representatives under section 248 of Civil Procedure Code—Notice given to wrong persons—Title of purchaser—Mortgage—Redemption—Limitation—Civil Procedure Code (Act X of 1877), Secs. 234, 248, 311.*

On the 29th March 1877 one Nagappa mortgaged certain property to the defendant. On the 27th June 1877 one Hanmant Vithal obtained a money decree against Nagappa, but before it could be executed Nagappa died leaving all his property to his daughters the plaintiffs. On the 22nd November 1878, Hanmant applied for execution against Nagappa, deceased, by his heir and nephew Ramlinga. Ramlinga appeared and stated that he was not the heir, but that the heirs of Nagappa were his daughters the plaintiffs. The plaintiffs, however, were not made parties to the execution proceedings, nor were notices served on them under section 248 of the Civil Procedure Code (Act X of 1877). The execution proceedings were continued and the mortgaged property was sold on the 9th June 1880, and

* Second Appeal, No. 884 of 1893.

was bought by the defendant (the mortgagee) subject to his mortgage The sale was confirmed and a certificate of sale was duly issued to the defendant, who got formal possession on the 11th October 1880, he being already in possession as mortgagee In 1889 the plaintiffs sued the defendant to redeem the mortgage It was contended that the defendant having purchased at a Court sale was entitled to the property free from the claim of the plaintiffs.

*Held*, by CANDY and JARDINE, JJ, that even assuming that the execution proceedings and sale had conveyed an absolute title to the purchaser the present suit, which was brought within twelve years of the sale, did, in effect, challenge the sale, and that the plaintiffs were, therefore, entitled to redeem

*Held*, by RANADE, JJ., that, in respect of the plaintiffs who were not parties, the sale proceedings were invalid and null and without jurisdiction that the auction purchaser acquired no rights under his certificate of sale as against these legal representatives and that as against them he could only claim title by adverse possession not falling short of twelve years. As the present suit was admittedly brought within that period, it was maintainable

SECOND APPEAL from the decision of Rao Bahadur N G Phadke, Joint First Class Subordinate Judge of Sholapur, with appellate powers, confirming the decree of Thomas Moore, First Class Subordinate Judge

[425] Suit for redemption

The plaintiffs were the daughters of one Nagappa, who mortgaged the property in question to the defendant for Rs 3,000 on the 28th March 1877. Subsequently, *viz*, on the 27th June 1877, one Hanmant Vithal obtained a money decree (No 687 of 1877) against Nagappa, but before it was executed, Nagappa died, having by his will, dated 15th February 1875, bequeathed all his property to the plaintiffs

After Nagappa's death, Hanmant Vithal on the 22nd November 1878, applied for execution of the decree against '*defendant Nagappa deceased, by his heir and nephew Ramlinga*' A year having elapsed since the decree, notice was issued under section 248 of the Civil Procedure Code This notice, however, was issued to one Ramlinga, the nephew of Nagappa and not to the plaintiffs Ramlinga appeared and informed the Court that he was separated from his deceased uncle Nagappa and that he was not Nagappa's heir that the plaintiffs were Nagappa's heirs and that he was not in possession of the estate. He was informed by the Court that the application was not against his property but against the estate of the deceased Nagappa and that if his property should be attached, he would have his remedy after attachment

The attachment issued and was followed by a proclamation of sale in which the defendant was described as "Nagappa, deceased, after decree—heir Ramlinga ' and the interest to be sold as that of 'Nagappa deceased, his heir Ramalinga " At the execution sale on 9th June 1880, the mortgagee Sidramappa purchased the property, and a certificate of sale was granted to him when the sale was confirmed He had given notice of his mortgage and the sale was made subject to it The certificate of sale described the interest old as that of " the deceased Nagappa ' On the 11th October 1880, Sidramappa was put into formal possession, he being already in possession as mortgagee.

In the year 1889 the plaintiffs brought the present suit as heirs of their father Nagappa and also as legatees under his will for an account of the mortgage of the 28th March 1877, and for redemption The defendant contended that as purchaser at an execution sale he was entitled to the property, that the plaintiffs [426] had full knowledge and notice of the sale, that the certificate of sale was duly registered, that in a redemption suit they could not call in question the legality of the sale, &c, &c

The Subordinate Judge dismissed the suit, holding that the equity of redemption belonged to the defendant, he having purchased it at an execution sale, and that the plaintiffs had no claim to redeem

On appeal by the plaintiffs the Judge confirmed the decree

The plaintiffs appealed to the High Court

*Macpherson* (Acting Advocate General) and *N G Chandavarkar* appeared for the Appellants (Plaintiffs) The equity of redemption is in the plaintiffs as the heirs of the mortgagor and they are entitled now to redeem The equity of redemption did not pass to the defendant by the execution sale We contend that as against the plaintiffs the sale was null and void The decree was passed against Nagappa but he died before it was executed At his death the property passed to the plaintiffs as his heirs and representatives That property was no doubt liable to the decree but it could only be made available to satisfy the decree in the mode prescribed by the Civil Procedure Code see sections 234 and 248 But no notice under section 248 was given to the plaintiffs The legal procedure was thus not followed and as against the plaintiffs the sale is null and void —*Alisahamji Daoji* v *Nathwa Kallya* P J, 1878, p 190 *Sheo Prasad* v *Hira Lal* I L R 12 All 440 *Sahdeo Pandey* v *Ghasiram*, I L R, 21 Cal, 19 *Chathukelan* v *Govinda* I L R 17 Mad 186 Sections 235 and 244 of the Civil Procedure Code also support our contention

As the heirs of the mortgagor we may sue for redemption at any time within sixty years article 148* of the Limitation Act (XV of 1877) This suit has been brought within twelve years after the date of the mortgage and only nine years since the sale in 1880 to the defendant

As to acquiescence we rely on *Yaswantrapa* v *Ranu*, I L R 9 Bom, 86 *Bhagvant* v *Kondi* I L R, 14 Bom 279 *Rambhat* v *Babaibhat*, I L R, 18 Bom 250 *Aba* v *Dhondu Bai* I L R 19 Bom 276

[427] *Inverarity* (with *Daji A Khare* and *G M Tripathi*) appeared for the Respondent (Defendant) The mortgagor's equity of redemption was sold to the defendant at an execution sale The sale gave him an absolute title to it and the plaintiffs as heirs of the mortgagor have no claim It is alleged that the mere failure of the decree holder to give the plaintiffs notice of the intended sale under section 248 of the Civil Procedure Code makes the sale null and void as against them We contend that the omission was a mere irregularity of procedure and that the defendant as purchaser at the sale is not affected by it He is not bound to see that the proceedings are regular—*Rewa* v *Ram Kishen* L R 13 Ind Ap 106 I L R 14 Cal 18 *Natha Hari* v *Jamni*, 8 Bom H C R p 37 (A C J) The sale to him was duly confirmed and a certificate was granted and the defendant got a complete title The plaintiffs in this suit really seek to set aside the sale, but a mere irregularity is not a sufficient

* [Art 148

| Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|
| Against a mortgagee to redeem or to recover possession of immoveable property mortgaged | Sixty years | When the right to redeem or to recover possession accrues<br><br>Provided that all claims to redeem arising under instruments of mortgage of immoveable property situate in British Burma which have been executed before the first day of May 1863 shall be governed by the rules of limitation in force in that province immediately before the same day ] |

ground to set it aside once it has been confirmed -*Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein* I L R 18 Cal, 188 *Suryanna* v *Durgi*, I L R, 7 Mad, 258 Notice to persons in possession is sufficient *Prosunno Chunder* v *Kristo Chytunno*, I L R, 1 Cal 342 *Janaki* v *Dhanu Lall*, I L R, 14 Mad 451 Section 234 of the Civil Procedure Code is permissive and not mandatory It applies only when the property sought to be attached is in the hands of the legal representative *Aba* v *Dhondu* ... I L R 19 Bom 276, *Kunhammad* v *Kutti* I L R, 12 Mad 90 The notice contemplated by section 248 is required to be given when execution is sought against the legal representative, but not otherwise *Aba* v *Dhondu Lal* I L R 19 Bom, 276, *Hirachand* v *Kasturchand* I L R 18 Bom. 224

If the plaintiffs were damnified by the sale they should have applied to set it aside under section 311 of the Civil Procedure Code

*Macpherson* in reply —There is a distinction between an illegality and a mere irregularity -*Girdhari Lall* v *Kantoo Lall* L R 1 Ind App 321 A purchaser at a Court sale is bound to inquire whether the proper legal representatives of a deceased judgment debtor are informed of proceedings in execution, so that they may have an [428] opportunity of being heard A decree holder can according to section 234 of the Civil Procedure Code, get at the property of the judgment-debtor only through his legal representative This is made clear by the change in the language of section 210 of the Code of 1859 Under that section the decree holder could get at the property without the legal representative being made a party The words estate of the deceased are omitted from section 234 of the present Code

Section 311 of the Code applies only to a material irregularity in publishing or conducting the sale This section does not apply to a vital illegality which cannot be cured by any equitable consideration Section 248 of the Code makes it incumbent upon the Court to issue notice to the legal representative

**Farran, C J** -This was a suit by Irava and the son of Tukava who are the heirs of Nagappa deceased to redeem a mortgage of four survey numbers from the defendant Malkarjun the son of Sidramappa the original mortgagee

The questions to be decided in the appeal are (1) whether the sale certificate of the equity of redemption granted by the Court to Sidramappa legally conveyed the equity of redemption in the mortgaged premises to him so as to extinguish it, and (2) whether assuming that not to be the case, Sidramappa acquired a title by estoppel or acquiescence on the part of the representatives of Nagappa, or by limitation, to the equity of redemption so as to prevent their now redeeming

The facts which give rise to the former are these In March 1877 Nagappa mortgaged the four survey numbers in question to Sidramappa the father of the defendant Sidramappa obtained possession under his mortgage In the month of June following one Hanmant Vithal obtained a money decree in the Court of the Subordinate Judge at Sholapur against Nagappa, the principal debtor, and his son in law Venkappa his surety Nagappa died soon after the decree and before proceedings in execution of it had been taken He left two daughters Irava and Tukava and also a separated nephew Ramalinga On the death of Nagappa accordingly the equity of redemption in the mortgaged premises devolved upon his daughters Irava and Tukava

[429] After Nagappa's death, Hanmant Vithal applied under section 234 of Act X of 1877 for execution of his decree against the defendant Nagappa, deceased, by his heir and nephew Ramalinga, to recover Rs. 65-6-2 by the

attachment and sale of the four survey numbers which had been mortgaged to Sidramappa The application was also headed with the name of Vyankappa, but no execution was sought against his property. The Court directed notices to issue under section 248 of Act X of 1877. Ramalinga was, it appears, in possession of a house which formed portion of the estate of Nagappa. He appeared in answer to the notice to him, and stated that he was not the heir of Nagappa, but that Erava and Tukava were the heirs. He was informed by the Court that the plaintiff's application was against the property of the deceased, and that, if he had any interest in that sought to be attached, he should take steps after attachment The attachment issued, and it was followed by a proclamation for sale, in which the defendant was described as "Nagappa, deceased after decree, heir Ramalinga," and the interest to be sold was described as that of "Nagappa, deceased, his heir Ramalinga" Sidramappa purchased at the auction sale, and a certificate of sale was granted to him on the sale being confirmed. He had given notice of his mortgage, upon which he alleged that Rs 3,680 were then due, and the sale took place subject to it. The certificate of sale described the interest sold as that of "the deceased Nagappa." Formal possession was given to the purchaser, but he had already been, as I have said, in possession under his mortgage.

The sections bearing on the question before us are identical in Act X of 1877 and in the present Civil Procedure Code I may, therefore, treat the case as though the proceedings in execution had proceeded under the latter As these sections have given rise to different and somewhat irreconcileable views it will be desirable that I state the reasons for my decision in some detail.

Now in approaching this subject it is well to have before us a clear perception of the position of the judgment creditor of a deceased person in relation to the property and to the representatives of his deceased judgment-debtor. A mere money decree creates no lien upon the property of the judgment-debtor, but it [430] renders every part of such property liable to be attached and sold in execution of the decree. Its effect is explained by the Privy Council in *Mirza Mahomed* v *The widow of Balmakund*, L. R, 3 I. A., 241. At page 248 of the report their Lordships say "A judgment does not vest in a judgment-creditor any portion of the property of his judgment-debtor. It gives him a right to have the judgment executed, but until execution the property of the judgment debtor does not vest in the judgment-creditor simply by virtue of the judgment That is so according to the law of this country, and it is also the case under the Code of Civil Procedure, * * *, which is the law in force in India" Their Lordships were then speaking of the Civil Procedure Code of 1859, but their remarks apply *a fortiori* to the present more definite Code It follows, as was there indeed ruled, that the property of a deceased judgment debtor devolves upon his heirs free from any lien in their hands, but subject to his judgment and other debts, and liable in the same hands to be attached and sold in execution of the decree already obtained against him, a decree which can be enforced by following the procedure laid down in the Civil Procedure Code and in no other way.

The decree, however, does not by the death of the judgment-debtor cease to be operative. It does not, like proceedings before decree, abate, but continues as it were a living decree, which without revival the judgment-creditor can enforce. The views entertained upon this subject in the other High Courts have not been uniform (see *Sheo Prasad* v. *Hira Lal*, I. L. R., 12 All., 440, where the cases are collected, and *Krishnayya* v *Unnissa Begam*, I. L. R, 15 Mad., 399, and *Aba* v *Dhondu Das*, I. L. R., 19 Bom, 276, where they are again cited), but it was so ruled in this High Court in *Gulabdas* v. *Lakshman*, I. L. R., 3

Bom., 221, which has been always followed here. The Legislature has also recognised it as the correct view of the Code in Act VI of 1892. Accordingly it has been held in the Bombay High Court that after decree it is not necessary to place the representatives of a deceased judgment-debtor upon the record—*Hirachand* v. *Kasturchand*, I. L. R., 18 Bom., 224, which followed an earlier unreported ruling, confirmed on appeal, on the Original **[431]** Side of the High Court. Notice to the representatives is all that the Civil Procedure Code requires before execution is issued in such cases. Section 248 of the Code places a decree where a year has elapsed since the last proceeding in execution and a decree in cases in which the judgment-debtor has died upon the same footing. A duty is imposed on the Court to give the requisite notice before execution issues in either case. The procedure to be adopted in the case of the death of the judgment-debtor where execution is sought against his property is that laid down in section 234 of the Code. To my mind it appears to be the only way in which the decree can be enforced The Code of 1859 provided (section 210) that an application for execution could be made against "the estate" of a person dying after decree against him, but no such provision is to be found in the present Code. The argument that such a decree can be enforced by giving notice to the person in possession of a part or even of the whole of the property of a deceased judgment-debtor, as to Ramalinga or Sidramappa in this case, seems to me to be without warrant. The cases cited in support of it—*Prossunno Chunder* v. *Kristo*, I. L. R., 4 Cal., 342, and *Janaki* v. *Dhanu Lall*, I. L. R., 14 Mad., 454—were cases where a wrong legal representative was sued to decree, and effect to a certain extent was given to such decree, and were of a very peculiar nature To me it appears that where the Legislature has indicated a mode of procedure in a given case, that course of procedure, and that only, can be pursued. The necessity of having the legal representative and not a mere stranger before the Court in cases of attachment is pointed out in *Abrahamji Daooji* v. *Nathwa Kallya*, P J., 1878, p. 190, though that judgment may have gone too far in saying that the Code requires him to be placed upon the record. The case of *Cnathakelan* v *Govinda*, I. L. R., 17 Mad., 186, is also an authority upon this point. The legal representative in whom the property of the deceased is vested is the person interested in seeing that it shall not be attached and sold improperly. Section 234 accordingly provides that if execution is sought in cases where the judgment-debtor is dead, application is to be made to execute it against the legal represenative of the deceased. The Court then is directed by section 248 to issue **[432]** a notice to such legal representative to show cause why the decree should not be executed against him. On no sufficient cause being shown, the Court shall order the decree to be executed (section 249), and then it shall issue its warrant for execution (section 250). The execution-creditor is, when these steps have been taken, in a position to attach and sell the property of the deceased though it is then vested in his legal representative. The object of giving notice to the legal representatives is not stated in the Code. It may be, not only to enable them to show cause why the decree by reason of its being time-barred adjusted or otherwise satisfied should not be executed at all, but also to give them an opportunity of satisfying it before execution issues and thus preventing the sale of all or any part of the property which has devolved upon them.

The words of section 248 being imperative "The Court *shall* issue a notice" it appears to me to follow that, unless such notice is issued and the representatives of the judgment-debtor are given an opportunity of showing cause against the enforcement of the decree by execution, a warrant to execute it issued and an attachment levied under such warrant and a sale held in pursuance of it are

informal and irregular, and that the legal representative is entitled to have the same set aside as of right if he applies in time and an interest superior to his has not supervened. It does not appear to me to be material whether the notice has not issued at all, or whether it has issued to a wrong person, whether he be a near heir, not being the legal representative of the deceased, or a stranger. The result to the legal representative is the same in each case.

The further question, however, arises whether the several proceedings prior to and including the auction sale are in such cases absolutely null and void, or whether they are not, though liable to be avoided at the instance of the legal representative of the judgment-debtor, valid until set aside. The latter is, I think, the case. The proceedings and sale, if not challenged within the time which the law allows for that purpose, convey title to the purchaser. The decree is, as I have shown, a living decree; the formal steps have been taken to effect a sale under it; the pro-[433]perty attached and sold is property liable to be attached and sold under the decree; the law confers upon the Court the jurisdiction to sell. All is complete save that a person who ought to have had notice of the proceedings has not been notified. I can see no reason for holding that on that account the proceedings are a nullity and that nothing passes under the sale. A decree passed without summons served on the defendant is not a mere nullity. I see no reason for holding that an order to issue execution is on a different plane. The legal representative can object and set the order aside, but if he does not do so, I think that the sale, confirmed by the Court, conveys title to the certified purchaser.

How, it may well be asked, can a purchaser know whether a notice under section 248 has been issued or not, or if issued, whether it has been duly served. To use the language of the Judicial Committee of the Privy Council, "To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions"—*Rewa Mahton* v. *Ram Kishen Singh*, L. R., 13 I. A., 106 at p. 111; I. L. R., 14 Cal., 18 at p. 25. No purchaser would be safe who purchased the property of a deceased judgment-debtor. Again, how, if he inquires and finds that the notice has been served, is he to know that it has been served on the proper person though served upon the apparent heir. A will appointing an executor may subsequently be found. There is no security for him. Consider, then, the position of the legal representative. As a rule he is not damnified at all. The property of the dead man is made answerable for the debt of the dead man. If the legal representative objects to this, he can come and set the sale aside. This affords him full protection. Is he to be allowed, when the estate which has devolved upon him has had the benefit of the sale proceeds of the property sold, to fold his hands for twelve years and see whether the property will rise in value, and then if it does, to evict the purchaser? I cannot bring myself to believe that such is the law.

As to the procedure which the legal representative can adopt to set aside the proceedings, it would, I think, be rather a straining of language to say that his case falls within section 311 of the Code. That section is found in a division of the Code which re-[434]lates to sales, as to the mode of publishing and conducting which elaborate rules are laid down. Section 311 provides that the decree-holder or any person whose immoveable property has been sold may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it, but such sales shall not be set aside on those grounds unless the applicant proves that he has sustained substantial damages by reason of such irregularity. In such a case as the present there is nothing irregular in publishing or conducting the sale. The improper step taken is long

anterior to the publication of the sale. It goes back to and attacks the validity of the order under which the sale is held. An *ex parte* order has been made, which ought to have been made after giving the party whose interests have been affected by it an opportunity of showing cause against it. Such an order may of course be set aside by taking the proper steps in the suit at any rate until the sale is confirmed—*Ramessuri Dassee* v. *Doorgadass Chatterjee*, I. L. R., 6 Cal., 103; *Krishnayya* v. *Unnissa Begam*, I. L. R., 15 Mad., 399. Until confirmation the rights of the auction-purchaser are inchoate and incomplete—section 314. After confirmation the proceedings can, I apprehend, only be set aside by suit. The provisions of section 244 do not, I think, apply, as the purchaser is not a party to the suit. As to the necessity of a suit in cases not provided for by the Code, see *Mirza Mahomed* v. *The widow of Balmakund*, L. R., 3 I. A., 241.

In the present case the legal representatives did not come in before the sale was confirmed and seek to have it set aside. It is contended that it has become absolute as against them on two grounds—(1) Because Sidramappa was a *bonâ fide* purchaser for value whose title on confirmation became absolute. (2) Because the plaintiff's right to set aside the sale has become time-barred.

Mr. Inverarity for the respondent in support of the first ground contends that as a purchaser at a Court's sale cannot be disturbed by reason of the decree under which he purchased having been erroneous and subsequently to his purchase set aside— *Nawab Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan*, L. R., 15 I. A., 12; *Gir*-**[435]***dharee Lall* v. *Kantoo Lall*, L. R., 1 I. A., 321,—so a *bonâ fide* purchaser is not bound to inquire whether the attachment proceedings under which the property has been put up for sale have been regular or not. He relies on *Rewa Mahton* v. *Ram Kishen Singh*, L. R., 13 I. A., 106; I. L. R., 14 Cal., 18, where their Lordships say (p. 111) :—" A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." I am inclined to yield to that contention notwithstanding the decision in *Baswantapa* v. *Ranu*, I. L. R., 9 Bom., 86, relied on by the Advocate-General. There the decree was obtained against the wrong person as legal representative, and it was held that it could not be executed against what was in fact the property of the true legal representative. The distinction is pointed out in *Natha Hari* v. *Jamni*, 8 Bom. H. C. Rep., 37.

It is, however, unnecessary to decide this question, as I think that the second objection must prevail. Whatever may be the legal limitation within which the representatives of the mortgagor could have brought a suit to set aside the sale to Sidramappa, it is plain that it could not extend beyond twelve years, and even now no suit has been filed to set it aside. The present case does not fall within the ruling of *Bhagvant* v. *Kondi*, I. L. R., 14 Bom., 279. The defendant does not rely here upon adverse possession, but upon the title which the plaintiffs might at one time have avoided, but which they have not taken the proper steps to impeach. It is found that they knew of the sale. It is certain that they were not purposely kept in ignorance of it. In deciding in this manner I am not ruling, so far as I know, in opposition to any reported case. **[436]** In *Sahdeo Pandey* v. *Ghasiram*, I. L. R., 21 Cal., 19, the Judges no doubt

used expressions tending to show that a sale without notice in circumstances like the present would be wholly void (as did also STRAIGHT, J., in *Imam un-Nissa* v *Liakat Husain*, I L R, 3 All, 424), but this was not necessary for the decision and the cases upon which they relied did not go to that extent

It is unnecessary for me to consider the question of estoppel and acquiescence I have felt doubts as to whether the decree could have been supported upon these grounds, and have, therefore, dealt with the broader issue.

**Parsons, J** —There is no dispute about the facts of this case

On the 28th March 1877, Nagappa mortgaged the property in suit with possession to Sidramappa, the defendant On the 27th June 1877, one Hanmant obtained a money decree against Nagappa Nagappa died some time before November 1878 On the 22nd November 1878, Hanmant applied to have his decree executed against Nagappa deceased, his heir and legal representative, his nephew, Ramlingappa A notice was issued under section 248 and served on Ramlingappa, who appeared and said that he was not the heir or legal representative of Nagappa as the latter was separated in estate and had left two daughters, Erava and Tukava who were his legal heirs and representatives Nevertheless the Court allowed execution to proceed, the property was proclaimed as that of Nagappa, deceased, his heir and legal representative Ramlingappa, and it was sold and purchased by Sidramappa on the 11th October 1880

The plaintiffs as the legal heirs and representatives of Nagappa have brought this suit to redeem the mortgage of 1877 and recover possession of their property There is no question but that they are the rightful heirs of Nagappa, and that Ramlingappa was not, and the suit is brought within twelve years of the sale, having been filed in 1889

The point that arises is this —Does a purchase at a sale in execution of a mere money decree convey any title to the purchaser when the application to execute the decree has been made against a person other than the legal representative of the de [437] ceased judgment debtor, and no notice under section 248 of the Civil Procedure Code has been given to the legal representative? In my opinion the question must be answered in the negative

My first proposition will be "The only mode in which a decree holder (I am speaking of money decrees only throughout) can execute his decree after the death of the judgment debtor is by application to execute it against the legal representative of the deceased as provided in section 231 of the Code"

"A judgment does not vest in a judgment creditor any portion of the property of his judgment debtor It gives him the right to have the judgment executed, but until execution, the property of the judgment-debtor does not vest in the judgment creditor simply by virtue of the judgment" —*Mirza Mahomed* v *The widow of Balmakund*, L R, 3 I A, 241 This decision was passed under the Code of 1859 and applies with greater force to the present Code which has taken away the power of proceeding against the estate given by section 210 of the Code of 1859 On the death of a judgment debtor his estate vests in his legal representative alone, upon whom alone also devolves the duty of paying the debts whether due on decrees or otherwise, and it is clear that that estate cannot be made liable except by proceeding against the legal representative It is said in *Abrahamji Daooji* v *Nathwa Kallya*, P J, 1878, p 190, citing *Lekraj Roy* v *Becharam Misser*, 7 Cal. W R, 52 "It is manifest from section 231 that there must be some person on the record as representative of the deceased defendant before execution can be had against the estate which belonged to that defendant at his decease. Execution against

such estate cannot be had otherwise" It is held in *Ramasami* v *Bagirathi*, I L R, 6 Mad., 180, that the representative of a deceased judgment debtor ought to be brought in in the case, and that sale could not legally take place without some person on the record representing the deceased, and again in *Krishnayya* v *Unnissa Begam*, I L R, 15 Mad, 399, that the property might be liable in the hands of a legal representative, but that the right, title and interest of a deceased person could not be sold In *Sheo Prasad* v *Hira Lal*, I L R, 12 All, 440, EDGE, C J at page 445 says "If at the time of [438] the death of the judgment-debtor his property is not under attachment, the judgment creditor must (except in the case of a decree under section 89 of the Transfer of Property Act) proceed under section 234 if he desires to execute his decree against property which was of the judgment debtor in his lifetime and which came into the hands of his legal representative at his death"

My second proposition will be "Not only must there be an application against the legal representative but there must be a notice issued to him" Section 248 imperatively requires this to be done The Privy Council in the case above cited—*Mirza Mahomed* v *The Widow of Salimkund* L R 3 I A, 241 at pp 250 1,—speak of the notice being necessary and say that plaintiff could not have executed the decree until he had given notice The High Court at Calcutta have held that the omission to give the notice required by the section to be given to the judgment debtor renders the whole of the execution proceedings altogether bad and ineffectual to bind the judgment debtor so that the sale could not be sustained *Sahdeo Pandey* v *Ghasiram*, I L R, 21 Cal 19 To the same effect is the decision in *Ramessuri Dassee* v *Doorgadass Chatterjee*, I L R 6 Cal 103 In *Imamun nissa Bibi* v *Liakat Husain*, I L R 3 All, 424, STRAIGHT J says "It certainly does appear to me that the sale was void *ab initio* as being held in pursuance of a warrant for execution irregularly and illegally granted against the legal representative of a deceased person who has had no opportunity of showing cause why it should not be issued Such a proceeding was as much *ultra vires* as it would have been for the Court trying the original suit to pass a decree against a person not a party to it The provisions of sections 248 and 249 seem to me peremptorily to require, as a condition precedent to the issue of a warrant for execution of decree, that the legal representative of a deceased judgment debtor should upon notice duly given, have an opportunity of showing cause" and in the same case PEARSON J, says "The opinion expressed by the Calcutta High Court in *Ramessuri Dassee* v *Doorgadass Chatterjee*, I L R 6 Cal, 103 that the omission to give the notice required by section 248 to the judgment debtor affects the regu-[439]larity of the sale, and the validity of the entire execution proceedings, appears to me to be indisputable

My third proposition directly arises out of the two former ones and is this "When a person other than the legal representative has been proceeded against in execution, and no notice has been given to the legal representative, any sale that may take place is a nullity and has no valid or binding effect on the estate of the deceased in the hands of the legal representative

I can see no practical difference between this case and the case where a stranger is joined as the legal representative of a person who has died before decree The law in the latter case is clear It behoves an intending purchaser to see that the person sued as representative was really the representative of the debtor deceased, since by sale of the derived interest (which is no interest) of *A*, the real interest of *B*, the true representative, cannot in general be affected"—*Baswantapa* v *Ranu*, I L R, 9 Bom., 86.

On the death of a judgment debtor his estate vests in his legal representative, who alone has the power to deal with it By a notice given to the latter he and the estate become bound by the order of the Court, but neither would be in any way bound by a notice given to a stranger A person, who buys what was the property of *A* sold by order of the Court, after due notice given to *B* *A* s legal representative would no doubt obtain the title both of *A* and *B* as it existed at the date of the sale but even he would not obtain the title of *A* as it existed at the date of *A* s death, for it then vested in *B*, and *B* may have disposed of it in the meanwhile Similarly a person who buys what was the property of *A* sold by order of the Court after due notice given to *C* who is not *A* s legal representative, would only obtain the title of *A* and *C* as the same existed at the date of the sale That of course would be no title at all for *A* s estate had on his death vested in *B*, and *C* had no title at all in the property There is no hardship in this It is purely a case of *caveat emptor*, the would be purchaser has to see that the persons whose interests are put up for sale are the real owners He has full **[440]** information given to him in the proclamation of sale as to who is the deceased judgment debtor and as to who has been joined and noticed as his legal representative and it is his duty to enquire into their title If he were dealing out of Court for the purchase of the property, and were to purchase from a person other than the legal representative he would acquire no good title The Court gives no warranty of title and I fail to see how a sale by a Court can possibly convey a better title than the persons named as the persons whose interests are to be sold could themselves give There is nothing in the decision of the Privy Council in *Rewa Mahton* v *Ram Kishen Singh* I L R 14 Cal 18 opposed to this view Their Lordships say (p 2?) If the Court has jurisdiction a purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues The Court has jurisdiction to sell the estate of *A* after it has vested in his legal representative on proper proceedings being taken against that legal representative but it has not jurisdiction to sell that estate on proceedings taken against a stranger In the latter case it has only jurisdiction to sell what it purports to sell *viz* the estate in the hands of that stranger, and if that turns out to be no estate at all it is the look out of the purchaser It would be contrary to first principles to hold that a man s property could be validly sold away from him in proceedings taken behind his back and without his knowledge and without his being in any way represented in them

My fourth proposition results necessarily I think from the third, and is this

The legal representative can bring a suit to recover the property sold so long as his right to do so has not become barred by the law of limitation, that is, by twelve years adverse possession on the part of the purchaser

It is obvious I think that he is not obliged to apply to the Court to set aside the sale under section 311 There may have been no irregularity in publishing or conducting the sale Neither would he be bound to sue to set aside the sale for that could **[441]** only be if he were affected by the sale Here the sale is an absolute nullity so far as regards his property for the Court did not purport to sell his interest in that property Moreover, he might not even know of the sale and his possession of the property might not be attempted to be disturbed until long after the expiration of the year which would be allowed to him to bring a suit to set aside the sale His right to recover possession would I think, clearly subsist until the purchaser had by adverse possession cured the defects of his original defective title and gained a

good title by prescription Until then the real owner would be entitled to treat the purchaser as being what indeed he was, no more than a trespasser. As authorities for this proposition I need only refer to the cases mentioned at page 142 of Starling's Indian Limitation Act (3rd Ed)

The lower Court seems to think that even if the sale was not legally binding on the appellants, they became bound by their acquiescence in it There is, however, no finding that they personally had any notice of the intended sale, still less that they put forward Ramlingappa as the representative of Nagappa so as to deceive and mislead the execution creditor or the purchaser. At the most, if it be assumed that they did know of the sale, there was quiescence, and mere quiescence could not deprive them of their legal rights. See *Baswantapa* v *Ranu* I L R, 9 Bom 86 There is no estoppel which alone would deprive the plaintiffs of their right to sue to recover the property

For these reasons I am of opinion that the plaintiffs have not lost their right as owners of the equity of redemption and that the defendant has not acquired the same by the sale and purchase in 1880, and I would reverse the decree and remand the case for an account to be taken of what is due on the mortgage and for a determination of the amount that the plaintiffs must pay in order to redeem the property As, however, I have the misfortune to differ from the learned Chief Justice on the fourth proposition only for we agree, I think, on all the other points in the case the appeal must be referred to other Judges under section 575 of the Code

[442] The case being thus referred under section 575 of the Civil Procedure Code (Act XIV of 1882) it came on for argument before a Full Bench composed of JARDINE CANDY and RANADE JJ

*Macpherson* (Acting Advocate General with *Narayan G Chandavarkar*), for the Appellants (Plaintiffs) We submit that the sale to the defendant was wholly void—not voidable Voidable proceedings are those which the parties can elect to carry on But in this proceeding the plaintiffs who are the legal representatives, were not parties and could not elect *Nathu Hari* v *Jamni*, 8 Bom H C Rep, 37 *Baswantapa* v *Ranu*, I L R 9 Bom 86 *Sahdeo Pandey* v *Ghasiram* I L R, 21 Cal, 19 We admit that we could have brought a suit to set aside the execution proceedings but the fact that we did not do so does not destroy our title A suit to set aside the sale would be a suit for a mere declaration and not a suit for possession As to the distinction between illegality and an irregularity, *Oghan* v *Nag*, P J 1881 p 26 *Ardesar* *The Secretary of State*, 9 Bom H C Rep, 177 at p 197 No notice having been given to the legal representative, the Court had no jurisdiction to carry out the execution proceedings which were against the wrong person

*Branson* (with *Daji A Khare* and *Govardhanram M Tripathi*) for the Respondent (Defendant) —Failure to give notice to the legal representatives does not affect the jurisdiction of the Court. The decree was passed by a competent Court, and it had jurisdiction to execute it If the execution was issued against a wrong person, that was merely an irregularity A decree does not become a nullity if no summons has been served on the defendant or if it has been served on a wrong person Non service of notice is treated as a mere irregularity—*Jagannath* v *J E Sassoon*, I L R, 18 Bom, 606, *Sham Lal Pal* v *Modhu Sudan Sircar*, I L R, 22 Cal, 558 A purchaser at an execution sale is generally a stranger and cannot be expected to see that the proper persons are put on the record He is not bound to see that the proper representative is a party to the proceeding—*Girdharee Lall* v *Kantoo Lall*, L R, 1 Ind. App, 321. What the purchaser has to see to is that there is a proper sanction of the Court for the sale—*Nawab Zain-ul Abdin Khan* v.

*Mahammad Asghar Ali*, L R, 15 Ind App, 12, [443] *Rewa Mahton* v *Ram Kishen Singh*, L R, 13 Ind App, 106. It has been held by a Full Bench of Allahabad that if a judgment debtor dies after the commencement of the execution proceedings it is not necessary to apply to bring his legal representative on the record--*Sheo Prasad* v *Hira Lal* I L R. 12 All, 440 See also *Gulabdas* v *Lakshman*, I L R, 3 Bom, 221

The next question is what limitation is to apply Under article 12,* Schedule II of the Limitation Act (XV of 1877), a suit to set aside the sale ought to have been brought within one year after the confirmation of the sale Further, we say that our possession has been adverse to the plaintiffs We have been in possession for eleven years and by the time the plaintiffs could now bring a suit to recover possession by setting aside the sale, our title by adverse possession will be complete

*Narayan G Chandavarkar*, in reply: --The Court has no jurisdiction to attach and sell *B's* property in execution of a decree against *A* That rule holds good in this case The difference between section 210 of the Code (Act VIII) of 1859 and section 221 of the present Code clearly shows that the Legislature intended the legal representative to be on the record In the present case as we were not put on the record the execution proceedings are a nullity In the cases relied on, there was irregularity in the *modus operandi* Section 248 of the Code is imperative After the judgment debtor's death the property vested in his legal representatives and the purchaser could not take anything if the legal representative was not brought on the record Once the legal representative is brought on the record the Privy Council cases apply, and the purchaser's duty of inquiry is fulfilled by reading the decree and the warrant of attachment and sale The Privy Council cases merely lay down that the purchaser need not go behind the decree As to limitation we rely on *Bhagvant Govind* v *Kondi*, I L R 14 Bom 279

**Candy, J** --This appeal has been referred under section 575 of the Civil Procedure Code so the whole appeal must now be decided not only one or more points on which the Judges may have differed I need not repeat the facts The question simply [444] is whether the plaintiffs are entitled in the present suit to redeem the mortgage

As regards the equities of the case, there is not, in my opinion, much to choose between the parties

* [Art 12 --

| Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|
| To set aside any of the following sales --<br>(a) sale in execution of a decree of a Civil Court<br>(b) sale in pursuance of a decree or order of a Collector or other officer of revenue<br>(c) sale for arrears of Government revenue or for any demand recoverable as such arrears<br>(d) sale of a patni taluq sold for current arrears of rent<br>*Explanation* --In this clause 'patni' includes any intermediate tenure saleable for current arrears of rent | One year | When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought ] |

It is found that the plaintiffs were aware that the property was to be sold by the Court in 1880. It is also found by the Lower Appellate Court that defendant, who was mortgagee in possession of the property, was fully aware, from accounts in his own books, that Nagappa and Ramlingappa had been separate in estate; and he must have known, therefore, when (to use the words of the Lower Appellate Court) he interpleaded in the execution-proceedings, and applied to the Court to have his mortgage-lien recognized, that the legal representatives of Nagappa were not on the record.

But, in my opinion, these facts do not deprive either side of its legal rights. The quiescence on the part of the plaintiffs does not deprive them of the right of asserting their ownership of the equity of redemption, if it still exists, and if the form of the present suit is no obstacle. The quiescence on the part of defendant does not deprive him of the right of asserting that the equity of redemption has been extinguished, or that plaintiffs in the present suit are not entitled to redeem.

In the view which I take of the case, it is unnecessary to decide whether the Court-sale in 1880 was a nullity or only voidable. I will take it that notice under section 248 to the legal representatives was absolutely necessary, but that the proceedings and sale, if not challenged according to law, conveyed title to the purchaser; also that the legal representatives can object by regular suit. I hold that the present suit to redeem, brought within twelve years of the Court-sale, does in effect challenge the sale, and, therefore, that the plaintiffs are entitled to redeem The learned Chief Justice holds that the plaintiffs have not taken the proper steps to impeach the sale. By this I take it he means that there should have been in the plaint a formal prayer to have the sale set aside. It is on this point that I differ from the learned Chief Justice. The Subordinate Judge in the Court of First Instance evidently regarded the suit as in effect one to set aside [445] the sale. He said : "The plaintiffs now seek to set aside the purchase." Had the plea been raised that the plaint contained no formal prayer to that effect, opportunity would no doubt have been given to the plaintiffs to amend their plaint. Now in the present case it has not, as I understand, been contended that the present plaintiffs were bound to have sued to set aside the sale within one year from the date of the confirmation thereof. There are cases quoted by Mr. Starling in his notes to article 12 of the Limitation Act, showing that that article would not apply to a case in which the plaintiff seeks for a declaration that the sale is inoperative as regards himself.

But it is said by the learned Chief Justice : "Whatever may be the legal limitation within which the representatives of the mortgagor could have brought a suit to set aside the sale, it is plain that it could not extend beyond twelve years, and even now no suit has been filed to set it aside. The present case does not fall within the ruling of *Bhagvant* v. *Kondi*, I. L R , 14 Bom., 279. The defendant does not rely here upon adverse possession, but upon the title which the plaintiffs might at one time have avoided, but which they have not taken the proper steps to impeach. It is found that they knew of the sale." In my opinion, the present case does fall within the principle enunciated in *Bhagvant* v. *Kondi*. In that case the plaintiff, in 1885, sought to redeem a mortgage executed by his father in 1858. Defendants pleaded that in 1863 the widows of the mortgagor (the plaintiff being then a minor) had sold the equity of redemption to the second defendant, who, it was found, was in possession as agent or trustee for the mortgagee, the first defendant. Sir C. SARGENT, C.J., said : "It is contended for the second defendant, first, that the plaintiff's right to impugn the sale to second defendant is barred by article 44 of the Act of Limitation" (plaintiff not having sued within three years of his attaining

majority) "secondly, that the plaintiff's right to recover possession is barred by his (the second defendant) having been in adverse possession for more than twelve years before the suit

"Now it is to be remarked that this suit is to redeem this mortgage, under which, according to the finding of the District [446] Judge, the second defendant took possession as the legal mortgagee, although as a fact found by the Court, he was a trustee or agent for the first defendant's father The necessity of impugning the sale of 1863 to the second defendant arises from the second defendant's resisting the plaintiff's suit to redeem the mortgage and is, therefore, subservient to that suit, and the case is, therefore, analogous to that of *Ramausar Pandey* v *Raghubar Jati* I L R 5 All, 491, where the High Court held that the setting aside the mortgage deed in that case, which was impugned by the minor, was subservient to the suit to recover the land and that article 142* and not 44† of the Statute of Limitation of 1877 was applicable The same principle was acted upon with regard to article 92‡ of Act IX of 1871— *Boo Jinatboo* v *Sha Nagar Valab Kanji*, I L R 11 Bom 82 As to the second point, the second defendant having entered into possession as mortgagee could not afterwards set up an adverse possession as owner so as to defeat the plaintiff's right to redeem—*Ali Muhammad* v *Lalta Bakhsh*, I L R 1 All, 658, *Tanji* v *Nagamma*, 3 Mad H C Rep, 137

It will be seen that the plea of adverse possession relied on by the second defendant in the above case was entirely distinct from the plea as to the necessity of the plaintiff formally impugning the sale by the widows Here as there defendant holds possession and uses the Court sale to him to defend it The necessity of impugning that sale arises from the defendant's resisting the plaintiffs suit to redeem the mortgage If the plaintiffs can justly impugn the sale on the ground that no notice was given to them under section 248 then I cannot see how defendant can resist the present claim for redemption As the Chief Justice Sir CHARLES SARGENT said in *Akoba* v *Sakharam*, I L R 9 Bom, 429 the inheritance not having been substantially represented, plaintiffs equity of redemption must prevail

Being unable to distinguish this case from the principles laid down in *Bhagvant* v *Kondi* I L R, 14 Bom 279 I would reverse the decrees of the lower Courts and remand the case for an account to be taken of the mortgage

*[Art 142 —

| Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|
| For possession of immoveable property, when the plaintiff while in possession of the property has been dispossessed or has discontinued the possession | Twelve years | The date of the dispossession or discontinuance ] |

†[Art 44 —

| | | |
|---|---|---|
| By a ward who has attained majority to set aside a sale by his guardian | Three years | When the ward attains majority ] |

‡[Art 92 —

| | | |
|---|---|---|
| To declare the forgery of an instrument issued or registered | Do | When the issue or registration becomes known to the plaintiff ] |

[447] **Jardine, J.**:—Dealing first with the chief contention, I think Mr. Macpherson put his argument too high when he called the proceedings in execution a nullity, although the Court had jurisdiction. The decisions do not go so far. *Oghad* v. *Nag*, P. J, 1881, p. 26, is a case of an officer after becoming *functus officio* making an order. To such an act the word "nullity" applies; and the learned Judges after referring to *Ardesar* v. *The Secretary of State*, 9 Bom. H. C. Rep., 197, for the distinction between what is a nullity and what is an irregularity say: "That which is a nullity, being legally of no force, and absolutely void and not merely voidable, cannot be set aside, and is by the Courts simply declared to be null and void." *Oghad* v. *Nag* thus resembles the cases of *coram non judice* where the judgment is void in respect of the authority or commission of the Judge. So a judgment contrary to the verdict has been held void, also one given in a wrong Court. These classes of judgments are to be found in Viner's Abridgment, Tit. Judgment, and also those that are merely to be set aside for irregularity or as being erroneous. The present matter more resembles those discussed in Coke on Littleton, sections 436, 437 and 438, of a prisoner disseised or outlawed or against whom there was a recovery by default. As the law presumed that the prisoner was "without intelligence of things abroad, and also that he hath not libertie to goe at large to make entrie or claime or seeke counsell," he was allowed to avoid the judgment, but only by writ of error, for the law recognized that the procedure had been that of the *lex terræ* and the execution done by the King This shows the antiquity of the principle. In England a completed sale by the sheriff under writ of *fi. fa.* even if obtained irregularly is effectual and gives a right to the purchaser: see *Doe d. Emmett* v. *Thorn*, 1 M. and S., 425, *Jeanes* v. *Wilkins*, 1 Ves. Sen., 194, *Manning's Case*, 8 Coke R., 96 b, and other authorities collected by Mr. T. Kerr Anderson in his Treatise on the Law of Execution, page 185 The subject is discussed in *Dorab Ally Khan* v. *Abdool*, L. R., 5 I. A., 116 at p. 125, by their Lordships of the Privy Council, where the Sheriff of Calcutta on a writ of *fi. fa.* sold land outside of his jurisdiction. Treating real estate in India like a chattel [448] the sheriff was held to be in the position of an ordinary person who has sold that which he had no title to sell The inclination of their Lordships' opinion was, that if the execution-creditor had given an implied warranty of title there would be an exception to the rule about chattels of *caveat emptor*. They treated the sale as possibly a nullity on the ground only of want of jurisdiction. They say: "In the present case the subject matter of the sale was the estate of the execution-debtor, so that if the sheriff had had jurisdiction, his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative and wholly ineffectual." This case is commented on and followed in *Sundara* v *Venkatavarada*, I. L. R., 17 Mad., 228.

The High Court of Calcutta has treated decrees passed against dead men, not as nullities, but rather as bad and erroneous where there was a jurisdiction —*In the matter of the petition of Samuel Cochrane*, 14 Ben. L R, 330. There it was held that the decree-holder having been the purchaser could not successfully contend as against the assignee of the owner that a suit to set aside the sale would not lie. In *Nawab Sidhee* v. *Rajah Ojoodhyaram*, 10 M. I. A., 540, their Lordships of the Privy Council held that a sale obtained under Act I of 1845 by fraud might be avoided by suit, and that the limitation of one year under section 24 to set aside the revenue sale did not apply, for "the plaintiff claimed a right, as it were, to confess and avoid that sale by imposing a trust on the estate which passed under it," and that as against the plaintiff the sale ought to be viewed as a private sale. That decision proceeded partly on fraud,

partly on the rule of estoppel that a man cannot take advantage of his own wrong But there is no suggestion that the judicial proceedings were a nullity. As said there from the *Duchess of Kingston's case* the sentence of the Court "is impeachable from without, although it is not permitted to show that the Court was mistaken, it may be shown that they were misled" Mere mistakes or misleadings are not apparent they have to be shown to the Court as where contrary to section 234 of the present Code a stranger in possession is wrongly proceeded against in execution as if he were a legal representa- [449] tive—*Chathakelan* v *Govinda*, I L R, 17 Mad, 186 *Actus legis nemini facit injuriam* What is irregular is not void, but may be corrected by the Court if its aid is sought by whatever procedure applies, as, *e g* by suit to set aside a decree for fraud Therefore I think that the analogy which the Chief Justice has taken of a decree passed without notice of the suit to the defendant is just I am of opinion upon principle and upon the cases that although the act of the Court may have been irregular in not following section 248, or the Court may have been misled, it acted with jurisdiction and its action is not a nullity I adopt the statement in 1 Dan Chancery Practice (Ch 16 S 4) that it is an established principle that every order and judgment made with jurisdiction however erroneous is good until it is discharged—see *Chuck* v *Cremer* 2 Phillips, 113

The less argued question is as to the procedure by which what the Court did is to be impeached as upon that hangs the question of limitation I concur with my brother CANDY in holding that article 12 does not apply, and that the suit is within the twelve years limit—see also *Pinnyamma* v *Manjaya* P J for 1895 p 395 *ante* p 159 *Lalchand* v *Sakharam* 5 Bom H C Rep, 139 A C J *Nawab Sidhee* v *Rajah Ojoodhyaram* 10 M I A, 540, and also generally in his view of the respective rights and equities of the parties The mortgagee Shidramappa knew of what was being done, a matter which has always been a circumstance of note he thus resembles somewhat a decree holder who has purchased at the Court sale knowing of the irregularity I take note also that the plaint contains a general prayer for relief, and I am of opinion that the present suit is effectual under all the circumstances I would, therefore, make the decree proposed by my brother PARSONS

**Ranade J.** – The chief point on which the Chief Justice and Mr Justice PARSONS appear to differ relates not so much to the fourth proposition laid down in the judgment of Mr Justice PARSONS but to his third proposition They both affirm the necessity of having the true legal representative and not a mere stranger before the Court in cases of attachment proceedings and they also hold that it is necessary to issue notice to such legal representative under section [450] 248 The Chief Justice thinks that, in the absence of such a notice, the subsequent sale proceedings are not absolutely null, but are only irregular, and as such liable to be avoided at the instance of the true legal representative not necessarily by an application under section 311, but also by a regular suit if brought within the time allowed by law, which period cannot, at the most, exceed twelve years On the other hand, Mr Justice PARSONS holds that, in the absence of a notice to the legal representative, the sale proceedings are a nullity which the legal representative might set aside by a regular suit, if such suit were brought within twelve years from the date of the confirmation of the sale As the legal representatives in this case brought no suit to set aside the sale within twelve years, the Chief Justice was of opinion that the legal representatives had no right to succeed in their present claim for redemption, while Mr Justice PARSONS was inclined to hold that as the present redemption claim was made within twelve years, defendant, as the auction-

purchaser, had not acquired an adverse title by possession, and that the suit for redemption was maintainable.

The learned Advocate-General for the appellant, and Mr. Branson for the respondent, chiefly confined their arguments to the question whether the sale-proceedings, in the circumstances of this case, were absolutely null, or were only irregular and voidable. It is thus clear that the difference of opinion relates to the third proposition, and not to the fourth, as stated towards the conclusion of Mr. Justice PARSONS' judgment.

There is always some room for ambiguity in the unqualified use of the words "irregular" or "null" apart from all reference to the person in respect of whom the proceeding may be described as irregular or null. The attachment and sale-proceedings in this case might both be regular and null—regular as regards the parties to the record, and null as regards those who were not parties to it. The facts of this case show that, on the death of the judgment-debtor Nagappa after decree, a notice under section 248 was issued at the instance of the judgment-creditor to his separated nephew Ramlinga, who accordingly appeared, and informed the Court that he was not in possession of the property sought to be attached, and that he was not the heir or legal representative, as Nagappa had left two daughters, who were his heirs and [451] legal representatives. The creditor, however, took no notice of this statement of Ramlinga, and the Court allowed Ramlinga's name to remain on the record as Nagappa's legal representative, and issued no notices to the daughters of Nagappa. The sale took place accordingly, and defendant bought the property of which he was already in possession as mortgagee of Nagappa.

The immediate question for consideration is thus whether, under the circumstances, the sale was only irregular, or was absolutely null as regards the true legal representatives of Nagappa, who were not parties to the execution proceedings. There was no *boná fide* mistake in this case, but all parties had full knowledge that Nagappa's representative on the record was Ramlinga, who disclaimed that status, and not his daughters. I am inclined to hold that, in respect of these daughters, the sale-proceedings were invalid and null, and the auction-purchaser acquired no rights under his certificate of sale as against these the true legal representatives, and that as against them he could only claim title by adverse possession not falling short of twelve years. As the present suit was admittedly brought within that period, I am disposed to hold that the suit was maintainable.

The reasons which lead me to this view may be thus briefly stated: It is a mere accident that the defendant as mortgagee was in this case in possession of the lands in dispute. A parallel case of a mortgage without possession might well be supposed, in which the mortgagor Nagappa, and after his death his daughters, as his heirs and legal representatives, would be in possession of the mortgaged property. If in such a case, a judgment-creditor of Nagappa had, after Nagappa's death, proceeded to execute his decree, and, without issuing any notice to the legal representatives in possession, had joined Ramlinga's name as representative in the execution proceedings, and the sale had taken place, at which the mortgagee without possession bought the property, and then sued for possession as owner, I do not think that, in such a case as this, the true legal representatives would be debarred from urging that the sale conveyed no title of ownership to the auction purchaser as against them, and that the mortgage still subsisted intact. The sale would be pronounced in [452] such a case to be not merely voidable, but absolutely invalid as against the daughters in possession.

Suppose again there was no judicial sale, but a private sale by Ramlinga to the defendant-mortgagee in possession, or without possession behind the back, and without the knowledge, of the daughters. If the daughters' rights were beyond dispute, the private deed of sale would not be held to have conveyed as against them the equity of redemption to the mortgagee, who could only claim ownership by adverse possession of twelve years and more. If this view held good in respect of a private sale, it should hold good *a fortiori* in the case of a judicial sale where the maxim *caveat emptor* applies with greater cogency.

Quite independently of these analogies, it may be noted that, looking at the reasons which clothe judicial procedure with the finality and validity that generally attend it, the main reason no doubt is that all parties concerned have an opportunity allowed to them to represent their respective case before a judicial order is pronounced. It is this circumstance which gives the Courts jurisdiction over persons and interests so represented. The jurisdiction has no foundation when this opportunity has not been allowed.

The absence of a notice under section 248 prevents such a jurisdiction from arising in regard to those persons who have a right to receive such notice, and in the words of a Division Bench of the Calcutta High Court the order of sale "was of no effect whatsoever as against the judgment-debtor," and *a fortiori* as against the legal representative—*Mirza Mahomed Aga Ali Khan Bahadur* v. *The widow of Balmakund*, L. R., 3 I. A., 241 at p. 250, *Komeshury Dasi* v. *Durgadass*, 7 C. L. R., 85, *Sahdeo Pandey* v. *Ghasiram Gyawal*, I. L. R., 21 Cal., 19, *Imam-un nissa Bibi* v. *Liakat Husain*, I. L. R., 3 All., 424. *Rameswari Dassee* v. *Doorgadass Chatterjee*, I. L. R., 6 Cal., 103, *Sheo Prasad* v. *Hira Lal*, I. L. R., 12 All., 440, *Abrahamji* v. *Nathura*, P. J. for 1878, p. 190, *Lekraj Roy* v. *Becharam Missir*, 7 Cal. W. R., 52. *Ramasami* v. *Bagirathi*, I. L. R., 6 Mad., 180.

[453] It was indeed admitted by Mr. Branson that when the omission to follow the procedure laid down by law affected the jurisdiction of the Court, then the order was absolutely null, and not merely voidable, but he contended that, in this case, the Court had jurisdiction, and the omission was, therefore, only an irregularity. No doubt, the Court had jurisdiction over the subject-matter, *i. e.* the execution of its own decree, but over and above this jurisdiction over the subject-matter, it ought also to have jurisdiction over the parties, and this it can only claim when the proper parties are allowed an opportunity to appear before it. Failure in this respect operates as an obstacle in the way of its jurisdiction as though it had no jurisdiction over the subject-matter itself.

It was urged, however, that the liability in this case affected the estate of the deceased Nagappa only, and that it was a mere informality that the true heirs' names were not joined in the record in execution proceedings. This view had some force under the old Act, which apparently has influenced some of the earlier decisions. Later legislation, however, lends no countenance to this view. The so-called estate of a deceased person is a very convenient legal fiction, but, as a matter of fact, there is in Hindu law at least no such objective reality as the estate of a deceased person At the moment of Nagappa's death, the property owned by him ceased to be his, and became the property of his heirs subject, of course, to the liabilities and obligations created by him. The obligation to satisfy these liabilities is not in the strict Hindu law limited by the value of the assets received, though such a limit has now been placed thereon by express legislation (section 234 and Bombay Act V of 1865). If a judgment-debtor dies before a decree is passed against him, the decree is not enforceable as such against his estate. The legal representative's name must be joined before a decree can be passed against a deceased person and similarly the legal

representative's name must be joined if death occurs after decree, and it is sought to execute it. The fiction of the estate of the deceased cannot dispense with this necessity. The omission to follow the procedure laid down in sections 234 and 248 is not a mere informality, but is an illegality which affects jurisdiction.

[454] Section 311, no doubt, permits not merely the decree-holder, but all persons whose property has been sold, to apply to the Court to set aside the sale on the ground of a material irregularity, but the irregularities referred to in this section are irregularities in publishing and conducting the sale. The section does not cover grounds of objection which seek to make out that the decree was passed without jurisdiction, or that the party whose property was sold was not the judgment dedtor, or if the property sold belonged to the legal representative, that he had inherited no property from the deceased. The omission in the present case to issue notice under section 248 affected the jurisdiction of the Court to order the sale, or rather its order could only affect the sale of the right which Ramlinga, joined as legal representative, had in the property, and it was this Ramlinga's right alone which passed to the purchaser. The rights of the true legal representatives, who were not parties to the record, were not affected by the order, and did not pass to the purchaser under the sale.

There have been some conflicting decisions, no doubt, on this point, but the general tendency of the authorities is altogether in favour of the invalidity of a sale brought about under such circumstances. The facts in *Baswantapa* v. *Ranu*, I. L. R., 9 Bom., 86, following *Natha Hari* v. *Jamni*, 8 Bom H C. Rep., 37, have been indeed distinguished from the present case on the ground that the debtor had died before suit, and the creditor brought his suit against a stranger, omitting to proceed against the true legal representative. The principle of the ruling, however, ought to hold good equally in respect of execution proceedings, for these are only a later stage of the suit. The ruling in *Bhagvant* v. *Kondi*, I. L. R., 14 Bom., 279, relates to an omission to join the proper legal representative in execution proceedings, and I do not think that it can be distinguished on the ground that the defendant here did not rely, as in that case, on adverse possession, but upon a title which the plaintiffs might have avoided, but which they did not impeach. Looking at the written statement of the defendant in this case, I find that he did rely on his adverse possession as owner after the sale, being only mortgagee before The ruling in *Imam-un-nissa Bibi* v. *Liakat Husain*, I. L. R., 3 All., 424, also related [455] to the case of a legal representative who received no notice under section 248. The decisions in *Ramasami* v. *Baginathi*, I. L. R., 6 Mad., 180 *Krishnayya* v. *Unnissa Begam*, I. L. R., 15 Mad., 399, *Sahdeo Pandey* v. *Ghasiram Gwawal*, I. L. R., 21 Cal., 19, also relate to omissions to join the names of legal representatives in execution proceedings I had occasion to review all these cases in *Aba* v. *Dhondu Bai*, I. L. R., 19 Bom., 276, and the principles laid down there appear to me equally applicable to the facts of this case, though these facts relate to a different set of transactions.

It was finally urged that a purchaser at an auction sale cannot be expected to inquire whether the proper legal representative was or was not served with a notice under section 248, and that above all his interests must be protected. If the defect in this case had been merely that the legal representatives had not been duly served with a notice, then this argument would have held good, and the purchaser's protection would be complete. In this case, however, the purchaser had notice that the present plaintiffs' names were not joined, and that the sale was of the property of the deceased so far as he was represented by Ramlinga. Under these circumstances, the purchaser can claim no equities which should override those of the legal representatives, who were ignored.

altogether throughout the proceedings. The ruling of their Lordships of the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh*, L. R., 13 I. A., 106: I. L. R., 14 Cal., 18, assumes that there was jurisdiction.

The whole question thus turns upon the question of jurisdiction, and for the reasons stated above, I am inclined to hold that the order of sale in this case was without jurisdiction as regards the legal representatives who were not made parties to the record. The rulings of this Court cited above appear to me to fully cover the circumstances of the present case, and the right of the present plaintiffs to sue for redemption must, therefore, be affirmed, as defendant's possession under the certificate of sale has not ripened into adverse ownership.

*Per Curiam*: --The other Judges concurring, the Court directs that the costs of this appeal abide the result.

*Decree reversed and case remanded.*

**NOTES.**

[The Privy Council reversed this decision in (1900) 25 Bom., 337 sub-nom. *Malkarjun* v. *Narhari*. These were earlier decisions (1899) 21 Bom., 337; (1897) 22 Bom., 271. Case also (1904) 8 C.W.N., 843; (1910) 14 C.W.N., 560.]

## [456] APPELLATE CIVIL

*The 7th January, 1896.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Mulla Abdul Hussein.........(Original Plaintiff) Appellant

*versus*

Sakhinaboo and others............(Original Defendants) Respondents.*

*Civil Procedure Code (Act XIV of 1882), Secs 223 and 239 - Transfer of decree—Execution of decree—Power of Court executing a decree sent for execution.*

Where a decree is passed by one Court and sent to another Court for execution, the Court executing the decree cannot question the propriety of the order transferring the decree to such Court for execution.

SECOND APPEAL from the decision of T. Hamilton, District Judge of Surat.

Suit to declare property liable to attachment.

The plaintiff obtained a decree for Rs. 250 against one Salebhai in the Court of Small Causes at Bombay (No. 32126 of 1890). It was transferred for execution to the Court at Surat under section 31 of Act XV of 1882, and certain immoveable property in Surat was attached in execution. The defendants thereupon applied for the removal of the attachment, alleging that the property was theirs, and the Court granted their application. The plaintiff now brought this suit in the Court of the First Class Subordinate Judge of Surat for a declaration that the property at Surat was liable to attachment in execution of his decree against Salebhai.

At the trial it appeared that Salebhai was the plaintiff's step-son, and evidence was given that Salebhai had property in Bombay of the value of Rs. 10,000.

The First Class Subordinate Judge found that the property which had been attached did not belong to Salebhai, and he, therefore, dismissed the suit.

* Second Appeal, No. 285 of 1895.

The plaintiff appealed, and the appellate Court confirmed the decree on the grounds stated in the following passages from its judgment:—

"The decree which plaintiff seeks to execute was obtained in the Court of Small Causes in Bombay. His judgment-debtor is his own step-son and the decree was passed by default.

[457] "The said step-son has admitted that he has property worth some Rs. 10,000 in Bombay. The decree in question is for Rs. 250 only. The darkhast shows that no attempt has been made to satisfy that decree out of the Bombay property, and, therefore, no execution can be taken out here. The suit must fail on this account alone."

Plaintiff preferred a second appeal to the High Court.

*Lallubhai A. Shah*, for the Appellant (Plaintiff):—The question before the lower Court was merely whether the property in question was the property of Salebhai. If it was, the Court at Surat is bound to execute the decree which was transferred to it for execution. It could not consider the propriety or otherwise of executing it against any particular portion of Salebhai's property—*Beerchunder* v. *Maymana Bibee*, I. L. R., 5 Cal., 736; *Shib Narain* v. *Gobind Doss*, 23 Cal. W. R., 155; Civil Procedure Code (Act XIV of 1882), Sections 223, 223B and 239.

*N. M. Samarth*, for the Respondent:—Section 31 of the Presidency Small Cause Courts Act (XV of 1882) provides that a decree of the Court may be transferred to another Court for execution only when the judgment-debtor has not, within the local limits of the jurisdiction of the Court which passed the decree, moveable property sufficient to satisfy the decree. Here the judgment-debtor Salebhai has in Bombay property worth more than Rs. 10,000. It was wrong, therefore, to transfer the decree under section 31 of that Act for execution to another Court. See *Haji Musa* v. *Purmanand*, I. L. R., 15 Bom., 216, and *Imdad Ali* v. *Jagan Lal*, I. L. R., 17 All., 478. The District Judge, therefore, was right in holding that no execution could be taken out in Surat while there was sufficient property in Bombay to satisfy the decree.

**Jardine, J.**:—The Presidency Court of Small Causes empowered under section 31 of Act XV of 1882 so to do, sent the decree for execution to the Court of Surat, which under the same section had to follow the Code of Civil Procedure (Act XIV of 1882). The District Judge, on the mere statement of the judgment-debtor, not a party to the execution proceeding before him, held that the debtor had sufficient property in Bombay as if such a question could be inquired into twice over, first in Bombay and then at Surat. Then the District Judge gives as his sole reason for [458] dismissing the application—"the darkhast shows that no attempt has been made to satisfy that decree out of the Bombay property, and, therefore, no execution can be taken out here." This curt statement is not a proper judgment. The District Judge ought to have considered the statutes as interpreted by the decisions.

Section 223 of the Civil Procedure Code required the Surat Court to certify to the Bombay Court the fact of execution or the reasons of failure. This is inconsistent with a power to refuse to execute the decree on the ground that the proceedings of the Bombay Court were irregular or mistaken. The cases cited in support of the District Judge's order—*Haji Musa* v. *Purmanand*, I. L. R., 15 Bom., 216, and *Imdad Ali* v. *Jagan Lal*, I. L. R., 17 All., 478,—relate to decrees passed without jurisdiction, and are irrelevant to questions of mere procedure. Although it is unnecessary to consider section 239, we may refer to *Beerchunder* v. *Maymana Bibee*, I. L. R., 5 Cal., 736, and *Shib Narain* v. *Gobind Doss*, 23 Cal. W. R., 155, as showing the limits of the function of the Court to which the decree has been transferred.

For these reasons the Court sets aside the decree of the District Judge and remands the cause to the District Court for disposal according to law. Costs of this appeal on the respondents ; other costs to abide the result.

*Case remanded.*

**NOTES.**

[ See also (1905) P.L.R., 156 ]

[ 21 Bom. 458 ]

## APPELLATE CIVIL.

*The 7th January, 1896.*

PRESENT.

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Gopal Hari Joshi Rairikar. ..........(Original Plaintiff) Appellant

*versus*

Ramakant Rangnath Joshi Rairikar and others... ........(Original Defendants) Respondents.*

*Partition— Inam village—Right of management.*

Property consisting of an ordinary inam village and a cash allowance payable out of the revenue of another village is liable to partition at the suit of a co-sharer, except when it is held on saranjam or other impartible tenure, or where the terms of the [459] original grant impose a condition upon its enjoyment that the management shall rest with a particular branch of the family of the grantees, and possibly a long continued practice from which a family custom may be inferred, may operate to bring about the same result.

APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona

Suit for partition The plaintiff sued to recover his share in the inam village of Ahire and of a cash allowance paid by Government. The thirteenth defendant (Vinayak Vaman Joshi) contended that he was entitled to manage the village and to receive the cash allowance and to divide them among all the co-sharers according to their shares, and that the plaintiff was, therefore, not entitled to partition

The Subordinate Judge found that the property in dispute was not liable to partition, that defendant No 13 had a right to manage the whole of the property as contended by him, and that the plaintiff was not entitled to any relief He, therefore, rejected the claim The plaintiff appealed.

*Manekshah J Taleyarkhan*, for the Appellant (Plaintiff) :—The original grant of the inam was made by the Peshva in 1762 to six brothers who were the ancestors of the parties. The grant contains no condition with respect to the management of the inam. The village remained in the management of Chinto, one of the six brothers and the ancestor of defendant No. 13, because he was the active member of the family, and subsequently the management continued in his branch of the family merely by agreement and for the convenience of the family. Under these circumstances the possession of defendant No. 13 cannot be adverse to the other members of the family—*Narayan Jagannath Dikshit* v. *Vasudeo Vishnu Dikshit*, I. L. R., 15 Bom., 247 ; *Shankar Baksh* v. *Hardeo Baksh*, I L. R., 16 Cal., 397.

*Purushottam P Khare* and *Shamrav Vithal*, for Respondents.

* Appeal, No. 37 of 1894.

**Farran, C.J.** — The plaintiff has sued in this case for partition of the village of Ahire and of a cash allowance payable by Government out of the revenue of the village of Vagaz It is admitted that he is entitled to a one-fifth share in the property sought to be partitioned, but his claim is resisted by Vinayak Vaman Joshi, the thirteenth defendant, on the ground that he, Vinayak, is [460] entitled to manage the village, and to receive the cash allowance on behalf of all the co-sharers, and to distribute the profits of the village and the cash allowance amongst them in proportion to their respective shares, and that the plaintiff is, therefore, not entitled to partition

The Subordinate Judge has held that the defendant Vinayak has established that position The question which we have to determine upon this appeal is whether the facts of the case, which are practically undisputed, justify that conclusion

The Subordinate Judge has relied upon the case of *Dikshit* v *Dikshit*, I L R, 15 Bom, 247, as establishing the proposition that the right to manage property on behalf of co sharers is an interest in land which is recognized by the law That case is certainly an authority for that conclusion when the land is held upon *saranjam* or other impartible tenure In the present case the village in suit is an ordinary inam village and there is nothing peculiar or impartible in the nature of the cash allowance Doubtless even in such cases it may be that the terms of the original grant by the ruling Power can impose as a condition upon its enjoyment that the management shall rest with a particular branch of the family of the grantees, and possibly a long continued practice from which a family custom may be inferred may operate to bring about the same result Upon that we do not consider it necessary to express any opinion

The judgment of the Privy Council in *Shankar Baksh* v *Hardeo Baksh*, I L R, 16 Cal, 397, however, shows that there must be very clear and cogent evidence to establish the existence of such an anomalous estate In our opinion, the evidence in the present case is insufficient for this purpose We deal with that relating to the village of Ahire in the first instance The cash allowance from Vagaz and the revenues of another village not mentioned in suit are in some of the documents, to which we shall have to refer, mentioned along with the Ahire village They all in many respects stand upon the same footing The original grant of the village of Ahire which is dated 27th December 1762 is a simple grant in inam to the sons of Vithal. [461] The reasons assigned for the grant are that the grantees were great and worthy Brahmins and performed the *shetkarma* wishing well to the Rajeshri Swami and that Chinto Vithal, the youngest of the six had served the Sarkar with singleness of purpose, by undergoing much trouble and risk It contains no conditions or provisions with reference to the management or the partition of the village The confirmatory grant is similar As a fact however, it would seem that the village was entered in the name of Chinto and that he managed it for the co sharers He appears to have been the most active and energetic member of the family The sons of Vithal were joint at the date of the grant, but subsequently became separate in estate They did not however, when they separated, partition the village, but left it to be managed on their behalf by Chinto, who divided the produce of it between them In 1777 78 the village was attached by the Government of the day and remained under attachment until the year 1800 At the latter date Chinto was dead, but his adopted son Trimbak succeeded in getting the attachment removed The takid ordering its removal, dated 14th November 1800, directs that the inam of the village should be continued as before to Trimbak Chinto The Subordinate Judge treats this order as in the nature of a fresh grant after a forfeiture, but it is in terms

simply an order releasing the village from attachment, and it has not been contended before us that it is of a different character. When the attachment was removed, the village was held as before under the terms of the original grant. (His Lordship then examined the further evidence in the case and continued.)

The management of the villages has continued since 1830 with the family of Vaman and is now in the hands of his son Vinayak.

From the long continuance of the management in Chinto's branch of the family, coupled with the terms of the documents to which we have referred, we are asked to draw the inference that by the custom of the family the village of Ahire is impartible and that the management of it rests, of right, with Chinto's branch. It appears to us, however, that the documents emanating from the ruling Power, subsequent to the [462] original grant, were not intended to have the effect of varying the terms of that grant, but that, recognizing its validity, they provide for the continuance of the enjoyment of the villages in accordance with its terms, and that when they recognize Chinto's branch as in the management of the villages, they recognize merely the actual mode of management which the grantees had adopted. When we look to the documents which passed between the members of the family themselves we see that that mode of management was adopted for family convenience and rested upon agreement. The terms of the yadis of 1820 and 1830 appear to us to be conclusive upon this point. The presumption then arises that the management confided to Vaman in 1830 by the agreement of that year continued with him and his sons upon the same terms until now. Neither, therefore, by the terms of the original grant nor of the subsequent orders of the ruling Power, nor by family custom, nor by adverse possession (if such there could be in a case like this), has Chinto's branch of the family, it appears to us, acquired a right to perpetual management of the village of Ahire or in consequence to resist its partition.

The cash allowance stands upon the same footing, save that, as it is paid by Government, and the Court cannot direct Government in what manner they are to pay it—a matter which is entirely in their option—no direction for its partition can be made by this Court; the Court can only declare that as between the several parties entitled to the allowance no right to recover it in the first instance has been established by the defendant Vaman, and that the several co-sharers are entitled to receive it in porportion to their shares.

The decree of the lower Court must, for these reasons, be reversed and a decree made for a partition and declaration in accordance with this judgment. The costs will be awarded as provided in the decree.

*Decree reversed.*

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**NOTES.**

[This was affirmed in (1903) 27 Bom., 353 P.C.]

## [463] APPELLATE CIVIL

*The 9th January, 1896.*

PRESENT

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR JUSTICE PARSONS

Yellappa... ... .. (Original Defendant No 2) Appellant

*versus*

Ramchandra and others (Original Plaintiffs) Respondents *

*Execution- Execution sale—Sale in execution of decree already satisfied—Bona-fide purchaser at such sale right of such purchaser*

Where a person a stranger to the proceedings purchases property *bonâ fide* at an auction sale held in execution of a decree the sale to him cannot be set aside on the ground that the decree had already been satisfied out of the Court at the time the sale was held

*Rewa Mahton* v. *Ram Kishen* L R 13 I A 106 and *Mothura Mohun* v *Akhoy Kumar*, I L R, 15 Cal 557 followed

SECOND APPEAL from the decision of J B Alcock District Judge of Sholapur Bijapur, reversing the decree of Rao Saheb V V Tilak Subordinate Judge of Bijapur

Suit to set aside a sale in execution In 1884 a decree was obtained by one Fulchand against Ramchandra and others (present respondents), and on the 20th July 1886, in execution of that decree certain land was sold and was purchased by Yellappa (the appellant)

In the same year Ramchandra applied to set aside the sale, alleging that Fulchand's decree had been satisfied and that Yellappa, the purchaser, had had full notice of the fact The Court, however, refused to set aside the sale, but found that the decree had been satisfied, and ordered that the purchase money paid by Yellappa should be paid to Ramchandra

The plaintiffs (Ramchandra and others) thereupon brought this suit praying that the sale to Yellappa might be set aside on repayment by them to Yellappa of his purchase money

The Subordinate Judge dismissed the suit holding that although the decree had been satisfied, Yellappa was a *bona fide* purchaser for value without notice of the satisfaction of the decree

[464] The plaintiffs appealed The appellate Court following the ruling in *Ganga Pershad* v *Gopal Singh*, I L R 11 Cal 136, reversed the decree holding that a sale in execution of a decree by accident or mistake after the decree had been satisfied was of no effect The Judge therefore directed that possession be restored to plaintiffs on their paying the amount of purchase money to Yellappa. Yellappa preferred a second appeal

*Shamrao Vithal*, for the Appellant (Defendant) The Judge was wrong in holding that because the decree was satisfied out of Court, the Court sale in execution did not confer any right on us as purchaser We purchased the property *bonâ fide* for value without notice of satisfaction of the decree The Court sale was legal and we are entitled to hold the property *Mothura Mohun* v *Akhoy Kumar*, I L R, 15 Cal 557 *Rewa Mahton* v *Ram Kishen* L R 13 I A, 106

*Ganesh K Deshmukh*, for the Respondents (Plaintiffs) —The question is who is to suffer. We had satisfied the decree before the sale took place, and

* Second Appeal, No 8 of 1895

contend that, therefore, the sale was inoperative and conferred no title on the purchaser—*Ganga Pershad* v. *Gopal Singh*, I. L. R., 11 Cal., 136; *Pat* ... v. *Sharup Chand Mala*, I. L. R., 14 Cal., 376.

**Farran, C.J.**:—The case is, we think, concluded by authority later than the case upon which the District Judge has relied. The Privy Council in a case very analogous to the present has decided that where a person, a stranger to the proceedings, purchases preperty *boná fide* at an auction sale held in execution of a decree, his sale cannot be set aside on the ground that the existence of a cross decree rendered the sale in execution improper. "If the Court has jurisdiction," their Lordships say, "a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues"—*Rewa Mahton* v. *Ram Kishen*, L. R., 13 I. A., 106. In a case almost on all fours with the present, the Calcutta High Court followed the principle laid down by the Privy Council and applied it—*Mothura Mohun* v. *Akhoy Kumar*, I. L. R., 15 Cal., 557.

**[466]** In the case relied on by the District Court, fraud was alleged, and that possibly may distinguish it from the later case; but whether that be so or not, we consider that the latter was correctly decided, and must, therefore, follow it. We reverse the decree and restore that of the Subordinate Judge, with costs in both appellate Courts on respondents.

*Decree reversed.*

**NOTES.**

[ See also (1909) 37 Cal., 107, where the sale was treated as a nullity on the ground that the decree (under the Public Demands Recovery Act) was satisfied.]

**[21 Bom. 466]**

## APPELLATE CIVIL.

*The 8th January, 1896.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Vyankatesh Chimaji Joshi and another............(Original Defendants) Appellants

*versus*

Sakharam Daji Ganpule............(Original Plaintiff) Respondent.*

*Award—Decree upon an award*—Res judicata—*Civil Procedure Code (Act XIV of 1882), Secs. 13 and 522.*

A judgment and decree passed in terms of an award under section 522 of the Civil Procedure Code (Act XIV of 1882) constitute a *res judicata*.

*Waseer Mahton* v. *Chuni Singh*, I. L. R., 7 Cal., 727, followed.

SECOND APPEAL from the decision of A. S. Moriarty, Acting District Judge of Ratnagiri, in Appeal No. 164 of 1894.

Plaintiff alleged that he was a pujari of the shrine of Parshuram near Chiplun and that the defendant was the manager of the shrine; that as such manager the defendant had to make certain payments to the family to which he (the plaintiff) belonged; and that he (the plaintiff) was entitled to a share of such payments; that in 1892 he had brought a suit (No. 232 of 1892) against the defendant to recover the share due to him for the years 1889—1892 and that the suit was referred to arbitration; and that by the award made he

* Second Appeal, No. 575 of 1894.

was held entitled to his share that the award was duly filed in Court and decree (No. 232 of 1892) passed in accordance therewith

He now sued for his share for the years 1891—1893

[466] The defendant contended that the decree (No 232 of 1892) passed upon the award was not conclusive of the plaintiff s right

The Joint Subordinate Judge of Chiplun held that the judgment of 1892 which affirmed plaintiff s right was conclusive and binding upon the defendants. He, therefore, passed a decree for the plaintiff

On appeal the District Judge of Ratnagiri confirmed the decree

Defendants preferred a second appeal to the High Court

*Daji Abaji Khare* for the Appellants The judgment in the suit of 1892 does not operate as *res judicata* A judgment can be only treated as *res judicata* when it is the decision of a Court of competent jurisdiction An arbitrator is not a Court of competent jurisdiction his jurisdiction is limited to the decision of the particular matter referred to him Further the award dealt only with the claim for certain specified years It cannot be a bar to all inquiry as to other years The case of *In re Tahi ... v Chuni Singh* I L R, 7 Cal. 727 will be cited against us but see the later case of *Keshava v Rudran* I L R, 5 Mad 259 *Jenkins v Robertson* L R 1 H L Sc 117 was a case of a consent decree

*Ganesh Krishna Deshmukh* for the Respondent (Plaintiff) *Jenkins v Robertson* L R 1 H L Sc 117 has been explained in *In re South American and Mexican Company Ex parte Bank of England* (1895) 1 Ch 37 I rely upon *Waz[illegible] Mahton v Chuni Singh* I L R 7 Cal 727

**Jardine J** The chief question argued is whether a judgment and decree of a Court passed under section 522 of the Code of Civil Procedure according to an award can constitute *res judicata* as held in *In re Mahton v Chuni Singh* I L R 7 Cal 727 a case on the Code of 1859 Perhaps some doubt is thrown on that decision by the view taken by TURNER C J and KINDERSLEY, J, in *Keshava v Rudran* I L R 5 Mad 259 where a decree passed upon the oath of a party under sections 9 and 11 of the Indian Oaths Act was held not to create the estoppel *Jenkins v Robertson* L R 1 H L Sc 117 being cited to show [467] that there was no *judicium* The same case is relied on by Mr Khare It differs from a reference to arbitration under Chapter XXXVII of our Code, inasmuch as there was no such reference of the matters in dispute, but, as observed by the Lord Chancellor in his judgment the interlocutor in the former action having been the result of a compromise between the parties, it cannot be considered as a *judicium* and cannot be admitted as *res judicata* The case is explained by VAUGHAN WILLIAMS J in *In re South American and Mexican Company, Ex parte Bank of England* (1895) 1 Ch 37 as no decision whatever upon the general law In the appeal from that learned Judge Lord HERSCHELL, L C and LINDLEY L J held that a judgment by consent can not be reopened Per the Lord Chancellor p 50 The truth is that judgment by consent is intended to put a stop to litigation between the parties just as much as a judgment which results from the decision of the Court after the matter has been fought to the end *A fortiori* a judgment and decree passed after solemn investigation by arbitrators on the award may constitute *res judicata* We are therefore of opinion that *In re Mahton v Chuni Singh*, I L R 7 Cal 727 should be followed and we confirm the decree with costs

*Decree confirmed*

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**NOTES**

[ See also (1896) 2 O.C, 28 ]

# APPELLATE CIVIL

*The 10th January, 1896*

PRESENT

MR JUSTICE PARSONS AND MR JUSTICE CANDY

Krishnaji Narasinva Kalandikar... . . (Original Defendant No. 1) Appellant

*versus*

Krishnaji Narayan Joshi . (Original Plaintiff) Respondent *

*Khoti Settlement Act (Bombay Act I of 1880), Secs 16, 17, 18, 20, 21, 22 and 23 —Land Revenue Code (Bom Act V of 1879) Secs 108 and 110—Khot —Privileged occupant — Dharekari —Entry made by Survey Officer Conclusive and final evidence Entry specifying the amount and nature of rent*

Under the Khoti Act (Bombay Act I of 1880) it is only an entry of the Survey Officer specifying the nature and amount of rent payable to the khot by a privileged occupant according to the provisions of section 33 in a record made under section 17 that is declared to be final and conclusive evidence

[468] An entry of a Survey Officer specifying that an occupant, who was found to be not a dharekari or privileged occupant should pay assessment and local fund cess only for the lands in his possession is not conclusive and final evidence under the Khoti Act, section 21 declaring such decision binding only on the parties until reversed or modified by a final decree of a competent Court

SECOND APPEAL from the decision of F Walker Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb K N Patankar, Subordinate Judge of Dapoli

The plaintiff sued to recover *thal* (customary rent in kind), alleging that he was the managing khot and the defendants were tenants of the lands in question

The first defendant alleged that the lands were his *dhara* and that no *thal* was payable in respect of them that the plaintiff was only entitled to Government assessment and local cess which had been duly tendered to him but was refused

He relied on a copy of an order dated 24th September 1887, made by the Special Assistant Collector and Settlement Officer which stated that he had looked into this matter and found that though the land was khoti and not dhara it was not shown that the khoti sharers had been in the habit of receiving customary rent from the land and so it was decided that defendant No 1 should pay survey assessment and the local fund in respect of these lands

The Subordinate Judge found that the lands were not defendants' *dhara* and that the plaintiff was not restricted only to Government and local cess But he allowed the claim partially because notice demanding the *thal* according to *abhavani* (appraisement of crops) was not proved by plaintiff to have been served on the defendant

The following is an extract of the Subordinate Judge's judgment —

'Defendant Krishna seems to rely principally upon the Special Officer's decision (Exhibit 21) declaring that he is liable to pay only assessment and local cess. This officer, however, holds the land to be khoti The dues on khoti lands are regulated by section 33 of the Khoti Act. In the present case an agreement is not even alleged. The Special Survey

* Second Appeal, No 710 of 1895.

Officer had therefore, no power to fix an invariable amount He could, at the best, fix a certain proportion of the actual yield This he has not done His decision is against the provisions of the Khoti Act, and must therefore be treated as a nullity "

[469] On appeals by both the parties the Judge confirmed the decree. The following is an extract from his judgment —

"Exhibit 21 is the decision of the Settlement Officer dated 24th September 1887, that the land is khoti, and that Government assessment and local fund are leviable from the tenant, Defendant No 1 in this case is admittedly a privileged occupant as this entry specifies the nature and amount of rent payable it would have been conclusive under section 17 of the Khoti Act if it had been duly made according to section 33 Unfortunately it has not been duly so made as that section requires the rent to be fixed at a share of the gross produce and on the [illegible] In other cases a suit is expressly allowed and provided for by section 22

Defendant No 1 preferred a second appeal

*Vasudeo G Bhandarkar* for *Daji Abaji Khare* appeared for the Appellant (Defendant No 1)

*Ganesh K Deshmukh* appeared for the Respondent (Plaintiff)

**Parsons J** Both the lower Courts have found that the land in suit is not the defendant's dhara land and we see no reason to hold that that finding is wrong

The only other point argued before us is in our opinion quite untenable It is that the entry of the Survey Officer specifying that the defendant shall pay assessment and local fund cess for the lands in suit is conclusive and final evidence Under the Khoti Act it is only an entry specifying the nature and amount of rent payable to the khot by a privileged occupant according to the provisions of section 33 in a record made under section 17 that is declared to be final and conclusive evidence Here the defendant is not a privileged occupant, for he is found not to be the dharekari which he had claimed to be and he does not claim to be an occupancy tenant His real status is that of a sharer in the khotki of the village which admittedly is undivided and the land is khoti land The dispute now is only as to what rent he has to pay for the land Plaintiff claims *thal*, i e, a share of the produce The Survey Officer has decided that he should pay the survey assessment and local fund cess It is not stated under what provision of law that decision was passed but having regard to the status of the defendant and the tenure on which he holds the land it is clear that it could only be passed under section 18 of the Khoti Act (Bombay Act I of 1880) [470] Nowhere in the Act is finality given to the entry of such a decision as evidence On the contrary in section 21 the decision is declared binding only on the parties until reversed or modified by a final decree of a competent Court, in other words, the point at issue is one that can be tried and determined on evidence by a civil Court as has been done in the present case The question is purely one of fact to be determined by the custom and practice found to prevail among the co sharers in the khotki The lower Courts agree that the defendant is bound to pay *thal* No error of law is shown in this decision and it is one binding on us in second appeal We therefore confirm the decree with costs.

**Candy, J** —Plaintiff is managing khot of Shirkhal for the years 1888 89 and 1889 90 sued defendants for *thal* rent due on their lands for those years Defendant Krishnaji contended (*inter alia*) that the lands are his dhara that he himself is a khot, and so *thal* cannot be claimed from him, and that he had tendered the Government assessment and local cess which was all that was due from him

At the trial defendant Krishnaji relied on Exhibit 21, which purports to be a copy of an order of the Special Assistant Collector and Settlement Officer

dated 24th September 1887, and addressed to the Huzur Deputy Collector reciting that Krishnaji had applied to him that his lands at Shirkhal which had been entered as khoti should be entered as dhara, that he (the Special Officer) had called for the papers and looked into the case, and found that though the land was khoti and not dhara, it was not shown that the khot sharers had been in the habit of receiving the customary rent from this land, and so it was decided that Krishnaji should pay the survey assessment and the local fund in respect of the land standing in his khata

The Subordinate Judge held that this decision being against the provisions of the Khoti Act must be treated as a nullity He further held that the land was khoti and not dhara and that plaintiff was entitled to demand the customary rent The Subordinate Judge referred to a decree of the civil Court awarding customary rent for this land [The Special Officer had also (Exhibit 21) alluded to two decrees of the civil Court, [471] but remarked that they were subsequent to the passing of the Khoti Act ]

Both sides appealed to the District Court, plaintiff on the ground that the full rent had not been awarded (this appeal requires no further consideration) and defendant Krishnaji on the ground that the land was his dhara, and in any case he as a khot sharer was not liable to pay *that*

The Assistant Judge found that the decision of the Special Officer would have been conclusive under section 17 of the Khoti Act I of 1880 if duly made according to section 33 of the Act "Unfortunately it has not been duly so made, as that section requires the rent of an occupancy tenant to be fixed at a share of the gross produce, and on the face of the order this has not been done

The Assistant Judge also held that Krishnaji was barred by previous decrees from pleading that the land was his dhara He confirmed the decree of the Subordinate Judge

Krishnaji has now made a second appeal to this Court, and his pleader Mr D A Kharo contended that the Court cannot award more than the survey assessment and local fund cess as fixed by the Special Officer and that the former decrees of the civil Court are no bar to such award while for plaintiff Mr Deshmuk argued that it is directly contrary to the Khoti Act to hold that an occupancy tenant can pay survey assessment and local cess, and Krishnaji's contention that he is a dharekari shows that there could not have been any agreement between himself as an occupancy tenant and the managing khot to pay as rent a fixed amount in money

In answer to our request that he would furnish us with an "extract from the revenue records showing how the numbers in question are entered in the records under section 16 of Bombay Act I of 1880 *viz*, as to the nature of the tenure and the nature and amount of rent" the Collector of Ratnagiri has furnished us with a true extract from the 'botkhat' of the village in question showing the entries made against the fields now in dispute Column 5 is "description that is inam, or khalsa, dhara or khoti," and the entry is "old khoti tenant" Under the columns relating [472] to the "amount (akar) to be paid according to the survey" we find certain amounts in cash, and in the last column there is an entry signed by Govind Atmaram Karkun, dated 14th January 1888 recapitulating the order No 167 dated 24th September 1867, from Mr Cumine to the Deputy Collector (that must be Exhibit 21 alluded to above), to the effect that the regular assessment under the survey and the local fund cess should be taken from the khatedar in question

Thus the point for consideration is whether the above entry is under section 17 of Bombay Act I of 1880 conclusive and final evidence of the liability of Krishnaji Narsinha Karandikar to pay in respect of the lands in suit the

survey assessment and local fund cess only If it is, then according to the decision of SARGENT, C J, and BAYLEY, J, in *Gopal Krishna Parachure* v *Sakhojirao*, I L R, 18 Bom, 133, any other evidence on the subject which might be adduced before the civil Court is shut out, and, apart from the question as to any previous decrees of competent Courts on the point at issue, this Court would be bound to reverse the decisions of the Subordinate and Assistant Judges and award to the plaintiff not ½ share of the produce, but the survey assessment and local fund cess only

Part III of Bombay Act I of 1880 lays down certain provisions which are to be carried out when a survey settlement of a khoti village is made or revised under Chapter VIII of the Land Revenue Code By section 16 the 'settlement register, which under section 108 of the Land Revenue Code must show the area and assessment of each survey number together with the name of the registered occupant must in the case of khoti villages also show whether such survey number is held by a "privileged occupant or not and if it is so held, then the tenure on which such number is held must be specified *i e* whether the holder is a dharekari or *quasi* dharekari or an occupancy tenant, and if the last named, whether his interest is transferable otherwise than by inheritance or not Section 108 of the Land Revenue Code also refers to other records which must be prepared by the Survey Officer on the occasion of making or revising a settlement of land revenue These other records are to be in accordance with [473] such orders as may from time to time be made on their behalf by Government and by section 17 of Bombay Act I of 1880 they must specify the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of section 33 of the Act (Bombay I of 1880) ' and any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established It will be noticed that, in order to make the entry conclusive it must be *duly* made under section 17, and no entry will be duly made under section 17 unless it is an entry in one of the other records prepared by the Survey Officer and unless it specifies the nature and amount of rent payable to the khot by the privileged occupant according to the provisions of section 33 of the same Act The section 33 is to be found in Part IV of the Act which is headed Administration of survey settlements made under this Act, whereas Part III deals with what takes place at the introduction of a survey settlement (new or revised)

Section 33 lays down what rents shall be payable to the khot by privileged occupants, *viz* —

(*a*) by a dharekari, the survey assessment of his land

(*b*) by a *quasi* dharekari the same with a certain addition

(*c*) by an occupancy tenant in the absence of or at the expiration of the term of any agreement for a fixed amount in money or in kind such share of the gross annual produce of the tenant's land as the Survey Officer who frames the survey record shall determine to be the customary amount hitherto paid by occupancy tenants in the village in which the said land is situate

It is thus evident that an entry of the nature and amount of rent payable by an occupancy tenant in order to be conclusive under section 17 must duly show under section 33 either that the rent so specified is the customary rent of the village, or that it is a fixed amount in money or in kind agreed upon between the khot and the said occupancy tenant either before or at the time of the framing of the survey record Of course it may happen that years after the framing of the survey record, which takes place at the introduction of the new or revised survey settlement, an occupancy tenant, who has hitherto paid merely the customary rent to his [474] khot, may agree with his khot to pay

him in future or for a stipulated term a fixed amount in money or in kind Such fixed amount will then under section 33 be the rent payable by that occupancy tenant to his khot, and it will not be the less so because it is not found in the survey record which is framed at the introduction of the survey settlement (new or revised) It is the duty (section 108, Land Revenue Code) of the Survey Officer on the occasion of making or revising a settlement of land revenue to prepare other records (besides the "settlement register'), which under section 17 of Bombay Act I of 1880 must specify the nature and amount of rent payable to the khot by each occupancy tenant That can only mean the amount of rent so payable at the time of framing the record There is no provision in Bombay Act I of 1880 for the subsequent amendment of any entry in the survey record specifying the nature and amount of rent payable by an occupancy tenant In section 110 Land Revenue Code a distinction is drawn between the settlement register and other records prepared by the survey officer, and the village records and accounts prepared in accordance with the settlement register and other records All changes that may take place are to be registered in the village records and accounts It is necessary to call attention to this distinction between the survey records which under the Land Revenue Code cannot be altered and the village records in which changes must be registered because when we come shortly to consider the provisions of sections 21 and 22 of Bombay Act I of 1880 it will be seen that the only record which is to be binding upon all the parties affected thereby is the survey record, not the village record and the only amendment of a survey record which is permitted by that Act is one that is not applicable to the specification of the nature and amount of rent payable by any occupancy tenant No inconvenience can thereby arise The fact that when the survey record was framed there was no agreement between the khot and the occupancy tenant for a fixed amount in money or in kind, and so there was no entry of any such agreement will not prevent any such subsequent agreement being given effect to, and in any subsequent suit for rent either the khot or the occupancy tenant can rely on an alleged agreement, and the entry merely in the survey record of the customary rent [475] payable in that village will not invalidate any agreement which came into existence, it may be many years after that survey record was framed It is necessary to emphasize this point, because so far as section 33 is concerned there is no allusion to the decision of the Survey Officer or of any other officer, beyond the determination arrived at by the Survey Officer when framing the survey record as to what is the customary rent of the village The section provides that an occupancy tenant shall pay that rent unless there is an agreement between the khot and the occupancy tenant to pay a fixed amount in money or in kind Section 33 does not deal with the question as to who is to determine whether there is any agreement for a fixed amount in money or in kind It merely provides that the occupancy tenant shall pay such fixed amount when agreed upon, otherwise he shall pay the customary rent of the village as determined by the Survey Officer when framing the survey record

Coming back to Part III the next sections to be considered are sections 18 and 19, which provide that whether the khotki is undivided or divided, the co sharers' respective rights shall be specified in the said records (i e, the other records prepared under section 108, Land Revenue Code) It is necessary to emphasize the important distinction between sections 17 and 18 By the latter section the Survey Officer is to enter in the records the rent payable by each co sharer on account of the survey numbers in his possession There is no mention of any section, like section 33 with regard to privileged occupants,

laying down what that rent should be. So far as the provisions of the Act are concerned, the Survey Officer is entrusted with the duty of ascertaining or determining the amount of rent payable by each co-sharer, and there is no mention of the entry made by the Survey Officer being conclusive.

Next we come to sections 20 to 22 which are headed "determination of disputes." Section 20 provides that the Survey Officer who frames the said register (section 16) or other record (sections 17 to 19), may investigate and determine any dispute as to any matter which he is bound to record, *viz.*, (the matters referred to in sections 16 to 19) and he may frame the said register or other record accordingly. He is not apparently bound to deter-**[476]**mine such dispute. He may do so: he may apparently refer the parties to the civil Court. But if he does determine the dispute then his decision under section 21, when not final, shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court; and (section 22) "the record shall from time to time be amended by the said Survey Officer or when the survey settlement is concluded by the Collector in accordance with any such decree as aforesaid." Thus the only amendment contemplated of any entry in "the register or other record" is one made in accordance with a decree of a competent Court, and that only when the decision of the Survey Officer is not final. When the decision of the Survey Officer is final, then apparently no one can amend the record. The entry once made stands good. It has been held in the case quoted above that the words "when not final" can only properly refer to the finality ascribed in section 17 to the entries of the nature therein mentioned, and which follow, as contemplated by section 20, on the Survey Officer arriving at his decision. That decision must be as to the nature and amount of rent paid by the privileged occupant. If either the khot or the privileged occupant wishes to contest the specification of the tenure made by the Survey Officer on the occasion of making or revising a settlement of land revenue in the settlement register (section 108, Land Revenue Code, 1879, and section 16, Bombay Act I of 1880) then he can obtain a final decree of a competent Court, and call on the Survey Officer, or if the settlement is concluded on the Collector, to amend the register in accordance with that decree.

Coming now to the facts of the present case and applying the provisions of the law as shown above, the first point to be noticed is that the Collector was asked to furnish the Court with an extract from the revenue records showing how the survey numbers in question are entered *in the records under sections 16 and 17 of Bombay Act I of 1880*. The Collector in reply has forwarded the extract called for. This is one record only, *viz.*, an extract from the botkhat of the village in question for the year 1879. Now it is clear from Nairne's Hand-book (3rd Ed., p. 141) that the "botkhat," or detailed record of each holding, is one of the "other survey records" prepared by the Survey Officer under section **[477]** 108, Land Revenue Code. A copy of this record according to the orders of Government quoted in the Hand-book is to be given to the khots. Further, it is clear that from this copy furnished to the khot the latter provides and keeps the appraisement register, which also is termed "botkhat." —See notification No. 1659, *Bombay Government Gazette*, 1882, Part I, pages 262 to 275, Rules VI and VII under clause (*e*) of section 40 of Bombay Act I of 1880 (pages 573 to 592 of the General Rules in force in the Revenue Department), and it is evident that this latter record is *a village record*, no doubt based on the survey record, but not identical with the *survey record* which is framed by the Survey Officer. The extract furnished by the Collector in the present case would seem to be an extract from the village *botkhat*, and not an extract from the original "survey record" framed by the Survey Officer.

Assuming, however, that it is an extract from the survey record, the next point to be noticed is that it purports to have been prepared in 1879 Now it is well known that between 1876 and 1880 the present survey settlement was introduced into the Ratnagiri District, the principles of that settlement being subsequently legalized by Bombay Act I of 1880 (See Bombay Gazetteer, Volume X pages 255 to 257) If the settlement was introduced into the village in question in 1879 it is difficult to see how a Settlement Officer could in 1887 make an entry in one of the survey records framed at the introduction of the survey In connection with this point it is necessary to call attention to the fact that Krishnaji in his application to the Special Assistant Collector and Settlement Officer (see Exhibit 21) stated that the land in question had been entered as khoti at the time of the "ruzuvat" This "ruzuvat" is the review of the khots and villagers in whose presence the Survey Officer frames the register and other records (See Gazetteer, idem, page 256) It would thus appear that the register and other records had been already prepared and if so, the only way, in which the entries when not final could, after Bombay Act I of 1880 become law, be altered was by the final decree of a competent Court

Assuming however, that the Special Assistant Collector and Settlement Officer in 1887 was really framing the register under [478] section 20 of Bombay Act I of 1880 can it be said that his proceedings were according to law? It appeared to him that there existed a dispute as to a matter which he was bound to record, the dispute being as Krishnaji said whether the land in question was khoti or dhara Mr Cumine held that the land was khoti and not dhara and presumably the entry specifying the tenure in the "settlement register" as khoti was made, or if made was allowed to stand

But the Survey Officer was also bound to specify in other survey records the nature and amount payable by Krishnaji according to the provisions of section 33 of the Act Krishnaji being an "occupancy tenant that is the position asserted for him by his pleader in this Court on the strength of the entry in the botkhat, 'Khoti june kul —would according to section 33 of the Act, in the absence of any agreement to pay a fixed amount whether in money or in kind pay the customary rents of the village Apparently there was no dispute as to the existence or non existence of any such agreement But Mr Cumine went on to hold that as the khoti sharers had not proved that they had received the customary share of the produce from Krishnaji, who was also a khoti sharer, 'it is therefore, decided that the applicant should pay the survey assessment and the local fund '

Now it is quite possible that Krishnaji, though a khoti sharer, is still an occupancy tenant of the particular lands in question 'Khoti june kul may mean that the land was khoti and had originally been held by old tenants, but had lapsed to the khot who instead of throwing it into the khoti khasgi had allowed Krishnaji's family to hold it as occupancy tenants The original entry in the settlement register specifying the tenure &c, which is binding on all the parties until reversed or modified by a final decree of a competent Court, has not been produced But assuming as is contended by Krishnaji's pleader here, that Krishnaji is an occupancy tenant of these lands, then clearly there has been no decision of the Survey Officer that as between the khot and the occupancy tenant there is an existing agreement that the latter shall pay the former a fixed amount, whether in money or in kind, in place of the ordinary customary rents of the village No such agreement was pleaded or found proved The [479] Settlement Officer decided that Krishnaji should pay the survey assessment and local fund, but he had no power to pass such a decision. Section 36

prevented him from directing an occupancy tenant to pay local fund cess, and section 33 prevented him from determining more than the customary rents of the village, and the existence or non existence of any agreement between the khot and an occupancy tenant to pay a fixed amount of rent Mr Cumine's decision does not purport to find the existence of any such agreement

Regarding the case from the other point of view and holding Krishnaji to be not an occupancy tenant but a khoti sharer holding land which had been originally occupied by old khoti tenants but which had lapsed to the khoti co parcenary then according to Rule III of the Rules under clause (e) of section 40 of Bombay Act I of 1880 (Notification No 1659 *Bombay Government Gazette* 1882 Part I pp 262 to 275) the rent payable to the managing khot by khot sharers for their private khoti land shall be the customary rates of the village for occupancy tenants unless it is proved that before 1865 khot sharers paid a *makta* or a lower rate of *thal* in which case the ancient practice shall be followed

It will be noticed that the *onus* is by this rule put on the khot sharers who are holding the land in question and not on the managing khot The former have to prove that before 1865 they paid a *makta* (i e fixed amount whether in money or in kind) or a lower rate of *thal* than the customary rates of the village In default of such proof they must pay the ordinary customary rates But Mr Cumine held that in default of proof that customary rates had been paid Krishnaji should pay survey assessment and local fund cess Thus his decision was directly contrary to the rules framed by Government under the Act

Again apart from the rule above noted it is admitted before us in the present case that the khoti is undivided If so then under section 16 the Survey Officer was bound to specify in the other records the survey numbers in the possession of each co sharer and the rent payable by such co sharer on account of the same But it is nowhere stated in the Act that such entry [480] shall be conclusive and final evidence of the liability thereby established Here we have the finding of fact of both the lower Courts that the land is not Krishnaji's dhara *Prima facie* then he must pay *thal* for the same It is for him to establish an exemption from *thal* He can only point to the Settlement Officer's decision of 1887 which by itself is found to be valueless No other reason is given why Krishnaji should not pay *thal* for the lands in suit I, therefore concur in upholding the decree of the Assistant Judge

*Decree confirmed*

NOTES

[ This was followed in (1896) 22 Bom 9? (1900) 24 Bom ?5? ]

[21 Bom 480]

# APPELLATE CIVIL

## FULL BENCH

*The 23rd January, 1896*

PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE MR JUSTICE JARDINE, MR JUSTICE PARSONS MR JUSTICE CANDY AND MR. JUSTICE RANADE

Antaji Kashinath (Original Plaintiff) Appellant

*versus*

Antaji Madhav Bhave and others (Original Defendants) Respondents *

*Khoti Settlement Act (Bom Act I of 1880) Secs 9, 10, 11, 12 16 17, 18, 19, 20, 21, 22 29, 33 and 40—Land Revenue Code (Bom Act V of 1879), Sec 106—Decision of Survey Officer as to tenure Reversal or modification of the decision by a competent Court*

The decision of a Survey Officer determining the tenure on which a survey number is held is not final under the Khoti Act (Bombay Act I of 1880) and it can be reversed or modified by a competent Court

SECOND APPEAL from the decision of T Walker, Assistant Judge of Ratnagiri confirming the decree of Rao Saheb S M Kuaudikar, Subordinate Judge of Devrukh

Plaintiffs sued for a declaration that certain lands in their occupation were held by them on dhara tenure complaining that the Special Survey Officer had entered them as khoti lands

The defendants contended (*inter alia*) that the lands were not plaintiffs dhara and that the claim was time barred

The Subordinate Judge found that the lands were not plaintiffs' dhara and that the claim for declaration was time barred [481] the suit not having been brought within one year under article 14 Schedule II of the Limitation Act (XV of 1877) from the date of the Special Survey Officer s entry

On appeal by the plaintiffs the Judge raised the issue "whether the land is plaintiffs dhara

But without recording any finding on this issue the Judge confirmed the decree observing as follows

"Respondents pleader has produced in this Court the decision of the Settlement Officer fixing plaintiffs' liability which of course is final under section 17 of the Khoti Act This shows that plaintiff has to pay *that*, and I had expected that in view of this order, it would have been thought unnecessary to press the appeal Appellant however urges that the rights of a dharekari are transferable and heritable while those of an occupancy tenant are heritable, but not necessarily transferable This is all very well but plaintiff does not really want any such declaration In face of the Settlement Officer s decision (Exhibit No 11 in appeal), I could not give him a simple declaration such as he seeks as he would at once claim to pay only Government assessment If he wants merely a declaration that his rights are alienable, there is no cause of action and this is the first instance in my experience, that anybody wishing to transfer his rights first sued for a declaration that he might legally do so The usual practice is to sell them first, and let the purchaser settle matters as best he can "

Plaintiff No 2 preferred a second appeal.

* Second Appeal, No 853 of 1893

*Nagindas T. Marphatia*, for the Appellant (Plaintiff No. 2).

*Ganesh K. Deshamukh*, for the Respondents (Defendants).

The case came on for hearing before a Division Bench composed of PARSONS and CANDY, JJ.

PARSONS, J. :—Plaintiffs sued for a declaration that certain thikans in their occupation were held by them on the dhara tenure. The first Court found against them on the point. The plaintiffs appealed, and the appellate Court raised the issue whether the land was plaintiffs' dhara. The Assistant Judge recorded, however, no finding on this issue. He said that the decision of the Settlement Officer fixing plaintiffs' liability, which of course was final under section 17 of the Khoti Act, showed that the plaintiffs had to pay *thal* and that after that he should have thought that it was unnecessary to press the appeal. After a few other remarks as to the suit he rejected the appeal with costs.

A finding on the issue raised cannot, however, be avoided in this way. The plaintiffs are entitled to a decision as to the [482] tenure on which they hold their land. The Survey Officer classing the plaintiffs under the designation of occupancy tenants has declared them liable to pay *thal*. The plaintiffs object to that designation of their tenure and claim to be dharekaris.

The first point, therefore, that arises is as to the finality of this decision of the Survey Officer on the question of tenure, for, if that decision is final, it is fatal to the claim. We think there can be no doubt that the decision is not final (See *Faki Ghulam Mohidin* v. *Sajnak*, I. L. R., 18 Bom., 244.) Section 21 of the Khoti Act provides that the decision of a Survey Officer when not final shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court. It thus distinctly assumes the power of a Court to reverse or modify all decisions of a Survey Officer other than final ones. The only section of the Act relied on as declaring finality in the present case is section 17. It says that any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established. The record here alluded to is one of the other records prepared under section 108 of the Bombay Land Revenue Code and which under section 17 of the Khoti Act are to specify the nature and the amount of rent payable to the khot by each privileged occupant according to the provisions of section 33. Section 108 itself merely says that the other records are those that are prepared in accordance with such orders as may from time to time be made on this behalf by Government. There is not a word so far in any of these sections as to an entry of the tenure on which the land is held, and this must be so because that entry is not to be made in the other records, neither does it form a subject of determination under section 33 of the Khoti Act. It is the settlement register which shows the tenure. That record has to be prepared under section 108 of the Bombay Land Revenue Code and shows the particulars specified in that section and also those specified in section 16 of the Khoti Act, one of the latter being the tenure on which the number is held. It is thus, we think, quite clear that the decision of the Survey Officer as to a tenure affects an entry in the survey register itself, which is nowhere declared final in the Khoti Act, and which can, therefore, [483] be reversed or modified by a decree of a competent Court. As, however, the ruling of a Division Bench of this Court in *Ramchandra* v. *Mukundshet*, P. J. for 1895, p. 145, is directly opposed to this opinion of ours and to the opinion of this Court in the case above quoted from I. L. R., 18 Bombay, we refer to a Full Bench the following question, *viz.* :—

Is the decision of a Survey Officer determining the tenure on which a survey number is held final under the Khoti Act, or can it be reversed or modified by a competent Court?

The case being thus referred, it was fixed for argument before a Full Bench consisting of FARRAN, C. J., JARDINE, PARSONS, CANDY and RANADE, JJ.

*Nagindas T. Marphatia*, for the Appellant (Plaintiff No. 2):—We submit that the decision of the Settlement Officer is not final and is liable to be modified or reversed by a competent civil Court. There is no dispute that before the Khoti Settlement Act came into force, civil Courts had jurisdiction to interfere with such decisions. Therefore, in order to exclude the jurisdiction of civil Courts, the language of the enactment under which it is contended that civil Courts have no jurisdiction must be clear and unambiguous—Maxwell on Statutes, p. 152. The Khoti Settlement Act is a Revenue Act. The Revenue Jurisdiction Act (Bombay Act X of 1876) contemplates that in petty matters civil Courts should not interfere, but in matters of importance they can. See section 4 (*b*) and section 5 (*b*) of the Act.

The word entry only occurs in section 17 of the Khoti Settlement Act. It does not occur in either section 21 or in section 33 which is incorporated with section 17. Section 33 deals with rent only and not with tenure. The finality mentioned in section 17 is as to nature and amount of rent and not as to the tenure. This conclusion is inevitable when sections 17, 21 and 33 are read together—*Faki Ghulam Mohidin* v. *Sajnak*, I L. R., 18 Bom, 241. The case of *Ramchandra* v. *Mukundshet*, P. J., 1895, p 145, is against us. We submit that the ruling in that case is not correct.

*Ganesh K. Deshmukh*, for the Respondents (Defendants) —The Revenue Jurisdiction Act (Bombay Act X of 1876) has no [484] application to the present case. It deals with disputes with Government see section 4 of the Act. In the present case the question turns upon the construction of section 17 of the Khoti Settlement Act. The word "nature" in the section has reference to the tenure with respect to which the rent is to be paid and not to rent. Section 17 has reference to section 33. Section 17 gives finality to certain entries, and all other entries are to be dealt with under section 21. Section 20 of the Act empowers the Settlement Officer to determine disputes summarily. Section 16 provides for the determination of the tenure and for its entry in the settlement register. We submit that these sections show that section 17 makes the entry as to tenure final.

PARSONS, J.:—Section 17 has reference to the settlement register and not to other entries.]

We submit that under that section the entry in the settlement register would become final. The expression "other records" in the section may mean the addition of any columns to the settlement register. Under section 33 of the Act the rent in the case of a dharekari is rent fixed by the Act, and there is no discretion left in the Settlement Officer in connection with it. He has a discretion in the case contemplated by paragraph 2, clause (*c*) of the section.

[PARSONS, J.: -Do you exclude the case of a disputed agreement from section 33 ?]

Yes. Our argument is not affected by section 20 of the Act which relates to disputes. Section 17 has reference to the first three cases mentioned in section 33. We submit that the word "nature" relates to tenure and the word "amount" relates to the quantity of rent. The word "nature" does not apply to rent, because whether the rent is in cash or kind, its nature is not changed. There may be a change in the form or manner of rent, but there can be no change in its nature. The rent in the case of a dharekari is fixed, and to such rent the word "nature" cannot be applied. Further, if the entry with respect to tenure is interfered with by civil Courts, the interference would affect the rent also, and thus the entry as to tenure would virtually make a

[486] change in the rent which the civil Courts have no jurisdiction to do under section 22 of the Act

PARSONS, J —The Collector has the right to change the entry as to rent ]

The Collector would then have to make a new settlement, which he is not empowered by the Act to do

In *Ramchandra* v *Mukundshet* P J 1895 p 145 it seems it was presumed that the entry as to tenure was final The decision in *Fiki Ghulam Mohidin* v *Sajnak* I L R, 18 Bom 214 is not a ruling directly on the point arising in the present case

**Farran C J** The question for our determination is stated by the referring Court ' Is the decision of a Survey Officer determining the tenure on which a survey number is held, final under the Khoti Act or can it be reversed or modified by a competent Court ? It is admitted that it would be open to the civil Courts to adjudicate upon such a question of tenure were it not for the provisions of the Act (Bombay Act I of 1880 It is therefore in the express words of that enactment or in the necessary implication arising from its general object and scope that the exclusion of the jurisdiction that exists must be sought

Now section 20 of the Act provides that if it shall appear to the Survey Officer who frames the said register or other record that there exists any dispute as to any matter which he is bound to record he may investigate and determine such dispute and frame the said register or other record accordingly and section 21 provides that in any such matter the decision of the Survey Officer *when not final* shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court The scheme of the Act as it appears from this provision is not to exclude all matters which the Survey Officer is bound to record and upon which there exists a dispute between the parties from the cognizance of the civil Courts, but only such matters as those upon which his decision is final We must, therefore, examine the several sections of the Act to see what matters which the Survey Officer is bound [486] to record are final Section 11 enables a khot to confer tenure rights upon his tenants and by section 12 upon his application the Collector is bound to make an entry upon the record of the grant of such rights The latter section (12) provides that an entry thus duly made shall be conclusive proof of the facts therein recorded In such case the determination of the tenure upon which a khoti tenant holds is withdrawn from the cognizance of the Court or more correctly speaking the Court is forbidden to go behind the entry made by the Collector and is concluded by it We do not find any other section in which the jurisdiction of the Courts to consider entries is dealt with until we come to Part III of the Act The earlier sections (16, 17, 18 and 19) of that part are headed ' Settlement Records '

Section 16 provides for the preparation of the settlement register " under section 108 of the ' Bombay Land Revenue Code 1879, and the matters which it is to contain They may be thus summarised

(1) The area and assessment of each survey number This is a matter dealt with by the Land Revenue Code

(2) A statement whether it is held by a privileged occupant or not

(3) In the event of its being so held, the tenure upon which it is held, the name of its registered occupant and an entry as to whether his interest is transferable otherwise than by inheritance or not.

(4) A list of the co-sharers of the khotki if there are such and the extent of each co sharer's interest therein

Passing over section 17 for the moment we find section 18 providing that the records shall specify the manner in which the possession of the village is held by the khots in the case of an undivided village and shall record agreements determinative of their responsibility *inter se* and as to the rotation of their management while section 19 provides for recording particulars of the interests of khots in divided villages In none of these sections is there any provision dealing with or in any way excluding, the ordinary jurisdiction of the civil Courts to inquire into the correctness of the entries and in the case of many, if not of most [487] of them, it appears to me that the civil Courts might naturally be expected to have the power to do so as many of them relate to questions of title and estate

We now turn to section 17 The entries to be made under this section in the other records are of a different character They relate to the rent payable by the privileged occupants to the khot The section enacts that "the other records prepared under the said section (108 of the Land Revenue Code) shall specify the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of section 33 of this Act and any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established, thus using words similar to those occurring in section 12 and again in section 29 They do not occur elsewhere in the Act It has been decided and as we all think correctly decided that these words preclude the Courts from questioning the correctness of the Survey Officer's entries duly made under section 13 as to the amount of rent payable by the several privileged occupants in respect of their holdings *Gopal Krishna Taracharya v Sakharam* I L R, 18 Bom 153 and the subsequent cases which followed it It has been argued before us that not only have they that operation, but also that they inferentially preclude the Courts from inquiring into the correctness of the entries as to tenure made under section 16 I am unable to agree with that contention The nature of the tenure may be and often is a matter of much moment independently of the question of rent altogether Upon it depends (*inter alia*) the extent of the assignability of the occupants holding Sections 9 10 and 11 deal with this subject There is therefore, I think a strong *a priori* presumption against this contention The specification of the nature of the rent has reference I think to the medium of the payment whether it is to be made in cash or kind or both and not to the tenure in respect of which it is payable There is no essential distinction in the nature of the rent arising out of the tenure payable by a privileged occupant whether he be a dharekari *quasi* dharekari, or an occupancy tenant It is in its amount and the medium in which it is paid in which the difference consists Quit rent and rack rent are well known expressions denot[488]ing the sort of tenure in respect of which they are payable but it would be impossible to distinguish between the rents payable by the several classes of khoti tenants unless by a statement of the tenure under which they hold but that is a matter already provided for in section 16

The reversal of the decision of the Survey Officer as to the tenure upon which a particular survey number is held, may doubtless in many cases necessitate an alteration in the entry as to rent payable in respect of that number The finality of the rent entries is thus indirectly impaired That must be so *Cessante ratione legis, cessat et ipsa lex* The rent is fixed with reference to the tenure It is upon the assumption that the tenure has been correctly determined and entered that the finality of the rent entries depends

The functions of the Court, however, cease, I think, when it has corrected the decision of the Survey Officer as to the tenure, and it is left to him to make under section 22 all necessary and consequential amendments, if any are needed in the rental entry If there is any difficulty in his doing so, Government can provide for it under section 40 of the Act

I answer the first branch of the question in the negative and the second branch of it in the affirmative

PARSONS, J I concur It is unnecessary for me to say more, as I have fully stated my opinion in the judgment referring the case

**Jardine J** —I concur The particular question argued before this Bench was not raised in *Ramchandra* v *Vatunisict* P J 1895 p 11 or *Ramchandra* v *Raghunath*, I L R 20 Bom 475 though an opinion was incidentally expressed That question is, whether the entry describing the tenure of a privileged occupant is made under section 17 of Bombay Act I of 1880 Now Bombay Act V of 1879 section 108 requires a settlement register and other records to be kept The settlement register is to show the area and assessment of each survey number and the name of the registered occupants The later Act in section 16 alludes to this particular settlement register, repeats the requirement about area and assessment and instead of that about the name of the registered occupant [489] requires a statement whether the number is held by a privileged occupant or not and if so, the tenure is to be specified and the registered occupant's name When there is no privileged occupant the name of the khot or sharer is to be entered but the Act does not call these persons registered occupants Perhaps the definition was omitted in order to raise the privileged occupant to the position of higher tenure than the khot being looked on as a sort of way paramount analogous to Government The tenure is to be specified in this settlement register by virtue of section 16 Is it also required in the other records to which section 17 relates in like manner as the amount and nature of survey assessment must be placed in both the register as survey assessment in the other record is not? This depends on the meaning of the requirement that the nature and amount of rent shall be specified in the other records In section 17 I take the words according to the provisions of section 33 of this Act as an adverbial phrase qualifying the word payable not the word "specify" I infer therefore that the specification need not include all the facts mentioned in section 33 and the schedule annexed it is confined to the nature and amount of rent payable under the statute Mr Deshmukh asks the Court to treat the vague word nature as equal to nature of tenure the word amount being wide enough to refer to rent of both sorts and every amount and I may add whether fixed or unfixed Mr Nagindas argued that nature is a phrase meaning what the words amount and kind mean in section 33 On the whole I think the word 'nature' does not refer to tenure but to the natural history quality of the rent the species of coins rupees annas etc the species of grain and produce The phrase nature and amount of rent &c, in section 17 thus refers chiefly to the items and species of such things as section 33 and the schedule describe and not to the tenures It is only to these figures and species that the rule of evidence in section 17 applies We did not fail to see that one result of allowing the tenure entry to be altered would be to allow the nature and amount of rent to be altered as the entry varies with the tenure just as the value of a fraction varies if you alter the integer I meet this objection with the maxim *Cessat ratio cessat lex* One result may be that the specification of nature [490] and amount of rent entered against a tenure becomes unmeaning and null in contemplation of law when the Court has decided that the tenure is of a different sort I agree with the referring Judges that the

decision of the Survey Officer on the question of tenure is not final, but under section 21 may be reversed or modified by a final decree of a competent Court.

**Candy, J.**:—I concur in the answer proposed to the question put by the referring Bench.

I have had occasion recently in Second Appeal No. 710 of 1893 (*ante* p. 467) to consider in detail some of the provisions of the Khoti Act (Bombay I of 1880). I will here merely refer briefly to one or two points which seem to me to be of special importance.

The entry in the record which by section 12 of the Act "shall be conclusive proof of the facts therein recorded" is the entry made on receipt of a written application from the khot that he has conferred on a certain person certain rights of a privileged occupant. There is no judicial adjudication of any rights contemplated.

So, too, with the certificate under section 29 which "shall be conclusive evidence of the right of the khot therein named to manage the village to which it relates for the year therein specified." —the certificate is not intended to be an adjudication of the rights of the khots *inter se*, but merely a provision for the due revenue administration of the village in the year specified.

Similarly, reading sections 17 and 33 together, the intention of the Act would appear to be that the entry in the record which "shall be conclusive and final evidence of the liability therein established," is merely the entry of the rents according to the provisions of section 33, which lays down definitely the rents payable by privileged occupants.

Whatever entries the Survey Officer may make in the survey records "other" than the settlement register, he cannot avoid the clear statutory provisions of section 33 For instance, if he made an entry that A B, a dharekari, should pay as rent one third of the produce of his dhara land, such an entry would be *ultra vires*, for it would be contrary to the provisions of section 33.

**[491]** So, too, with occupancy tenants.—They ordinarily pay the customary rates of the village, which are determined by the Survey Officer who frames the survey record, not for any particular occupancy tenant, but for the village as a whole. But the khot and any occupancy tenant may at any time agree to substitute for the ordinary customary rate a *makta* or *khand*, that is, a fixed amount whether in money or in kind, and not a fixed share of the produce The manifest advantage of such agreements is that they obviate the necessity of crop inspections and appraisements which are such a fruitful source of dispute Section 33 apparently contemplates that if the khot and occupancy tenant agree before the Survey Officer as to the existence of such a *makta* or *khand*, then he makes an entry of the fact, which entry as with the entry in section 12 is conclusive Now, if (Maxwell, page 30) the interpreter of a statute may call to his aid all external or historical facts for which he may consult contemporary or other authentic works and writings, then a reference to the Bombay Gazetteer, Vol. X, which gives an historical account of the introduction of the khoti settlement, bears out the above view. At pages 253 to 255 will be found an account of the principles adopted by Government, to legalise which Bombay Act I of 1880 was subsequently passed. "Existing agreements between khots and tenants, where found, were to be respected and enforced" It was apparently intended that where the khot and occupancy tenant appeared before the Survey Officer, and said that they preferred a fixed amount to the customary share of the produce, the same should be recorded and be conclusive.

So far there is no difficulty there could not be from the nature of things any antagonism between entries under sections 16, 18 and 19, which are nowhere in the Act said to be 'conclusive' and entries under 17 For as the khot and tenant could not agree before the Survey Officer unless there was no dispute and the Survey Officer could not record an agreement contrary to the provisions of section 33, there would be no room for inconsistent entries

But then we come to sections 20 to 22 These sections provide most distinctly that the Survey Officer when framing the settlement register or other record can investigate and determine any [492] dispute and that his decision, embodied in a survey record when not final is binding on the parties till reversed or modified by a final decree of a competent Court When that decree is obtained the survey record is amended in accordance with its terms

Now whatever may have been the external circumstances connected with the introduction of the khoti settlement they cannot justify a departure from the plain meaning of the words of these sections (Maxwell page 32) This much is clear that it was the intention of the Legislature by sections 20 to 22 of Bombay Act I of 1880 to vest the Survey Officer when framing his records at the introduction of the survey with the power to adjudicate in disputes connected with the preparation of those survey records and that where the Act did not speak of an entry made in accordance with the Survey Officer's adjudication being final or conclusive the survey record could be corrected by a final decree of a competent Court

It is objected that a settlement by which certain of the decisions of the Survey Officer are final and others are not must lead to inconsistency seeing that the nature and amount of rent payable by a privileged occupant must depend upon the nature of his tenure either both the decision as to tenure and also the decision as to nature and amount of rent must be open to correction by the civil Court or else both must be final and unalterable by the civil Court I do not agree with this view

The position of the words when not final in section 21 shows that they can only refer to the finality ascribed in section 17 to the entries of the nature therein mentioned as was held in *Gopal Krishna* v *Sakharam* I L R 18 Bom 133 But when we come to consider the nature of that finality it will be seen that there need be no inconsistency

Thus the Survey Officer decides that AB as dharekari pays survey assessment He cannot under section 33 decide anything else If the khot obtains a final decree of a competent Court that AB is not a dharekari but an occupancy tenant of the land in question then under section 33 AB must pay the customary rates of the village unless there be an agreement to take *makta* from [493] him There cannot be a decision of the Survey Officer which contains in the record that there is an existing agreement between the khot and AB as occupancy tenant that a fixed amount in money or in kind shall be taken in lieu of customary rates, for when the survey record was framed the Survey Officer treated AB as a dharekari This will not prevent any valid agreement between the khot and AB as occupancy tenant for *makta* being given effect to

In the same way should AB have been entered by the Survey Officer as an occupancy tenant paying *makta* according to an existing agreement and should AB denying the existence of such an agreement obtain the final decree of a competent Court that he is a dharekari, then by section 33 he must pay neither more nor less than the survey assessment and local fund cess, and a decision that he as occupancy tenant agreed to pay *makta* must be void when it is found that he is not an occupancy tenant at all

The apparent inconsistency disappears when it is remembered that the only "decision" which the Survey Officer can give under sections 17 and 33 is as to the existence or non-existence of an agreement for *makta* between *the khot* and *occupancy tenant*, and the determination of the customary rates of the village. He is not empowered to fix a "fair rent" for any particular occupancy tenant. He is not entrusted with the duty of ascertaining or determining the amount of rent that an occupancy tenant shall pay: the Legislature has done that in section 33. All that a Survey Officer can do is to determine the customary rents of the whole village, and in the case of any particular occupancy tenant he can find as a fact that the khot and that privileged occupant *quâ occupancy tenant* have agreed to a certain *makta* (*fixed amount*) whether it be fair or not. But if the Court finds that that privileged occupant is not an occupancy tenant, then it follows that no *makta* could ever have been agreed upon "between the khot and the said occupancy tenant."

For these reasons I hold that it is open to the civil Court to go behind the Survey Officer's entry in the settlement register as to the tenure of the various privileged occupants. When that **[494]** has been decided, the payment of rent follows automatically under section 33.

**Ranade, J** : - I concur. As one of the Judges who decided the case of *Ramchandra* v. *Mukundshet*, P. J for 1895, p 145, I may state that there was no intention to lay down any principle, or to place any construction on the terms of section 17 of the Khoti Act, at variance with the rulings in *Fakir Ghulam Mohidin* v. *Sajnak*, I. L. R., 18 Bom., 241. This is clear from the recorded judgment, the last but one paragraph of which sets forth the distinction between the effect of the words used in section 17 as compared with those used in sections 21, 22. We were of opinion then, and to that opinion I still adhere, that the "botkhat" is one of the "other records" prepared under sections 17 and 33, and *so far as the entries* in it relate to the nature and amount of the rent, the entries are clothed with a final and conclusive character.

The qualifying words underlined above should have been expressly stated in their place, and there would then have been no room for misconception. This same record, so far as it relates to the tenure of lands, is some evidence, which, if not controverted and corrected in due course and time, may become very strong evidence, and bind parties on the point of tenure itself, but in its origin it is not clothed with the character of finality In this view of the law, we examined fully the evidence in detail on the point of tenure. This examination would have been unnecessary, if we were of opinion that the Settlement Officer's entries in respect of tenure were final and conclusive. In this connection, there can be no doubt that in the last but one sentence in paragraph 6 of the judgment, the words "conclusive and final" were inadvertently used for "binding" under certain circumstances.

The entries are admissible evidence, but not conclusive or final. This correction does not affect the real point which was decided in that case, and there is thus no conflict between the views of the two Division Benches on this point.

*Order accordingly.*

**NOTES.**

[ This was followed in (1896) 21 Bom., 608. See also (1896) 22 Bom., 95 ; (1899) 23 Bom., 769 ; (1900) 24 Bom., 489.]

## [495] ORIGINAL CRIMINAL.

*The 4th April, 1896*

PRESENT

MR JUSTICE STRACHEY

Queen-Empress
*versus*
Visram Babaji

***Evidence—Confession—Statement of prisoner made before inquiry—Statement of prisoner made in the course of or after inquiry—Criminal Procedure Code (Act X of 1882), Secs 164 and 533***

The sections comprised in Chapter XIV of the Criminal Procedure Code (Act X of 1882) (except section 150) do not apply to the Police in the Presidency towns and consequently a statement or confession made to a Presidency Magistrate does not come within section 164 and the procedure prescribed in regard to the recording of statements or confessions by that section, and (by reference) section 364 do not apply to a statement or confession recorded by a Presidency Magistrate before the commencement of the trial. But such statement or confession though not taken under section 164 is admissible in evidence against the prisoner.

*Queen Empress v Nilmadhub* I L R 15 Cal 595 followed on this point.

During an inquiry before a Presidency Magistrate after the evidence for the prosecution was taken the Magistrate examined the accused under sections 209 and 342 of the Criminal Procedure Code (Act X of 1882). The accused was examined in Marathi, but the questions and answers were recorded in English. The Magistrate deposed at the trial that it was the invariable practice in his Court to take down depositions in English and that he could not himself have accurately recorded the prisoner's statement in Marathi. He also deposed that the statement was correctly recorded in English, and that each question and answer when recorded was interpreted to the accused in Marathi, and that the accused then made his mark at the end of the recorded statement. He further stated that there were at hand native subordinate officials of his Court who could have recorded the statement in Marathi, but that he himself had not sufficient knowledge of Marathi as to be able to read what was written by such a subordinate, or to satisfactorily check or test the correctness with which it represented the statement made by the accused.

*Held* that, assuming that it was practicable to record the statement in Marathi, and that consequently it was irregular, with reference to section 364 of the Code, to record it in English, the statement was nevertheless admissible in evidence under section 533, the irregularity not having injured the accused in his defence on the merits.

*Jai Narayan Rai v. Queen Empress*, I L R 17 Cal 862 dissented from.

THE accused was tried on a charge of murder. In the course of the trial, counsel for the prosecution tendered in evidence two statements alleged to have been made by the accused in the presence of Mr Hamilton, Second Presidency Magistrate. The first of these was made on the 28th February 1896, before the commencement of the inquiry which resulted in the commitment [496] of the accused. The second was made on the 29th February during that inquiry, after the evidence for the prosecution had been taken, and when the accused was questioned by the Magistrate under sections 209 and 342 of the Criminal Procedure Code (Act X of 1882). The statements were recorded in the English language but the accused spoke and was examined in Marathi.

*Lang* (Advocate-General) and *Sayani*, for the Prosecution.
*Robertson*, for the Accused.

The following evidence was given by Mr. Hamilton with reference to the taking of these statements :—

"I am Second Presidency Magistrate. The prisoner made a statement to me on the 28th February 1896. I recorded it in question and answer. It has been correctly recorded in English. He spoke in Marathi. It was interpreted to him correctly. Questions were put to him in Marathi. The answers were in Marathi and correctly taken down in English. I don't think I could myself have correctly taken it down in Marathi. In my Court the invariable practice is to take the deposition down in English.

"At the conclusion of the evidence for the prosecution, I questioned the accused. I recorded his answers in the same way. That is, at the end of the inquiry before me. I don't think that with any pretence to accuracy I could have myself recorded the statements in Marathi. I can read Marathi. I can write very imperfectly. I don't think I have written it for twenty years at least

"As regards the statement of the 28th February, each question and answer was interpreted to him from English into Marathi. The same thing was done in regard to the latter statement. When this had been done, he made his mark. The interpreter could have taken down the first statement in Marathi. The second statement could have been taken down in Marathi by a subordinate of the Court. I can read Marathi If a subordinate had written down the prisoner's statement in Marathi, I could not have read what he wrote, so well, or checked it independently so as to satisfy myself that he had correctly recorded what the prisoner had said."

*Robertson*:—The statements are not admissible in evidence not being recorded in Marathi—*Jai Narayan Rai* v *Queen-Empress*, I. L R., 17 Cal., 862. Section 164 of the Criminal Procedure Code (Act X of 1882) does not apply in the Presidency towns—*Queen-Empress* v. *Nilmadhub*, I.L. R, 15 Cal., 595; *Queen Empress* v. *Viran*, I. L R., 9 Mad., 224, *Reg.* v. *Sivya*, I. L. R., 1 Bom., 219.

[497] *Lang* (Advocate-General) *contra*. He cited *Empress* v. *Lairmbilee*, I. L R, 5 Cal, 826, at p. 829. *Lalchand* v. *Queen-Empress*, I L. R, 18 Cal., 549, section 533 of the Criminal Procedure Code (Act X of 1882).

**Strachey, J.**:—The Advocate-General, on behalf of the Crown, has tendered in evidence two statements purporting to have been made by the prisoner Visram Babaji in the presence of Mr Hamilton, Second Presidency Magistrate. The first of these was made on the 28th February 1896, before the commencement of the inquiry in which the prisoner was committed for trial. The second was made on the 29th February during that inquiry, after the evidence for the prosecution had been taken, and appears to have been made in an examination of the accused by the Magistrate under section 209 and section 342 of the Code of Criminal Procedure (Act X of 1882). Each of the two statements is in the form prescribed by section 364, except that the questions and answers are recorded in English, and not in Marathi, which is the language in which the accused was examined. Mr Hamilton has been called and examined as a witness. He states that he does not think that he could have himself recorded the statements in Marathi "with any pretence to accuracy." He says that he understands Marathi, and that he took down the statement of the prisoner correctly in English, according to the invariable practice of his Court. On each occasion an interpreter was present, and as each question and answer was recorded in English, it was retranslated back to the prisoner in Marathi, and he acknowledged that what was so put to him correctly expressed his meaning, and made his mark on the document at the end with his own hand. Mr. Hamilton further says that on both occasions there were at hand native

subordinate officials of his Court who could have recorded the statements in Marathi But he adds that although he is able, to some extent to read Marathi, he could not do so well enough to read what such a subordinate might have written, and satisfactorily check or test the correctness with which it represented the statement made by the accused

Mr Robertson, on behalf of the prisoner objects to both the statements tendered by the Advocate General on the ground that they are not admissible in evidence As regards the statement [498] made on the 28th February, he contends that, if it is regarded as having been taken under section 164 of the Code the second paragraph of that section requires that it should be recorded in the manner provided in section 364 and that as it was not proved that it was not practicable within the meaning of the latter section to record the examination in Marathi the Magistrate was not authorised to record it in English Mr Robertson further contends, upon the authority of certain cases which he has cited that the irregularity in the method of recording the examination could not be cured by applying the provisions of section 533 Mr Robertson further relies upon the authority of the decision of the Full Bench of the Calcutta High Court in *Queen Empress v Nilmadhub Mitter* I L R 15 Cal 595 that section 164 of the Code of Criminal Procedure does not apply to the statements recorded by Magistrates in the Presidency towns I should mention that the statement does not purport on the face of it to have been recorded under section 164 and that the memorandum made by the Magistrate at the foot of the record of the statement is not in accordance with the last paragraph of that section as it omits to state that the statement was read over to the person making it and admitted by him to be correct

I shall deal first with the last point which applies only to the statement recorded by the Magistrate on the 28th February It appears to me that the decision of the Full Bench of the Calcutta High Court so far as this point is concerned exactly applicable to the present case I agree with Mr Justice PRINSEP in his note to the heading of Chapter XIV of the Code and again to section 155 that the grounds of the decision of the Full Bench equally apply to Bombay The first paragraph of section 164 shows that the section does not apply generally to all statements or confessions made to a Magistrate but only to statements or confessions made to him in the course of an investigation under this chapter that is to say either during or after an investigation by the police under Chapter XIV B section 1 (a) of the Code provides that in the absence of any specific provision to the contrary nothing in the Code (and therefore [499] nothing in Chapter XIV) shall apply to the police in the towns of Calcutta and Bombay As there appears to be no specific provision to the contrary it follows that Chapter XIV (except section 155 as to which see *Queen Empress v Nilmadhub* I L R 15 Cal at p 606) does not apply to the police in the Presidency towns and consequently a statement or confession made to a Presidency Magistrate is not one made in the words of section 164 a statement or confession made to him in the course of an investigation under this chapter or at any time afterwards If that is so then the procedure prescribed in regard to the recording of statements or confessions by section 164 and (by reference) section 364 does not apply to statements or confessions recorded by a Presidency Magistrate before the commencement of the trial

The question then arises, whether the statement or confession though not taken under section 164, is admissible in evidence The decision of the Calcutta Full Bench is a direct authority in the affirmative The Court there held that "it being proved that the whole of the statements contained in the

documents were either the actual words spoken by the prisoner, or were accepted by him as representing the true meaning of what he had said, and as the whole document is signed by him with his own hand, the whole of the admissions contained in the document were strictly proved to have been made by him, and were admissible against him under the Indian Evidence Act The judgment specially refers to section 26 of that Act In the present case the statements contained in the document were not the actual words spoken by the prisoner but the evidence of Mr Hamilton satisfies me that they were "accepted by him as representing the true meaning of what he had said, and 'the whole document is signed by him with his own hand" I think that I ought to follow the decision of the Full Bench with which I agree and I, therefore overrule the objection as to the statement made on the 28th February and I admit the document tendered by the Advocate General

I now come to the statement recorded by the Magistrate in the course of the inquiry on the 23 February There can be no doubt in regard to that statement that the provisions of section [500] 364 of the Code were applicable The first question is whether it was not practicable to record the statement in Marathi Having regard to Mr Hamilton's statement that he could not write Marathi with any great accuracy I am satisfied that it was not practicable for the Magistrate to personally record the examination in that language Mr [illegible] however contends that there is nothing to show that it was not practicable for the examination to be recorded in Marathi by a native subordinate On the other hand the Advocate General contends that the record under section 364 must be made by the Magistrate personally unless he is physically unable to do so I think that would be going too far The second paragraph of section 364 requires the Magistrate to certify that 'the examination was taken in his presence and hearing'; it does not require a certificate that it was recorded by his own hand The third paragraph speaks of cases in which the examination of the accused is not recorded by the Magistrate or Judge himself and not of cases in which the Magistrate or Judge is physically disabled from recording the examination himself The recent decision of the Calcutta High Court in *Queen Empress v Kazai [illegible]* I L R 22 Cal 817 distinctly implies that a *mohurrir* may record a confession or statement under section 364 in a case where the only disability of the Magistrate is that he cannot write the language well In *Lekho Mahto v The Empress* I L R 11 Cal 339 a confession was recorded before a Deputy Magistrate by one of his clerks under section 164 but the Court does not say in its judgment that this was irregular In *Queen Empress v Bachanna* Allahabad Weekly Notes 1891 p 55 it was held that the Magistrate was justified in recording the statement in Hindustani as the statement was made on a close holiday and there was no native official at hand to record the statements of the appellant in the vernacular Mr Justice TYRRELL says that "the exception is where the statement is made to an officer who cannot record it in Hindustani and has not at hand the means of getting it so recorded It is a question of fact in each case whether an amanuensis could or could not readily be had to record the statement in Hindustani That implies that if a [501] native official or amanuensis had been obtainable, it would have been "practicable" within the meaning of the section 364 to record the statement in Hindustani In the present case, the Magistrate has deposed that the statement could have been taken down in Marathi by a subordinate of his Court Assuming however that it was practicable to record the examination in Marathi and that consequently it was irregular to record it in English, the further question arises, what is the effect of the irregularity, having regard to

the concluding words of section 533 ' Upon this point Mr. Robertson referred to *Jai Narayan Rai* v *Queen Empress*, I L R 17 Cal, 862, the passage at pp 607-608 of the report of *Queen Empress* v *Nilmadhub* I L R, 15 Cal, 595, *Queen-Empress* v *Viran* I L R, 9 Mad, 224, and *Reg.* v *Shivya* I L R, 1 Bom, 219. The first of these decisions has been doubted in *Lalchand* v *Queen-Empress*, I L R, 18 Cal, 549 With all respect for the learned Judges who decided the case of *Jai Narayan Rai* v *Queen Empress*, I cannot agree with them that the scope of section 533 is limited to any particular kinds of non compliance with section 364, that a neglect to sign the confession or the certificate or to certify the facts requiring to be certified would be an 'omission' curable by section 533 but that [illegible] to record the examination in the prisoner's own language would be a[illegible] 'direct violation,' not curable by the [illegible] evidence that the [illegible] been injured as to his defence on the merits. Neither [illegible] the object of section 533 appears to me to [illegible] from the Full Bench decision [illegible] and not going beyond the expression [illegible] case is, in my opinion inapplicable. [illegible] not apply where there has been a total [illegible] with the provisions of section 164 and 364 [illegible] is also inapplicable. It was decided with reference to [illegible] under the Criminal Procedure Code of 1872 [illegible] expressed by Sir JOHN EDGE [illegible] All Weekly Notes (189[illegible]) p 60 [illegible] [502] [illegible] prevent justice being frustrated [illegible] complied with the provisions of section 164 and section 364 In that case [illegible] took down the confession [illegible] down in the vernacular [illegible] word to the accused, who had acknowledged [illegible] at the end The confession was attested by the [illegible] It was held to be inadmissible [illegible] injured [illegible] accused as to his defence on the merits The case of *Queen Empress* v [illegible] which I have already referred [illegible] authority to the same effect In the present case [illegible] of the accused was [illegible] recorded in English [illegible] I am satisfied by Mr Hamilton's evidence that the accused was not injured as to his defence on the merits

For these reasons I overrule the objection [illegible] on the 29th February, and I admit the [illegible] that the same reasons would equally justify [illegible] under section 164 [illegible] made on the 28th February [illegible] section 164 [illegible]

NOTES

[See also (1899) [illegible] Bom 2[illegible] (1898) 2 C W N [illegible]]

[21 Bom. 502]

## ORIGINAL CIVIL

*The 18th December, 1896*

PRESENT

SIR C FARRAN KT CHIEF JUSTICE, AND MR JUSTICE CANDY

Luxumon Nana Patil (Original Defendant) Appellant

*versus*

Moroba Ramchandra and another (Original Plaintiffs) Respondents *

*Civil Procedure Code (Act XIV of 1882) Sec 379 Suit for injunction or damages Payment into Court by defendant to satisfy plaintiffs' claim—Costs in such case Costs Practice—Procedure*

The plaintiffs sued alleging certain windows in their house to be ancient windows and complaining that a building in course of erection by the defendant would when completed according to the building plan obstruct the light through the said windows. In his written statement the defendant denied that the plaintiffs windows were ancient and that the plaintiff were entitled to the light and air as an easement At the time of filing his written statement the defendant paid into Court the sum of Rs 200 which [503] in his written statement he stated was more than sufficient to compensate the plaintiff for any damages they might sustain and which he (defendant) paid in without prejudice to his contentions but for the sake of peace and to avoid litigation At the hearing the plaintiffs abandoned their claim for injunction but insisted that they were entitled to more than Rs 200 as damages The Court found that the plaintiffs windows were ancient but that the Rs 200 paid into Court was sufficient damages It therefore ordered that the defendant should pay all the plaintiffs costs up to the date on which the Rs 200 were paid into Court and as to their subsequent costs that the defendant should pay three fourths of the plaintiffs' subsequent costs and the plaintiffs should pay to the defendant one fourth of the defendant's subsequent costs The Court afterwards amplified its order by directing the defendant to pay all the costs of the plaintiffs up to the date of paying the Rs 200 into Court and half the plaintiffs taxed costs subsequent to that date The defendant appealed contending that under section 379 of the Civil Procedure Code (Act XIV of 1882) the plaintiffs should have been ordered to pay all the defendant's costs subsequent to the payment into Court

*Held* that the suit was not one to recover a debt or damages and, therefore section 379 of the Civil Procedure Code (Act XIV of 1882) did not apply That being so, the Judge had full discretion under section 220 of the Civil Procedure Code to apportion the costs, and the Court of Appeal would not interfere with that discretion

*Held* also that in cases not being suits to recover a debt or damages where money is paid into Court the principle underlying section 379 of the Civil Procedure Code ought to regulate the discretion of the Court in directing the payment of costs

THIS was an appeal against the order of the lower Court as to costs of suit, the appellant (defendant) contending that the order was wrong having regard to section 379 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs sued alleging certain windows in their house to be ancient windows, and complaining that a building in course of erection by the defendant would, when completed, as shown by the building plan, diminish the light and air coming through their windows

* Suit No 517 of 1895, Appeal No 924.

They also complained that the defendant had encroached upon an adjoining gully, alleging that he "had no right to build on any portion of the said gully, over the whole of which the plaintiffs claim to have the right of user"

The prayer of the plaint was as follows -

"1. That the defendant may be restrained by injunction from erecting or maintaining erected any building so as to obstruct the access of light and air through the plaintiffs' said seven ancient windows to a greater extent than the same were obstructed by the defendant's old building

[505] "2 That the defendant may be restrained by injunction from encroaching upon or erecting or maintaining erected any portion of building upon the gully between the plaintiffs' and the defendant premises

"3 That the defendant may be ordered to pay costs

4 That the plaintiff may have such further and other relief as the nature of the case may require"

The defendant when filing his written statement paid into Court Rs 200 as compensation to the plaintiffs for the injury (if any) sustained by them

The written statement (1) denied that the plaintiffs' windows (except 3) were ancient windows (2) denied that the plaintiffs were entitled to light and air as hitherto enjoyed through the said windows ... encroachment on the gully and denied plaintiffs had any right to use the gully

The fifth paragraph of the written statement was as follows

"... which he says is ... the plaintiffs ... which he may ... "

At the hearing the following issues were raised by the defendant

1 Whether the windows ... in the plaint ... the plaintiff ... entitled ...

Whether the ... the defendant will ... diminish the light and air ... plaintiff ... windows mentioned in the plaint

3 Whether ... Rs 200 paid into Court ... to compensate the plaintiff for any loss sustained

4 Whether the defendant has ... on the gully ...

5. Whether the plaintiff has any right to use the gully

6 What are the plaintiffs ... and what ...

Upon the above issues the Court found as follows

(1) For the plaintiffs, *viz*, that the windows were ancient

(2) For the plaintiffs *viz* that the defendant's building would materially diminish the light and air

(3) For the defendant *viz*, that the Rs 200 paid into Court were sufficient to compensate the plaintiffs

[505] (4) For the defendant, *viz* that the defendant had not encroached on the gully.

(5) For the defendant, *viz*, that the plaintiff had no right to use the gully

(6) That the plaintiff was entitled to Rs 200 as damages for the causes of action mentioned in the plaint

The following are the material portions of the judgment of the Division Court --

TYABJI, J —In the plaint the plaintiffs asked for an injunction but this was abandoned at the commencement of the hearing before me The defendant

by his written statement, which was filed on 31st January 1896 denied that any of the windows except 1 and 2 on the ground floor and No 7 on the first floor as shown in the plan (Exhibit 1) were ancient or that the plaintiffs were entitled to any relief in respect of the same but without prejudice to any of his contentions he brought into Court the sum of Rs 200 which he said was more than sufficient to compensate the plaintiffs for any damages which they might sustain by reason of the defendant's intended building At the commencement of the hearing before me on 24th February 1896 the plaintiffs although they abandoned their claim for injunction insisted that they were entitled to more than Rs 200 for damages The defendant on the other hand persisted in his denial that the plaintiffs' windows were ancient and asserted that they had only been put in in 1878 Having now found that the windows are ancient and the claim for injunction having been withdrawn the only question now remaining to be decided on the merits on this part of the case is whether the Rs 200 paid into Court by the defendant is sufficient (His Lordship discussed the evidence and continued ) The conclusion I have come to is that the plaintiffs upon whom of course the burden lies have failed to show that he is entitled to more than the Rs 200 paid into Court I am not satisfied that the house is worth more than Rs 500 nor that it will be damaged to the extent of one fourth of its value nor that the damages amount to Rs 4 per month I only assess the damages at Rs 200 because that is the amount admitted by the defendant

[506] The next question in the plaint was in regard to the gully between the plaintiffs' and defendant's property It was admitted before me by the defendant's counsel that the whole length of the gully or the gutter nine inches wide from the plaintiffs' wall belonged to the plaintiff while it was admitted by the plaintiffs that the rest of the gully is the absolute property of the defendant The defendant's counsel during the hearing before me has claimed the right on the contention of the defendant to encroach upon that part of the gully which belongs to the plaintiff while the plaintiff's counsel equally abandoned the plaintiff's contention that he had any right over that portion of the gully which belonged to the defendant There is therefore no question before me now to decide in reference to the gully

As to the question of costs which unfortunately has become now the most important question in the case it is clear from my findings that the plaintiffs have succeeded in proving that the windows are ancient though they have failed in establishing that they are entitled to more than Rs 200 paid into Court on 31st January 1896 I therefore order that defendant should pay the plaintiffs' costs up to and inclusive of the 31st January 1896 The subsequent costs related to the question first as to whether the windows were ancient or not secondly as to damages and thirdly as to whether the defendant had originally intended to encroach upon that part of the gully which he now admits to belong to the plaintiff and fourthly as to the plaintiff's right to use the whole of the gully

As to the defendant's contention After carefully considering the evidence of the surveyors on both sides and the plans put in as exhibits in the case and the correspondence prior to the suit I have come to the conclusion that the defendant did originally intend or at least that he led the plaintiffs to believe that he intended to encroach upon the plaintiff's part of the gully It is, therefore, fair that the defendant should pay to the plaintiff the costs of his unfounded contentions or claims both in regard to the windows and in regard to the plaintiff's part of the gully while the plaintiff should pay to the defendant the defendant's costs as regards the plaintiff's contention that the Rs 200

was not sufficient compensation and as to his claim to use the defendant's part [507] of the gully But instead of directing a complex taxation of the costs on the above basis I have thought it best to assess them roughly at three fourths and one fourth respectively and I accordingly order that the defendant, in addition to paying all the plaintiff's costs up to 31st January 1896, should pay three-fourths of the plaintiff's costs subsequent to that date, and the plaintiff should pay to the defendant one fourth of the defendant's taxed costs subsequent to the same date, or if the parties prefer I could simplify my order by setting off the one fourth costs payable to the plaintiff against one fourth payable to the defendant and thus by direction that the defendant is to pay all the costs of the plaintiff up to 31st January 1896 and half of the plaintiff's taxed costs subsequent to that date Each party to bear his own costs of the rule for injunction.

The defendant appealed on the question of costs on the following grounds —

1 That the appellant having paid into Court at the time of filing [illegible] written statement, viz the [illegible] of January 1896 the amount Rs 200 which [illegible] sufficient to compensate the plaintiff [illegible] the defendant's intended building, and the [illegible] of the compensation the plaintiff was [illegible] part of the [illegible] learned Judge [illegible] the defendant to pay half the [illegible] after the 31st January 1896

2 That in making the said order the [illegible] learned Judge violated the provisions of section 379 of the Code of Civil Procedure 1882

3 That the said learned Judge under the circumstances [illegible] ought having regard to the provisions of the said section 379 to have ordered the plaintiff to pay all the defendant's costs of suit and those incurred after the 31st January 1896

*Scott* (*Lowndes* with him) for Appellant (Defendant) — Under section 379 of the Civil Procedure Code (Act XIV of 1882) the Judge was bound to give the defendant all costs incurred after the payment into Court of Rs 200 which was found to be sufficient to compensate the plaintiff He cited *Buckton* v *Higgs* 4 Ex Div, 174 *Wood* v *Lethien* 61 L J (Com Law) 215

*Lang* (Advocate General) with *Macpherson* for the Respondents (Plaintiffs) Section 379 does not apply here It applies only [508] to suits to recover debt or damages see section 376 This was a suit for an injunction The plaintiffs were obliged to continue the suit in spite of the defendant's payment into Court, because the written statement denied that the windows were ancient windows The plaintiffs were bound to get that question decided or they would be afterwards barred The defendant himself raised an issue on the point at the hearing and denied the plaintiff's right Although, therefore, the plaint does not pray for a declaration of the plaintiff's right the suit was one of that nature, and not "to recover a debt or damages" Sections 376 and 379 of the Code do not apply, and the Judge had full power to apportion the costs in his discretion under section 220 of the Civil Procedure Code

*Scott* in reply The suit was one for damages The Court has power to award damages in lieu of an injunction The plaintiff must be assumed to know that and to count upon the Court giving damages if not an injunction Besides there is the prayer for "other relief" See *Hutchinson* v *L C D Railway*, 38 Sol Journal, 218, cited in Annual Practice for 1895, p 530 Money is constantly paid into this Court in suits for injunction, and it is only under these sections 376, 379 of the Code that such payment can be made No other section provides for it So that by long established practice at any rate these sections must be held to apply where money is paid into Court in suits for injunction.

**Farran, C. J.**—We think that with regard to the gully the question is so trifling that it may be left out of consideration. We think also that a suit for injunction to prevent a person from building so as to interfere with the plaintiff's light and air and including no claim for damages, is not a suit to recover a debt or damages within section 376 of the Civil Procedure Code, merely because in dealing with such a suit the Court has a discretion under the Specific Relief Act to award damages in lieu of an injunction. The claim is for an injunction and does not cease to be so because such a discretion is vested in the Court. We do not wish to throw any doubt on the validity of the payment of money into Court in injunction cases. It is a long established practice of this Court, and we think in ordinary cases when **[509]** money is so paid in the principle underlying section 379 ought to regulate the discretion of the Court. But we further think that where, although no declaration is prayed for, the defendant raises an issue the finding on which operates as a virtual declaration of the right of the plaintiff the principle of section 379 ceases to be applicable and the Judge then has full discretion under section 220 of the Code to apportion the costs. We think that in the course the Judge took in this case, and we do not feel at liberty to interfere with that discretion. This appeal must therefore be dismissed with costs.

*Appeal dismissed.*

Attorneys for Appellant (Defendant): Messrs. *Khanderao and Sripal.*

Attorneys for Respondents (Plaintiffs): Messrs. *Little, Smith, Nicholson and Bowen.*

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**[21 Bom. 509]**

APPELLATE CIVIL.

*The 14th January, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE STRACHEY.

Budesab and another ... (Original Plaintiffs), Appellants

*versus*

Hanmanta ... (Original Defendant), Respondent.*

*Adverse possession—Adverse possession of a partial interest (e.g., a tenant's) in land—Title by adverse possession asserted by a plaintiff against the true owner as well as alleged as a defence—Limitation Act (XV of 1877), Sec. 28 and Art. 144.*

Adverse possession for more than twelve years by one claiming to hold land as its full owner not only extinguishes the title of the true owner to the land so held and debars him from suing for its recovery, but creates a title by negation in the occupant which he can actively assert and hold by possession or even against the true owner.

A partial interest in land may be lost by adverse possession as well as the whole interest, and the right to such partial interest may be asserted by suit.

So where a landlord seeks to recover from his tenant possession of land in his tenant's occupancy and the latter, alleging a perpetual tenancy, successfully resists on that ground the landlord's attempt to dispossess him, the tenant may, after the statutory period has expired, plead limitation in bar of a subsequent suit in ejectment by the landlord.

A landlord allowing the tenant to assert the validity of an invalid lease for the statutory period of more than twelve years may be debarred from subsequently questioning the right of the tenant to hold under its terms.

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* Second Appeal, No. 300 of 1894.

[510] SECOND APPEAL from the decision of E H Moscardi, Acting Judge of Kanara, reversing the decree of Rao Saheb M M Nadgir, Subordinate Judge of Sirsi

Suit for possession by tenants alleging an occupancy right against landlord The plaintiffs father (Fakirsab) held the land in dispute as a tenant of the defendants father Ramingavda In 1862 Ramingavda sought to put an end to Fakirsab's tenancy, alleging it to be *chalgeni* Fakirsab thereupon took proceedings in the revenue Court to protect his possession alleging that he held the land on *mulgeni* tenure and was not liable to be evicted The revenue Court referred Ramingavda to a civil Court if he desired to evict his tenant, and accordingly Ramingavda filed a suit in the Munsif's Court at Yellapur to evict Fakirsab but his suit was afterwards dismissed for want of appearance Ramingavda [illegible] and Fakirsab and after him his sons (the plaintiffs) continued to occupy the land as tenants of the defendant (Ramingavda's son) paying rent until 1882 when the Collector acting on behalf of the defendant who was then a minor and [illegible] took possession of it from the plaintiffs and in 1884 [illegible] the defendant on his attaining majority

In 1891 the plaintiffs filed this suit to recover possession of the lands with mesne profits basing their claim (a) on a *mulgeni* lease alleged to have been granted in 1827 by the defendant's grandfather to the grandfather of the plaintiffs and (b) on adverse possession as *mulgenidars* for a long period

The defendant pleaded that the plaintiffs were not *mulgenidars*, that the lands in dispute were let out to them on *chalgeni* in 1850, that the suit brought by the defendant's father Ramingavda in 1862 was dismissed on the ground of his non-appearance as subsequent to his suit he died on the 10th October during the time [illegible] that the defendant having been born three months after the death of his father Ramingavda no steps could be taken to set aside the decree [illegible] the suit and that the plaintiffs were properly ejected in 1882 by the [511] Collector who was not satisfied with the genuineness of the alleged *mulgeni* lease

The Subordinate Judge found that the *mulgeni* lease set up by the plaintiffs was not sufficiently proved but he allowed their claim on the ground that they had acquired a title by adverse possession to the lands which had been in their possession from 1862 to 1882 when they were wrongfully taken possession of by the Collector

On appeal by the defendant the Judge reversed the decree The following is an extract from his judgment

"It is urged by the respondent plaintiffs that under [illegible] the Limitation Act after the lapse of twelve years from [illegible] that he [illegible] set up a *mulgeni* title his right to assert such title is extinguished But that [illegible] applies to possessory rights only No doubt if plaintiffs were still in possession they could [illegible] the defendant if during the period of limitation allowed under Schedule II article 144 of the Act above quoted he had failed to take steps to assert his right to eject them consequently in 1882 even if defendant's right to sue for and obtain [illegible] that plaintiffs were his *chalgeni* tenants or for ejectment after due notice [illegible] had been taken away under the decision quoted (*Sheikh Nazimudin Hossein* v *T* [illegible] Bengal Law Rep [illegible] Appendix p 130) yet his right to treat the plaintiffs as his *chalgeni* tenants was not extinguished and having regained possession he can now rely on such right as against the plaintiff Plaintiffs contend that they first set up their *mulgeni* title in 1862 and that defendant knowing of such

*i e, tenancy at will or occupation on paying rent for a short or indefinite term (see Wilson's Glossary of Judicial and Revenue Terms)

claim of plaintiffs, did not until 1882 take any steps to establish their *chalgeni* right But this will not help the plaintiffs now that they are out of possession and must therefore, prove the superiority of their title to that of the defendant It remains now to see whether the plaintiffs have proved the *mulgeni* lease they rely on I find it is not proved Only one witness is called to prove the handwriting of the writer and he denies that the document is in the handwriting of his father who purports to have written it The document purports to be more than thirty years old but there is reason to believe that it is a recent forgery, for as the lower Court remark in its judgment it never saw the light until 1884 although only two years before when the Collector asked plaintiff what documentary evidence they had of their *mulgeni* rights they gave a long written reply (Exhibit No 21) in which not a word is said about the lease

Plaintiffs preferred a second appeal

*Branson* with *Ghanasham N Nadkarni* for Appellants (Plaintiffs) — We contend that our possession was adverse to the defendant from 1862 to 1882, when the Collector dispossessed us The interest of a tenant is no doubt, a limited interest still there can be adverse possession of such limited interest, and acquisition of title by possession during the statutory period can prevail as [512] against the landlord provided the tenancy is not denied After the acquisition of such a title the tenant can bring a suit to recover possession on that title just as he can allege it as a defence in a suit brought by the landlord *Bhagu* v *Bapaji* P J 1892 p 33 *Rakhmabai* v *Anantrav*, I L R 9 Bom 198 *Maidin Sulai* v *Nagapa* I L R 7 Bom, 96 *Madhava* v *Narayana* I L R 9 Mad 244 *Sundaram* v *Periasami* I L R, 13 Mad, 467 *Sheikh Nazimudin* v *Lloyd* 6 Beng L R App 130 *Juna das* v *Ambashankar*, I L R 12 Bom 201 *Lachho* v *Har Sahai* I L R 12 All 46

*Macpherson* with *Shamrao Vithal* for the Respondent (Defendant) There is no doubt that if a rightful owner brings a suit after the expiration of twelve years from the time his title is denied by the person in possession his suit would be time barred under section 28 of the Limitation Act But that principle is not applicable to the present case The Statute of Limitation applies to the institution of suit and can have no application to a case like the present Further the Judge has not found whether the possession of the plaintiffs was adverse to us We rely on *Orr* v *Sundra Pandia* I L R 17 Mad 255 *Scott* v *Nixon* 3 Dr and W 388 *Doe d. Bennington* v *Llewellyn* 27 L J (Exch) 297

**Farran C J** This is a second appeal from the decree of the District Judge of Kanara dismissing the plaintiffs claim which had been awarded by the Subordinate Judge

The facts as they appear from the judgment of the latter, are briefly these The plaintiffs father was a tenant holding the lands in suit under the father of the defendant In 1862 the latter sought to put an end to the tenancy which he alleged to be *chalgeni* The plaintiffs father took proceedings in the revenue Court to protect his possession, and in the result the defendant's father was referred to a civil Court if he desired to evict, as the plaintiffs' father asserted that he held the land on *mulgeni* tenure and was not liable to be evicted The defendant's father accordingly filed a suit in the Munsif's Court at Yellapur to evict the plaintiffs father The suit was subsequently dismissed for want of appearance It would appear that the defendant's father had [513] then died, and that the suit was not prosecuted in consequence, but there is no finding upon this part of the case as the District Judge has not entered upon the question of adverse possession deeming it, upon the view which he took of the law to be unnecessary to do so After the dismissal of the suit the plaintiffs father and subsequently the plaintiffs, continued to occupy the land as the tenants of the defendant, paying rent until 1882, when the

Collector, acting on behalf of the defendant, who was then a minor, and as his administrator, took possession of it from the plaintiffs, and in 1884 made it over to the defendant on his attaining his majority. The plaintiffs filed the present suit in 1891 to recover possession of the land with mesne profits, basing their claim (*a*) on a *mulgeni* lease alleged to have been granted to their ancestor in 1827, (*b*) on adverse possession as mulgenidars for a long period.

Both the lower Courts have found that the alleged *mulgeni* lease set up by the plaintiffs has not been proved, and the District Judge has intimated his opinion that it is a forgery.

The Subordinate Judge, however, relying on the decision in *Maidin Saiba* v. *Nagapa*, I. L. R., 7 Bom., 96, awarded the plaintiffs' claim on the ground that they and their father had held possession of the land adversely to the defendant and his father for a period of twenty years. The District Judge, without recording any finding as to the nature of the plaintiffs' possession during this period, and considering the case cited by the Subordinate Judge to be inapplicable, dismissed the plaintiffs' claim. Hence this appeal.

The question for decision is, whether the plaintiffs' father and the plaintiffs continuing to hold the land after the unsuccessful attempt of the defendant's father to evict in 1862 constituted such an adverse possession as would create a title to the land in the plaintiffs to the extent which they claimed, *viz.*, a right to hold it on *mulgeni* tenure against the defendant, their admitted landlord and the true owner of the land. In considering that issue, inasmuch as the character of the possession of the plaintiffs since 1862 has not been found by the Lower Appellate Court, we must (for the purpose of our present decision) assume (as found [514] by the Subordinate Judge) that the continued holding of the land by the plaintiffs after 1862 was not under an arrangement with the defendant, but was in assertion of their alleged right to be considered his *mulgeni* tenants. We proceed to consider the case upon that assumption.

It was conceded in argument before us, and as we think rightly conceded, that an adverse possession for more than twelve years by one claiming to hold land as its full owner, not only extinguishes the title of the true owner to the land so held and debars him from suing for its recovery, but creates a title by negation in the occupant which he can actively assert if he loses possession even against the true owner—*Scott* v. *Nixon*, 3 Dr. and W., 388; *Brassington* v. *Llewellyn*, 27 L. J. Exch., 297; *Sanders* v. *Sanders*, 19 Ch. Div., 373. This result, we think, flows naturally from the wording of the provisions of section 28 of the Limitation Act (XV of 1877) which enacts that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." There is certainly authority for the proposition that a landlord allowing a tenant to assert the validity of an invalid lease for the statutory period of more than twelve years may be debarred from subsequently questioning the right of the tenant to hold under its terms—*Khagu* v. *Byramji*, P. J. for 1892, p. 39. That decision purports to be based upon the ruling in *Radhabai* v. *Anantrav*, I. L. R., 9 Bom., 198, but the latter was the case of a grant, and the relation of landlord and tenant did not at any time exist between the parties. The decision itself is, however, in point as an authority. In *Sheikh Nazimudin* v. *Lloyd*, 6 Beng. L. R., Appx. 130, the Judges (JACKSON and AINSLIE, JJ.) were of opinion that a landlord who allowed his tenant to pay him rent under a supposed *mokurrari* lease for more than twenty-seven years after an attempt to dispossess him was barred by limitation from maintaining a suit for a declaration that the lease of the defendant was of a different character. The suit was originally framed as a suit to eject the defendant, but that portion of the relief was abandoned. The learned

Judges [515] based their judgments mainly upon the deduction which they drew from the effect of the decision of their Lordships of the Privy Council in *Rajah Sahib Perhlad Sein* v *Doorgapershad Tewaree*, 12 M I A, p 322, and in *Rajah Sahib Perhlad Sein* v *Run Bahadoor Singh*, *ibid* p 332 It was not in those cases necessary for their Lordships to consider the question of limitation, as their Lordships took the view that the facts did not raise it, and they cannot therefore, be treated as authorities Their Lordships did not, however, intimate an opinion that limitation could not be pleaded in such a case, and it may be contended that they assumed that it could In *Madhava* v *Narayana*, I L R, 9 Mad, 244 at 247, it was held that where the father of the plaintiffs demised to the defendant's ancestor two items of family land on *kanam* and placed him in possession the plaintiffs could not, after the defendant had held under the *kanam* for more than twelve years, sue to eject him on the allegation that the *kanam* was illegally granted The learned Judges were of opinion that "adverse possession for twelve years of a limited interest in immoveable property is a good plea to a suit of ejectment to the extent of that interest" That case was followed in *Sankaran* v *Periasami*, I L R 13 Mad, 467, where it was held that payment of *purappu* by the person in possession did not prevent his possession from being adverse to the person to whom he made such payments The Court say "Possession of a limited interest in immoveable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as is adverse possession of a complete interest in the property to bar a suit for the whole property On the other hand, in *Watson* v *Ranee Shurut Soonduree Debia* 7 Cal W R, 395, it is laid down that a tenant cannot plead limitation against his landlord but in *Sheikh Nazimudin* v *Lloyd*, 6 Ben L R, Appx, 130, the Court say that the rule was there stated in too general terms

By article 144 of Act XV of 1877 a suit for possession of immoveable property or *any interest* therein is barred after the lapse of twelve years from the time when the possession of the defendant becomes adverse to the plaintiff In cases like the [516] present it may we think, be fairly contended that though the landlord's interest is throughout in the possession of the landlord by his tenant (as it certainly is as regards third persons), the tenant's interest is in possession of the tenant, and that it is the latter which the landlord in a suit in ejectment against his tenant who admits the tenancy seeks to recover If that be so it is competent to the tenant, while admitting the landlord's title to the land, and paying him rent in pursuance of such admission, to set up the case that the tenure upon which he holds is such as to disentitle the landlord to eject him so long as he pays the rent and to become entitled to the tenant's interest in the land which he claims by adverse possession We do not say that a tenant by a false allegation as to the terms of his tenancy though continuously repeated can alter those terms Such allegations do not necessarily throw upon the landlord the *onus* of refuting them by suit—*Rajah Nilmony Singh* v *Kally Churn Bhattacharjee*, L R, 2 I A, 83 But where a landlord seeks to recover possession of land in his tenant's occupancy from the tenant, and the latter, on the allegation of a perpetual tenancy, successfully resists the landlord's attempt to dispossess him for the statutory period, the current of authority to which we have referred in our opinion establishes that the law of limitation can be successfully pleaded in bar of a suit in ejectment by the landlord And as we do not think that there is any principle of law which prevents us from following that current, or that the authorities are based upon a necessarily incorrect interpretation of the provisions of the Limitation Act, we consider that we ought to follow them.

It has, however, been contended before us that even assuming the law to be in accordance with this view, the provisions of section 28 of the Limitation Act are not applicable to the case. We are unable to follow that contention. If the defendant has lost by the operation of article 144 his right to institute a suit to recover the tenant's alleged interest in the land from the latter, it seems logically to follow that the defendant's right to such interest has become extinguished by the operation of section 28 and that by negation it has become vested in the plaintiffs. A different rule cannot, we think, be applied to a partial interest in [517] the land lost by limitation from that which is admittedly applicable to the case of the whole interest. The principle laid down in the cases cited in the beginning of this judgment is, in our opinion, therefore, applicable to the present case. We must send down an issue to have the nature of the possession of the plaintiffs' father and of the plaintiffs between 1862 and 1882 determined. It will be:

Was the possession of the plaintiffs and of their father between 1862 and 1882 adverse to the defendant within the meaning of this judgment?

Finding to be certified in this Court within two months.

*Issue sent down.*

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**NOTES**

[1. SIR V. BASHYAM AYYANGAR J., after a full review of the case law thus summed up the law on the subject in (1902) 25 Mad 507: — A person who lawfully came into possession of land as tenant from year to year or for a term of years, or as mortgagee cannot by setting up during the continuance of such relation any title adverse to the landlord or mortgagor, as the case may be, inconsistent with the real legal relation between them and that however notoriously and to the knowledge of the other party, acquire by the operation of the law of limitation title as owner or any other title inconsistent with that under which he was let into possession. In the case of a mortgage the title of the mortgagor will be extinguished only at the expiration of the period prescribed for redemption of mortgage and in the case of a lease the landlord's title can be extinguished only at the expiration of the period prescribed by Art. 139 of the Limitation Act and under that Article such period will commence to run only when the tenancy is determined. See [illegible] (1899) 2 Bom [illegible] 02 (on non payment of rent), (1903) 27 Bom 3[illegible] (1904) 7 O C 372, (191[illegible]) 2[illegible] I C 307.

2. A tenant holding over after the expiration of the term under which he came into possession can acquire an interest by adverse possession. —(1910) 8 M L T 256; 37 Mad 1.

3. As regards invalid leases see also (190[illegible]) 2[illegible] Bom [illegible]1 (5[illegible]); (190[illegible]) 5 Bom L R 186.

4. As regards limited interest see also (1905) 2 C L J 125.

5. As regards extinguishment and creation of title by sec. 28 of the Limitation Act, see also (1915) 17 M L T 347; 2[illegible] I C 168.]

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[21 Bom 517]

## CRIMINAL REVISION

*The 16th January, 1896*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE

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Imperatrix

*versus*

Appaji bin Yadavrao

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*Penal Code (Act XLV of 1860), Sec 161 — Public servant — Revenue and police patel — Agreement to restore village Mahars to office on payment of Rs 300 towards repair of a village temple — Gratification — Official act.*

The Mahars of a certain village having been suspended from their office for some months a meeting of the villagers was held at the house of the Patel, at which the Patel was present,

* Application for Criminal Revision, No 364 of 1895

to consider the question of their restoration to office, and an agreement was there come to that they should be restored on their paying a sum of Rs. 300 towards the repair of the village temple.

*Held*, that the Patel, being a public servant, had committed an offence under section 161 of the Penal Code (Act XLV of 1860).

THIS was an application under section 435 of the Code of Criminal Procedure (Act X of 1882) for the exercise of the High Court's criminal revisional jurisdiction.

The accused was the revenue and police patel of Chinchodi in the Ahmednagar District. He was convicted under section 161 of the Penal Code (XLV of 1860) of taking a gratification for an official act under the following circumstances.

In 1892 the Mahars of the village in question were removed from the services of the village, and Mangs were employed in [518] their place. In 1894 a meeting of the villagers was held at the house of the accused, at which meeting the accused was present, to consider the question of the restoration of the Mahars, and an agreement was come to that they should be restored on their paying a sum of Rs. 300 for a village purpose, *viz.*, the repair of one of the village temples. This payment was apparently in the nature of a fine for the poisoning of certain cattle of which the Mahars were supposed to have been guilty during the period of their suspension.

The Collector sanctioned the prosecution of the accused for taking part in this transaction. The charge against him was that of taking a gratification for an official act under section 161, Penal Code.

The First Class Magistrate of Ahmednagar convicted the accused and sentenced him to suffer imprisonment for four months and pay a fine of Rs. 50, or in default of such payment further imprisonment for one month.

In appeal the Sessions Judge (G. C. Whitworth) of Ahmednagar confirmed the conviction and sentence. The following is a portion of his judgment:—

The evidence leaves no doubt that some three years ago the Mahars were removed, if not completely, yet in the main, from their services, and that in the rains of 1891 there was a general meeting at the appellant's house when the question of the restoration of the Mahars to service was considered, and an agreement was come to that on the payment of Rs. 300 they might be restored. These facts are proved by several persons who were present on the occasion and whose testimony is not weakened by the fact that some of them mention incidents not spoken to by others. Nor are they wholly denied by the patel himself. He has at one time taken the position that the villagers other than himself made the whole settlement with the Mahars and merely informed him of it. But when examined by the Mamlatdar in 1894 he said that he and the villagers removed the Mahars from service and subsequently brought them back on their furnishing security to pay Rs. 300 in consideration of their re-employment. It was natural that the patel should take a leading part in a transaction of this kind carried out on behalf of the village at large, and there is no doubt that he did so. The evidence in particular of Mahadu No. 6, the Vani who made himself responsible for the payment and who was obviously (as appears from his deposition) a most unwilling witness for the prosecution, confirms this.

'A more difficult question, however, remains, namely, whether this transaction, which seems to have been carried through without concealment and to have been at one time avowed by the patel, comes within the provisions of section 161 of the Penal Code. It is contended that the money was intended for a village purpose, namely, [519] the repairing of a temple; that it was in the nature of a fine in respect of cattle supposed to have been poisoned by the Mahars during their period of suspension; and, further, that this suspension was only from their private services to the villagers and not from their public service to Government. The village system is older than the institution of patel as Government servants, and it was

probably not the intention of the criminal law to forbid a bargain being made between the general body of the residents of a village and the distinct body of the Mahars I do not find it proved that the patel intended to take the Rs 300 for himself alone On the contrary the Mahars themselves seem to have regarded the transaction as a contract and not as a bribe, for they claimed, according to the chief constable's evidence, to cancel the *hawala* they had given through Mahadu when they found that their restoration to service was forbidden

"But though there might be a legitimate bargain between the villagers and the Mahars, I do not think the present one was such I do not think the public and private services of the Mahars can be distinguished in the way attempted or that the distinction was present to any of the parties' minds at the time It is well known and the records of any village will show (see, for instance, Village Form 9 in H p s Manual of Revenue Accounts) that public remuneration is given to village servants who are useful to the village community' as well as to those who are 'useful to Government Besides I think it is proved that the Mahars were removed generally from the essentially public function of carrying the village revenue to the taluka For though the trying Magistrate is mistaken in saying that there is no instance of their doing this during the period of suspension yet the fact that only four instances have been found and that none of these is later than 11th December 1892, shows that the suspension was general and was for the p ... and a half complete

"The appellant as a public servant must have kn wn that he had no right to deal with the Mahars who were in receipt of remuneration from the State His first act in removing them is not in question now but when in his public capacity he became a party to their restoration and agreed to accept even for a village purpose a sum of money as a considera tion for such restoration which could not be effected without his concurrence —for the Mahars serve immediately under him—he committed the offence of which he has been convicted '

The accused applied to the High Court under its revisional jurisdiction

*Kirkpatrick* (*N C Chandavarkar* with him) for the Accused There has been no offence under section 161 of the Penal Code The Judge finds that the Rs 300 were to be paid, not to the patel (accused) but to repair a village temple This cannot be a gratification within the meaning of the section The accused is not shown to be personally interested in the temple If he has any interest it is an interest common to all the parties to the arrangement and to the whole village community He had no power, as patel, to restore the Mahars to their employment Only [520] the villagers as a community could do that His concurrence therefore, was not an 'official act It was not as patel, but as a villager he concurred The fact that he holds the office of patel does not divest him of his rights and interests as a villager There was no corrupt motive on either side nor any concealment The arrangement was made by the villagers at a meeting at which he was present but not as an official He was surely not bound to absent himself or if present to dissent and by his influence prevent an arrangement restoring peace between the different classes in the village The satisfaction arising from the knowledge that he had assisted in restoring peace is not a gratification ' within the section.

There was no appearance for the Crown

**Jardine, J.** —On the findings of fact of the Sessions Judge we have to say whether the act done is punishable under section 161 of the Indian Penal Code The accused, being the revenue and police patel is a public servant. He agreed to accept money as a motive for restoring some village Mahars to office These village servants have duties connected with the public revenue, the village police, and the civil administration, they are usually remunerated by *haks* of money or kind, and have long been recognised as officers, and are called so in such statutes as Bombay Act III of 1874 The patel is their superior, he is the head of the village police under Bombay Act VIII of 1867, and of course must use all his lawful powers to prevent

and detect cattle-poisoning, a form of crime to which such persons as village Mahars are sometimes prone, as recognised in section 64 of Bombay Act III of 1874, because of their alleged right to the corpse or the skin of dead cattle as a *hak*. This statement shows that the bargain about reinstating the Mahars in office was connected with official functions. It appears to come within the words of section 161 of the Penal Code, which are wide, and deal with any gratification whatever other than legal remuneration.

The question then arises whether what was done comes within the meaning. The plain words exclude the defence that the benefit bargained for was to go to somebody else, and also exclude [521] the notion that an officer is protected if he agrees to let his official acts be swayed by the motive of accepting a gratification to be used professedly for advancing some public, not private, object, such as charity, science, or religion. That kind of motive is different to the desire of private lucre: but it may easily lead to oppression, and the subject in the pursuit or enjoyment of a right ought not to be hampered by any thought of pleasing the officer by promising a subscription of any kind, however laudable. Nor ought an officer to be affected in his duty to the Crown in dealing with a subject by such a consideration. There is no distinction between offices held at common law or by statute. The Imperial legislation extended to India is sweeping in its penalties against acceptance of gifts by officers. (See 33 Geo. 3, c. 52, s 62). The law is very jealous of bargains for offices, as the numerous reported decisions on English and Indian cases on the Statute 5 and 6, Edward VI, c. 16, show, for which see chapter 15 of Bk 2, Russell on Crimes, of buying and selling offices. The scope of Parliamentary legislation is fully discussed in the case relating to the corrupt mamlatdars, who confessed to the purchase of offices of civil and criminal judicature. Such a person is disabled from holding office during life, and although the Queen may pardon the misdemeanour, it is not lawful for the Queen to replace him in office. (See *In re Ganesh Narayen Sathe*, I. L. R, 13 Bom, 600 at p. 616). One chief reason of the disability is the danger of extortion from the suitors. So the Commons in impeaching Lord Chancellor the Earl of Macclesfield replied: "When it is said that a good officer may give money for his place and may resist the temptation of extortion, it is what the law of England would not trust to human frailty." So in matters outside that Act of Parliament the Courts have often held these bargains to be against the public policy.

In the present case there was the danger that if the village Mahars paid Rs. 300 for restoration to office, they might make the enterprise profitable by illegal or dishonest practices. On these considerations we infer that the act done is a misdemeanour, and, therefore, such as the law strikes at by penalties. (See *Queen-Empress* v. *Ganesh*, I. L. R., 13 Bom., 506, followed in *Queen-Empress* v. *Soshi* [522] *Bhushan*, I. L R., 15 All., 210 at p. 218). The answer to an argument of the learned counsel that the village people were equally concerned in the bargain is that such a circumstance does not lessen the misdemeanour. The principle applied to the Member of Council of Madras by the King's Bench on a criminal information—*Rex* v. *Hollond*, 5 T. R., 607,—applies here. The accused officer is liable for his own acts and omissions as well as for what he did in concert. We confine our remarks to the present case, as we concede to Mr. Kirkpatrick that there may easily be cases apparently within the words of section 161 which are outside its spirit. (See Lord MACAULAY'S Note E on the Penal Code: and what is said by the Judges as to corruption in *Richardson* v. *Mellish*, 2 Bing., 229, which illustrates the care required in forming a judgment on the quality of the motive, and the difference between an office and an employment.)

As regards the case before us, we think the objections taken by Mr Kirkpatrick to the danger of a wide interpretation are met by the judgments in *Douglas* v *The Queen*, 13 Q B, 74, construing the scope and intent of 33 Geo 3, c 52, s 62 While upholding the conviction, we are of opinion that the publicity of the bargain should weigh in reducing the punishment The facts as found by the learned Judge, with whom we concur, appear to show the absence of corrupt or oppressive motive and the patel's conduct may be explained by referring it to a wish to end quarrels and promote a public object We have already admitted him to bail and we now reduce the sentence to one of fine of Rs 10 only

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[ 21 Bom 528 ]

## APPELLATE CIVIL

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*The 14th January, 1896*

PRESENT

SIR C FARRAN, KT CHIEF JUSTICE AND MR JUSTICE STRACHEY

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Gangadhar Raghunath Joshi . (Original Defendant) Appellant

*versus*

Damodar Mohanlal Guzarathi . .(Original Plaintiff) Respondent

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*Contract—Condition against sub contract—Sub contract made notwithstanding condition—Suit by sub contractor—Illegality of sub contract—Damages—Compensation for work done—Contract Act (IX of 1872) Sec 23*

[528] Defendant contracted with the Executive Engineer of the Public Works Department to supply materials for the construction of a public road One of the conditions of the contract was that no work was to be underlet or let by task work by the contractor without the express permission in writing of the Executive Engineer or his duly authorised agent Subsequently the defendant without obtaining the requisite permission entered into an oral agreement with the plaintiff under which the plaintiff was to do the contract work and the defendant to pay him all moneys received from the Executive Engineer under the contract after deducting ten per cent as the defendant's profit It did not appear that the plaintiff knew of the condition against underletting contained in the contract

The plaintiff sued the defendant for the balance of money due to him under the oral agreement The first Court found that the plaintiff had executed the whole of the contract work that the defendant had received from the Executive Engineer a total sum of Rs 2 766 11 11 and of this had paid to the plaintiff Rs 2 334 13 6 leaving a sum of Rs 431 14 5 still in his hands It ordered the defendant to pay this sum to the plaintiff less 10 per cent of the whole sum of Rs 2 766 11 11 and passed a decree accordingly for Rs 155 3 9

On appeal the Judge varied the decree by awarding to the plaintiff the whole sum of Rs 431 14 5 He found that it had been agreed that the defendant should retain 10 per cent, but held that the agreement to assign or sublet the contract was contrary to public policy and bad under section 23 of the Contract Act (IX of 1872) On appeal to the High Court

*Held* (reversing the decree of the Judge and restoring that of the first Court) that as it did not appear that the plaintiff knew of the condition in the contract and as the objection of illegality was not taken by the defendant the plaintiff was not precluded from enforcing against the defendant his own contract Even if however the plaintiff could not enforce the contract, he would under the circumstances be entitled to receive from the defendant compensation for the work and labour of which the defendant had received the benefit The

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* Second Appeal No 684 of 1894

only question was how the work done should be valued. There was no direct test of its market value. The best available test was the amount which the plaintiff at the time when he entered into the agreement accepted as sufficient, namely the amount to be paid by the Executive Engineer less 10 per cent. The High Court, therefore, restored the decree of the Subordinate Judge.

SECOND APPEAL from the decision of A. H. Unwin, District Judge of Nasik, amending the decree of Rao Saheb D. G. Gharpure, Subordinate Judge of Yeola.

The plaintiff sued to recover from the defendant Rs. 599-15-3. In June 1888, the defendant had contracted to supply to the Executive Engineer, Public Works Department, Nasik, materials for the construction of the Manmad-Kopargaon road. One of the conditions of the contract was as follows:—" No work is to be underlet, or let by task work, by the contractor without the[524] express permission, in writing, of the Executive Engineer or his duly authorised agent."

Subsequently, however, and without obtaining the required permission, the defendant entered into an oral agreement with the plaintiff that the plaintiff should do the contract work and that the defendant should pay him all sums received from the Executive Engineer under the contract after deducting 10 per cent., which the defendant was to retain as his profit. It did not appear that the plaintiff knew of the condition against underletting contained in the contract.

The Subordinate Judge found that the plaintiff had executed the whole work; that the defendant had received from the Executive Engineer a total sum of Rs. 2,766-11-11 and had paid the plaintiff Rs. 2,334-13-6, thus leaving the Rs. 431-14-5 still in defendants' hands. The Court ordered that the defendant should pay the plaintiff this amount less 10 per cent. on the whole sum of Rs. 2,766-11-11, and passed a decree accordingly for Rs. 155-3-8.

On appeal the Judge varied the decree by awarding to the plaintiff the whole sum of Rs. 431-14-5. He found that it had been agreed that the defendant should retain 10 per cent., but held that the agreement to assign or sublet the contract was contrary to public policy and void under section 23 of the Contract Act (IX of 1872).

The following is an extract from his judgment:—

"On the facts, I concur with the Subordinate Judge that witnesses Nos. 55, 78, 79, 80 and 81 for defendant do prove that defendant did verbally sublet this public road (in) contract to plaintiff on the understanding that he, defendant, was to take 10 per cent. of the moneys that came to his hand from the Executive Engineer. It is also quite clear that plaintiff must have performed the contract work, for defendant fails to show who else did it, if plaintiff did not, so as to satisfy the Public Works Department and enable defendant to draw the final sum. Assuming, firstly, that there was no express departmental rule or clause in the defendant's contract with the Executive Engineer against a subletting of this kind, I do not think a Court would be justified in upholding such an agreement, which is surely 'of a tendency calculated to injure the public interest,' and 'against public policy,' and the consideration of which is, therefore, unlawful: *vide* section 23 of the Contract Act, and Cunningham, pp. 95 and 99. This was public money, and the road a public highway, and if the contractor with the Public Works Department were suffered to 'sweat' the sums paid by the department and sublet in this indolent fashion, his sublessee might, of course, do the same and so on *ad infinitum*, to the scamping of the work and detriment of the public. [525] But thinking it very unlikely that the Public Works Department permitted such transactions, I sent for defendant's original contract dated 2nd June 1888, with the Executive Engineer, and that officer has furnished the file from which Exhibits 10 and 11 are extracts. The 16th condition of this contract signed by plaintiff (defendant ?) Gangadhar Raghunath runs thus: '*No work is to be underlet, or let by task work, by the contractor, without the express*

*permission, in writing, of the Executive Engineer or his duly authorised agent.'* There is no pretence that this sub-agreement was known to that officer.

"The decree must, therefore, be amended by adding the sum in dispute, Rs. 276-10-9, to the amount already decreed to plaintiff. As the agreement in respect of it was unlawful, and I hold with the Subordinate Judge that plaintiff has falsely denied that there was any such agreement, interest cannot be allowed on any portion of the sum decreed to plaintiff up to date; but the total sum, *viz.*, Rs. 431-14-5, or any part of it unpaid by defendant to plaintiff, shall bear interest at 6 per cent. per annum from the 1st August 1894."

The defendant preferred a second appeal, and the plaintiff presented cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

*Mahadev V. Bhat*, for the Appellant (Defendant):—The Judge found that the assignment of the contract to the plaintiff was illegal and against public policy. Therefore, he ought to have dismissed the suit—*Debi Prasad* v. *Rup Ram*, I. L. R., 10 All., 577; *Judoonath Shaha* v. *Nobin Chunder*, 21 Cal. W. R., 280.

*Narayan G. Chandavarkar*, for the Respondent (Plaintiff):—The defendant did not plead the illegality of the assignment. The point was raised by the Judge himself in appeal. Even if the assignment is illegal, the illegality would not affect the defendant's liability to pay for the work done for him. The Judge has given us a decree for work done. We submit that the assignment is not illegal or opposed to public policy. It is found that we have worked for the defendant, and we are entitled to recover from him the value of the work done.

**Farran, C. J.**:—This was a suit for the recovery of Rs. 599-15-3 with interest as the balance due upon an agreement under which the plaintiff supplied the materials for the construction of a public road. In June 1888, the defendant had contracted with the Executive Engineer of the Public Works Department at Nasik to supply the materials for the Manmad-Kopargaon road, and **[526]** one of the conditions of the contract signed by him was as follows:—

"No work is to be under-let, or let by task work, by the contractor without the express permission, in writing, of the Executive Engineer or his duly authorised agent."

Subsequently, as found by both the Courts below, the defendant entered into an oral agreement with the plaintiff that the latter should do the contract work, and that the defendant should pay to him all moneys received from the Executive Engineer under the contract, after deducting 10 per cent. as the defendant's profit. The permission, in writing, of the Executive Engineer or his duly authorised agent was not obtained as required by the contract.

It is found that the plaintiff executed the whole of the contract work, that the defendant received from the Executive Engineer under the contract payments aggregating Rs. 2,766-11-11, and that of this he paid to the plaintiff Rs. 2,334-13-6, leaving unpaid Rs. 431-14-5. The Subordinate Judge of Yeola, who heard the suit in the first instance, gave the plaintiff a decree for Rs. 155-3-8, the balance of the Rs. 431-14-5, after deducting, in accordance with the agreement, Rs. 276-10-9, or 10 per cent. on the Rs. 2,766-11-11 received by the defendant from the Executive Engineer. Both parties appealed to the District Judge of Nasik, who varied the decree by awarding to the plaintiff the entire Rs. 431-14-5, and disallowing the 10 per cent. reduction claimed by the defendant. The Judge found that the plaintiff's denial of the stipulation as to the 10 per cent. reduction was false, but held that the agreement to assign or "sub-let" the contract made by the defendant with the Executive Engineer was contrary to public policy and void under section 23 of the Indian Contract Act. He refused to allow interest on the Rs. 431-14-5 prior to decree, and directed that each

party should bear his own costs throughout. Against this decree the defendant has appealed, and the plaintiff has filed cross objections.

Although the learned Judge apparently regards the whole agreement as opposed to public policy, and not merely the stipulation for the 10 per cent, reduction, he nevertheless enforces the [527] agreement with the exception of that stipulation. By his decree he recognises the right of the plaintiff to recover all the moneys paid to the defendant by the Executive Engineer, and thus gives effect to the agreement so far as it is for the plaintiff's benefit, but rejects it so far as it is for the benefit of the defendant. The result is that the plaintiff is allowed to recover, under an agreement held to be void, more than he would have been entitled to recover if the agreement had been valid. It is, however, unnecessary for us to decide whether the learned Judge is right in holding that an assignment or sub-letting of a contract such as that made by the defendant with a public department, in breach of an express condition of the contract, is necessarily void as opposed to public policy. In the cases of *Judoonath Shaha* v. *Nobin Chunder*, 21 Cal. W. R., 289, and *Debi Prasad* v. *Rup Ram*, I. L. R., 10 All., 577, which were cited to us, the agreements held to be void on that ground were agreements to assign or sub-let licenses granted under the excise laws and which the Legislature clearly intended should be held and used by the licensee only. In the present case it is not found, nor does it appear, that the plaintiff knew of the condition in the defendant's contract that the contract work was not to be under-let. The objection was not taken by the defendant. The Judge himself discovered, by sending for the original contract, that it contained the provision against sub-letting, and no evidence was given upon the question of the plaintiff's knowledge of that provision The plaintiff would not, therefore, it appears to us, be precluded from enforcing his own contract against the defendant. If, however, the Judge is correct in holding that the plaintiff cannot enforce his contract, he would at all events under these circumstances be entitled to receive from the defendant compensation for the work and labour of which the defendant has received the benefit, and the only question is, how the work done should be valued. The real test in that case would be the market value, but of that there is no direct evidence. According to the plaintiff's contention it should be valued at the entire amount which the Executive Engineer paid to the defendant. The District Judge has adopted this view. To us it appears that it should be valued at the amount which the plaintiff, at the time [528] when he entered into the agreement, accepted as sufficient, namely, the amount to be paid by the Executive Engineer less 10 per cent., and we see no reason why he should recover more. In this view Rs. 276-10-9 must be deducted from the Rs. 431-14-5 decreed by the District Judge, and the plaintiff will have a decree for the balance Rs. 155-3-8.

We allow the appeal, and, disallowing the cross-objections, set aside the decree of the District Judge and restore that of the Subordinate Judge with costs of the appeals both in the Lower Appellate Court and in this Court on the plaintiff.

*Decree reversed.*

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**NOTES.**

[A clause against sub-letting does not of itself render the contravention illegal and opposed to public policy.—(1900) 24 Bom., 622.]

[21 Bom. 528]
## APPELLATE CIVIL

*The 16th January, 1896*

PRESENT.

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS

Vasudeo Bhikaji Joshi............(Original Defendant No. 11) Appellant

*versus*

Bhau Lakshman Ravut and others... .. .(Original Plaintiffs) Respondents

Bhau Lakshman Ravut and others ..........(Original Plaintiffs) Appellants

*versus*

Ramchandra Bhikaji Joshi and another..... ......(Original Defendants) Respondents

*Mortgage—Sale—Conditions for repurchase*

The plaintiffs sued to redeem an alleged mortgage made in 1823 by their ancestor to the ancestor of the defendant. The alleged mortgage recited a previous mortgage under which the mortgagee Gopal Gokhale was in possession, and it stated that a sale had been contemplated, but the parties could not agree as to price, but that they had now settled it at Rs. 125 and the amount due on the mortgage at Rs. 200, and that the following arrangement was come to, *viz.*, that if within four years the mortgagor paid Rs. 125 with interest, he should get back the land, if not that the land should be the absolute property of Gokhale.

*Held*, that this was not a mortgage but a sale. It was an agreement which put an end to the previously existing mortgage. A mere stipulation for repurchase does not make a transaction a mortgage. To make a mortgage there must be a debt, and here there was no debt, nor was the property here conveyed as security.

CROSS second appeals from the decision of Rao Bahadur V. V. Wagle, First Class Subordinate Judge of Ratnagiri with appellate powers, reversing the decree of Rao Saheb V. K. Sovani, Joint Subordinate Judge of Rajapur.

[529] Suit for redemption. The plaintiff alleged that in 1823 the lands in question were mortgaged by their ancestors Krishnaji and Arjun to the first defendant's father Gopal Gokhale and that the mortgage-debt was now paid off.

At the trial the original of the alleged mortgage was not produced by the mortgagee, and the plaintiff was allowed to put in a certified copy. The following is a translation:—

"(Sale deed)

"Shri (*i. e.* Prosperity, &c.)

"Peace—the lunar date the 7th of Shravan Shudh of the Shake year 1745 in the cyclical year named Subhanu (13th August 1823). On that day (this) deed of sale, *i.e.* miraspatra, is given in writing to Rajeshri Gopal Anant Gokhale Murukar Mahajan (of) majre Holivdale Karyat Mithgavne, by Krishnaji Naik and Arjunji Naik bin Harji Naik Ravut of majre Madkhan Karyat aforesaid. I give this deed of sale, *i. e.*, miraspatra, in writing as follows:—There are my thikans at the above mentioned majre (*i.e.*, village) which have continued uninterruptedly. Out of them my own mirasi field, Kagur field, together with salt batty ground, and together with 'Temba field' situate at majre Kuveshi were formerly given (in mortgage) in the Shake year 1739 (1817-18 A. D.) by a mortgage deed for Rs. (170) one hundred and seventy given in writing in the names of yourself and Lakshman Narayan Desai, according to which you have been carrying on the vahivat (*i. e.*, management) thereof, and as mentioned in the former deed a miraspatra (*i.e.*, a title-deed of miras) was to have been given in writing; but as you and myself could not come to an agreement as to the price,

* Cross Second Appeals, Nos. 103 and 253 of 1895.

the same was not given in writing. Now by your and my consent the price has been settled, and I give (a letter is missing) in writing, the particulars whereof are as follows: —

"1. The above amount due to you (letters missing) and the balance settled on account of interest up to this day is (Rs.) 80, making together Rs. 200, which is the amount payable (to you.) Out of them the price (letters missing) (made) payable on the (mortgage) deed is (125) one hundred and twenty-five rupees. If I pay the same within five years, I will pay your amount with interest at the rate of three-quarters of a rupee (per cent. per month), and redeem the field. Therein (that is, in the account) you are to give me credit for whatever produce the field may yield, you are to give me credit (for the produce) after deducting the Government (assessment). If I fail to pay the amount within five years, then as mentioned above the fields have (will) become your miras (i.e., property by mirasi rights).

"75. The remaining seventy-five rupees due to you are made payable on personal security. I will pay these within one year as moneys carrying no interest, or I will give you my own (field called) 'Khavlotil shot' itself.

"Such is the agreement given in writing according to which I will act. I will not fail to do so. The handwriting of Atmaram Bahirav Karkare."

**[530]** The Subordinate Judge dismissed the suit, holding that the property in dispute was not mortgaged and that the claim was time-barred.

On appeal by the plaintiffs, the Judge reversed the decree and passed a decree directing the plaintiffs to redeem the lands on payment of Rs. 200 to defendants within six calendar months and in default to be foreclosed for ever.

Defendant No. 11 and the plaintiffs preferred cross second appeals.

*Manekshah J. Taleyarkhan*, for Appellant (Defendant) in Second Appeal No 103 and Respondent in Second Appeal No. 253:—The certified copy is the only evidence of the alleged mortgage, and it cannot prove the transaction under section 90 of the Indian Evidence Act (I of 1872). A certified copy cannot prove the genuineness of the original document, though it would be a very good evidence of the contents thereof.

[FARRAN, C. J., referred to *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno*, I. L. R., 5 Cal, 886].

We contend, however, that the transaction in dispute is a sale and not a mortgage, and that the plaintiff is not entitled to redeem—*Subhabhat* v. *Vasudevbhat*, I. L. R, 2 Bom, 113, and *Bapuji* v. *Senavaraji*, I. L. R., 2 Bom., 231.

*Narayan V. Gokhale*, for Respondents (Plaintiffs) in Second Appeal No. 103 and Appellants in Second Appeal No 253:—The defendant will not produce the original of the mortgage, and we are compelled to put in the certified copy which we obtained in the year 1882.

The construction put on the document by the Judge is correct. The transaction is a *gahan-lahan* mortgage. The document clearly mentions that, if the money be not paid in time, the transaction is to become miras. This is a *gahan-lahan* condition, which cannot be given effect to. Further, the document stipulates that, after the expiration of the period of five years, the mortgagee is to keep account of the profits. The transaction in *Subhabhat* v. *Vasudeobhat*, I. L. R., 2 Bom., 113, was a sale liable to be converted into a mortgage. **[531]** The transaction in *Bapuji* v. *Senavaraji*, I. L. R., 2 Bom., 231, was an out-and-out sale. The clause in *Ramji* v *Ohinto*, 1 Bom. H. C. Rep., 199, was similar to the clause in the present document.

**Parsons, J.**:—This suit was brought by plaintiffs to redeem an alleged mortgage of the year 1823 passed by an ancestor of the Ravuts (plaintiffs) to one Gokhale, whose rights were purchased in 1833 by the Marathes through whom the appellant (defendant No. 11) claims.

It appears that the defendant No. 1 (a member of the Gokhale family) produced in the course of some criminal proceedings in 1882 the original deed of 1823, and the plaintiffs obtained a certified copy of it. This they now have filed as secondary evidence of the deed itself. They are entitled to do this, as the defendant No. 1 does not and will not produce the original.

It was, however, contended on behalf of the defendant No. 11 that the presumption to be drawn, under section 90 of the Evidence Act, as regards the genuineness of ancient documents should not be drawn in the case of this copy. The decision of WILSON, J., in the case of *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno*, I. L. R., 5 Cal., 886, is opposed to the argument, as also are some remarks in section 621 of Taylor on Evidence (8th Ed ). It is, however, unnecessary in the present case to elaborate the point. We have only to determine whether the plaintiffs have a right to redeem They can only have that right if there is a mortgage still subsisting The document is put forward by them as the mortgage and they are bound by its terms. It does not purport to be a mortgage at all but a sale-deed. It recites the fact of a previous mortgage in 1817-18 for Rs. 170 under which Gokhale was in possession, and it states that although a sale had been contemplated, it had not been effected, because the parties could not agree as to the price of the lands mortgaged. It goes on to say that now the price of the lands has been settled at Rs. 125 and the amount due under the mortgage at Rs. 200, and the following arrangement is come to. If within five years Ravut paid Rs. 125 with interest, he should have back the lands, Gokhale accounting [532] for the profits, if he did not so pay, the lands should be the absolute property of Gokhale. The Rs. 75 balance were to be paid in one year; in default, another field was to be given to Gokhale

It seems to us that by this agreement the parties put an end to the mortgage that was subsisting at its date and substituted for it the agreement in question This latter agreement is not a mortgage. It extinguished the mortgage-debt, so that after its execution Gokhale could no longer have enforced payment of what was due to him. A mere stipulation for repurchase will not make a case one of mortgage. To make a mortgage there must be a debt, and here there was no debt. Moreover, the property was not conveyed to Gokhale as security for the payment of the Rs 125, but it was to be his, unless that sum with interest was paid within five years. The sum of Rs. 125 was the actual value of the lands, it was a fair price for the absolute purchase, and we find that the parties carried out their agreement, for the money was not paid, and in 1888 the lands were transferred to Gokhale's name in the revenue books. We are unable to distinguish this case from the case of *Bhau* v. *Sidu*, P. J., 1893 p. 258, which follows *Bapuji* v. *Senavaraji*, I. L R., 2 Bom., 231.

We, therefore, reverse the decree of the Lower Appellate Court, and restore that of the Court of First Instance, with costs on plaintiffs throughout.

*Decree reversed.*

**NOTES.**

[As regards when a conditional sale is a mortgage and when it is an out-and-out-sale, see also (1899) 22 All., 149 P. C.; (1910) 33 All., 337; (1915) 26 I. C., 706 (Oudh).]

## [533] APPELLATE CIVIL.

*The 20th January, 1896.*

PRESENT.

SIR C FARRAN, KT, CHIEF JUSTICE, AND MR JUSTICE PARSONS.

Parashram and others............(Original Plaintiffs) Appellants

*versus*

Ganpat and another...........(Original Defendants) Respondents.*

*Registration—Registration Act (III of 1877), Sec 17, Cls (c) and (h)—Receipt for purchase money—Document creating or extinguishing a right to immoveable property.*

The plaintiffs sued to recover the property sold to them by the defendants. The defendants set up a repurchase and produced a receipt passed to them by the plaintiffs which stated that the plaintiffs had no longer any interest in the property, and that they would execute a new sale-deed The plaintiffs contended that the receipt required registration.

*Held*, that as the receipt created or declared or extinguished a right to the property with a superadded covenant to execute a stamped document to the same effect on a future occasion, it required registration

SECOND APPEAL from the decision of Arthur H Unwin, District Judge of Nasik, reversing the decree of Rao Saheb S M Kale, Subordinate Judge of Malegaon.

Suit in ejectment The plaintiffs had bought the house in question in 1875 from the defendants, and now sued for possession. The defendants alleged that in 1883 they had repurchased the house from the plaintiffs, and they relied on a document of which the following is a translation.—

Receipt passed on Magh Shudh 13th, Shake 1804, cyclical year of the name of Chitra bhanu (19th February 1883), to Ganpati valad Navji of Chinchavad, taluka Malegaon, district Nasik, by Parashram valad Raja Patil of Chinchvad, taluka Malegaon, district Nasik, as follows —Rs 322 8 0, that is Rs 222-8, former debt, including principal and interest up to date and Rs. 100, being the price of your two houses which are with us by reason of purchase, in all Rs 322-8-0 is due to us by you. The same debt you have discharged by giving us twenty-seven maunds of cotton worth Rs. 135 at the rate of Rs 5 per maund and by paying us this day in cash Rs. 187-8. Thus you have paid us in all Rs 322-8-0 which we have received Now up to date nothing is due to us by you Should there be any khata or bond, the same is to be deemed as cancelled We have no longer any interest remaining in any way in the aforesaid two houses We shall execute to you a new sale-deed on a stamp. This receipt is passed by us in our sound mind and of free will and accord."

The Subordinate Judge passed a decree for the plaintiffs. He held that the above document not being registered was inadmissible in evidence.

[534] On appeal by the defendants, the Judge reversed the decree, holding that the receipt did not require registration and was admissible in evidence, and that the plaintiffs were not entitled to eject the defendants.

The plaintiffs preferred a second appeal

*Ganesh K Deshamukh*, for the Appellants (Plaintiffs):—The document relied on by the defendants, either creates a title or it does not. If it does create a title, and operates as a sale-deed, then not being registered it is inadmissible in evidence. If it does not create a title, then the defendants cannot resist our claim, as they have no other evidence. Whether the document is a sale deed or a mere receipt, it requires registration under clause (c), section 17 of the

* Second Appeal, No. 171 of 1895.

Registration Act (III of 1877)—*Valaji Isaji* v. *Thomas*, I. L. R., 1 Bom., 190, at p. 196; *Basawa* v. *Kalkapa*, I. L. R., 2 Bom., 489; *Waman Ramchandra* v. *Dhondiba Krishnaji*, I. L. R., 4 Bom., 126; *Faki* v. *Khotu*, I. L. R., 4 Bom., 590; *Ramapa* v. *Umanna*, I. L. R., 7 Bom., 123. The language of the document shows that it was intended to be evidence of title.

*Vasudev G. Bhandarkar*, for the Respondents (Defendants):—The document does not require registration, as it contemplates the execution of another document. Further, it shows that there was a previous oral contract of sale. The property became vested in the defendants when the whole consideration was paid and not under the document It, therefore, does not require registration—clause (*h*) of section 17 of the Registration Act. It does not by itself create or extinguish any right in immoveable property—*Chunilal* v. *Bomanji*, I. L. R., 7 Bom., 310; *Shridhar* v *Chintaman*, I. L. R., 18 Bom., 396.

**Farran, C J.**:—The plaintiffs seek to recover the property in suit by reason of an admitted sale of it by the defendants to them. The defendants attempt to resist plaintiffs' claim by alleging a repurchase of the property on 19th February 1883, from the plaintiffs In proof of this repurchase they produce the document bearing date on that day. It is the only proof which [535] they adduce. The question is whether it is admissible in evidence, not being registered.

In the document the plaintiffs state that they received Rs. 322-8-0, which, as the receipt shows, included a sum of Rs. 100, the alleged consideration for the repurchase. It is contended that under clause (*c*) of section 17 of the Registration Act the document, therefore, requires registration. Mr. Bhandarkar for the defendants, on the other hand, argues that there was a prior oral sale which passed the property, but which became complete only on payment of the consideration, but assuming that to be so, the payment of the consideration which completed the title to the land is evidenced by the document, and it, therefore, falls within the express words of clause (*c*), as the payment extinguishes the plaintiffs' title to the land. There is not, however, any evidence of the prior oral agreement which Mr Bhandarkar suggests The document then goes on "We (the plaintiffs) have no longer any interest remaining in any way in the aforesaid two houses. We shall execute to you a new sale-deed on a stamp." The Lower Appellate Court has treated this as an agreement falling within clause (*h*) of section 17 of the Act as not in itself creating or declaring or extinguishing a right, but merely creating a right to a document, which will, when executed, create, declare or extinguish a right We are unable to agree in that view. To us it appears to create or declare or extinguish at once a right to the property with a superadded covenant to execute a stamped document to the same effect —another sale-deed stamped—on a future occasion. Manifestly it requires registration.

We reverse the decree of the Lower Appellate Court, and restore that of the Court of First Instance with costs in this and the Lower Appellate Court on the respondents.

*Decree reversed.*

## [536] CRIMINAL REVISION

*The 20th January, 1896*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE.

Imperatrix
*versus*
Keshavlal Jekrishna and others *

*Penal Code (Act XLV of 1860), Secs 426 and 441—Criminal trespass—Mischief—Who may complain ?*

The words 'any person in possession' in section 441 of the Indian Penal Code do not mean only "a complainant in possession"

Certain persons were prosecuted under sections 426 and 447 of the Indian Penal Code (Act XLV of 1860, for committing mischief and criminal trespass by entering upon a certain field which was in the possession of the complainant's tenants and destroying the seed sown therein

The defence raised was an *alibi* it was also contended on behalf of the accused that the field belonged to one of them and that the complainant had no title whatever to it

The Magistrate who tried the case declined to go into the question of title, he found that the complainant's tenants were in possession of the field, and disbelieving the evidence of *alibi* he convicted the accused and sentenced them to fine

On application in revision to the High Court it was urged (*inter alia*) that the complainant not being the person in possession could not legally institute the criminal proceedings, and that therefore the conviction was bad

*Held* that looking to the nature of the false defence set up by the accused, this was not a case for interference in revision as to do so would encourage perjury

*Held* also that the words 'any person in possession' in section 441 of the Indian Penal Code do not mean only "a complainant in possession" there being no authority for taking the offences of mischief and criminal trespass out of the general rule which allows any person to complain of a criminal act

*Reference in the case of Kalinauth Nag Chowdhry* 9 Cal W R 1 Cr R *Chandi Pershad v Evans*, I L R 22 Cal 123 *Iswar v Sital* 8 Beng L R App 62 and *In Re Ganesh Sathe*, I L R 13 Bom 600 referred to

THIS was an application under section 435 of the Code of Criminal Procedure (Act X of 1882) for the exercise of the High Court's criminal revisional jurisdiction

The accused were charged with having entered and ploughed up a field in the possession of the complainant They were convicted of mischief and criminal trespass under sections 426 and 447 of the Penal Code (Act XLV of 1860)

[537] The accused at the trial pleaded an *alibi* The first accused (Keshavlal) further pleaded that he was the owner of the land in question, and that the complainant had no title to it

The Magistrate disbelieved the evidence as to the *alibi* and declined to go into the question of title He found that the complainant was in possession, through his tenants He convicted the accused, and sentenced them to pay a fine.

The accused applied to the High Court under its revisional jurisdiction.

*Robertson* (with him *Ramdatt Vithoba Desai*), for the Accused —The defence was that the land was not the complainant's, but belonged to the first

* Application for Criminal Revision, No. 387 of 1895.

accused (Keshavlal). If it was Keshavlal's, he had a right to enter and plough it, and his doing so was no offence The Magistrate ought to have referred the complainant to a civil Court in order that the question might be properly tried. If he desired to try the case himself, he should have heard our evidence of title.

Again, the complainant was not himself in possession of the land, nor was he the person injured by the conduct of the accused He was not the person in possession contemplated by section 441 of the Penal Code He ought not, therefore, to be allowed to be the complainant in this case—*Kalinauth Nag Chowdhry*, 9 Cal W R, 1 Cr R, *Chandi Pershad* v *Evans*, I L R, 22 Cal., 123, *Iswar* v *Sital*, 8 Beng L R., App, 62, Bacon's Abridgement—Trespass, p 554, 4 Comyn's Digest, Indictment, p 372, Hale s Pleas of the Crown, pp. 514, 515, Archbold, p 5, Stephen s History of the Criminal Law, 495

(The Court referred to *In Re Ganesh Sathe*, I L R, 13 Bom., 600) That was a case in which Magistrates were accused of purchasing their offices, a matter in which the general public are interested This is an entirely different case and is not of the slightest importance to the public

There was no appearance for the Crown

**Jardine, J** — This is not a case for interference by revision The plea of the accused under section 242 of the Code of Criminal [538] Procedure was *alibi*, and the Magistrate is clearly of opinion that the evidence of *alibi* was false. Thereupon he convicted It would encourage perjury if this Court re-opened the case on the ground that one of the accused was owner of the land, and that he entered on it with the others, and ploughed it on a *bonâ fide* claim of right

Mr Robertson contended that the only person having a right to complain of criminal trespass is the person in possession or the person injured, and cited *Reference in the case of Kalinauth Nag Chowdhry*, 9 Cal W R, 1 Cr R., *Chandi Pershad* v *Evans* I L R, 22 Cal, 123

We do not think it can be contended that the learned Judges meant to say that in section 441 of the Penal Code the words "any person in possession" mean only "a complainant in possession Nor is that construction supported by *Iswar* v *Sital*, 8 Beng L R, App, 62 The destruction of the crop must have been damaging or annoying to the owner or tenant or both as in the present case The leading authority on the question of criminal law, who may complain ? is *In Re Ganesh Sathe*, I L R, 13 Bom, 600

Mr Robertson sought to distinguish that case on the ground that the complaint there related to higher misdemeanours, corrupt purchases of judicial offices, a matter of immense public concern But he has shown us no authority for taking the offences of mischief and criminal trespass out of the general rule which allows any person to complain of a criminal act Exceptions are made by statute if by our decision we added a new exception to Chapter XV of the Code of Criminal Procedure, we would invade the functions of the Legislature.

The Court rejects the petition

*Petition rejected*

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## [539] APPELLATE CIVIL.

*The 20th January, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Achut Ramchandra Pai............(Original Defendant) Appellant

*versus*

Manjunath Venkatnarnappa and another............(Original Plaintiffs) Respondents,

Manjunath Venkatnarnappa and another...........(Original Plaintiffs) Appellants

*versus*

Achut Ramchandra Pai............(Original Defendant) Respondent.*

*Execution—Decree—Death of the judgment-debtor leaving minor sons—Widow in possession—Sons not parties to execution proceedings—Sale in execution after judgment-debtor's death—Minor sons represented by their mother and guardian on record—Minor—Guardian—Purchase of judgment-debtor's interest by decree-holder—Subsequent suit by sons to recover the property—Civil Procedure Code (Act VIII of 1859), Sec. 210.*

Under section 210 of the Civil Procedure Code (Act VIII of 1859), an execution sale of the property of a deceased judgment-debtor was binding, if the estate of the deceased was sufficiently represented *quoad* such property.

A Hindu judgment-debtor died, leaving a widow and two sons, who were minors. His widow was placed on the record as his heir, and not his sons. Certain property of the deceased was sold in execution. The sale certificate issued to the purchaser stated that he had purchased the right, title and interest of the judgment-debtor in the property. In a suit subsequently brought by the sons,

*Held*, that they were bound by the sale. The widow of the deceased judgment-debtor, who as natural guardian of the minor sons was in possession of the property, was upon the record, and it was clear that it was the interest of the judgment-debtor, and not that of the widow, that was intended to be sold.

CROSS SECOND APPEALS from the decision of E. H. Moscardi, District Judge of Kanara, reversing the decree of Rao Saheb H. S. Phadnis, Subordinate Judge of Kumta.

On 21st February 1866, Venkatesh Pai obtained a decree against Venkat for Rs. 951 with interest and costs. Subsequently Venkat died, leaving a widow and two sons (the plaintiffs), who were then minors. Venkatesh had made several ineffectual attempts to execute the decree during the lifetime of Venkat. In the year 1876 he again applied for execution, placing Venkat's widow, and not his sons, on the record. In his application for execution, the judgment-debtor was described as "Venkat, deceased, by his heiress and widow Sundrabai." The application was granted, and the property now in dispute was [540] put up to auction sale. It was purchased by the decree-holder

* Cross Second Appeals, Nos. 5 and 6 of 1895.

Venkatesh Pai on the 19th September 1876, and he was put in possession on the 22nd June 1879

The certificate of sale granted to him as purchaser ran as follows —" In the sale of 19th September 1876, the plaintiff Venkatesh having paid Rs 1,075 has purchased the right, title and interest in the above mentioned property of the original defendant Venkat '

After the purchase a partition took place between Venkatesh and his nephew the defendant, and the property in dispute fell to the latter's share

On the 21st June 1891, the plaintiffs, who were minors at the time of their father's death and of whom the younger attained majority within three years, brought the present suit against the defendant to recover possession with mesne profits for twelve years

The defendant pleaded that the sale was binding on the plaintiffs and that the suit was barred by limitation

The Subordinate Judge rejected the claim, holding that the sale was binding on the plaintiffs, and that the claim was time barred

On appeal by the plaintiffs, the Judge reversed the decree, holding that the claim was not time barred and that the plaintiffs were not bound by the sale, not having been parties to the execution proceedings He however, directed that the plaintiffs should pay to the defendant Rs 1 075 principal, *plus* Rs 1 075 interest, within six months before delivery of the property to them

*Ghanasham N Nadkarni* with *Ganpat S Mungaumkar* for the Appellant (Defendant) We say the Court sale is binding on the plaintiffs It took place under the Civil Procedure Code (Act VIII of 1859), section 210 The plaintiffs were then minors but they were sufficiently represented by their mother and guardian who was on the record The certificate of sale clearly shows that what was sold was the estate of the deceased Venkat and not of his widow The plaintiffs, therefore cannot impeach the sale [541] -*Chathakelan* v *Govinda Karumiar* I L R 17 Mad 186 *urayanna* v *Durgi*, I L R, 7 Mad, 258 *Haji* v *Atharaman* I L R, 7 Mad, 512 The suit is barred under article 12 of Schedule II of the Limitation Act (XV of 1877)

*Narayan G Chandavarkar* for Respondents (Plaintiffs) —The plaintiffs were not parties to the sale The decree holder was aware of the existence of the plaintiffs, who were minors at the time of the sale and yet he omitted to join them as parties Even supposing that article 12 is applicable, still the suit cannot be held to be barred in the case of the plaintiffs, who attained majority within three years of the institution of the suit

Section 210 of the Code (Act VIII of 1859) is not materially different from section 234 of the present Civil Procedure Code (Act XIV of 1882) The widow of the deceased judgment debtor was brought on the record as the heir of the deceased and not as the guardian of the plaintiffs We submit that the plaintiffs were not represented by the widow, and the sale as against her in her capacity as heir cannot bind the plaintiffs We submit that the sale is null and void because the minors were not parties to the proceedings—*Shaik Abdulla Saiba* v *Haji Abdulla*, I L R, 5 Bom 8

**Farran, C J** - On the 21st February 1866 Venkatesh Pai obtained a money decree for Rs 951 with interest and costs against Venkat the father of the plaintiffs That decree Venkatesh Pai made several attempts to execute during the lifetime of the plaintiffs father The last application, which was made in the lifetime of the father of the plaintiffs was made and granted in 1874

After the death of the plaintiffs father, Venkatesh Pai not having then obtained satisfaction again applied, in 1876, to execute his decree His

darkhast mentioned Sundrabai, the mother of the plaintiffs, as the widow and heir of the plaintiffs' deceased father Venkat The plaintiffs were then minors, but as they were the sons of Venkat, the judgment-debtor, they, and not his widow, were his heirs The property in suit was put up for sale by the Court and was sold on the 19th of September [542] 1876 Venkatesh Pai, the decree holder, purchased it for Rs 1,075, and a sale certificate was granted to him as follows —"In the sale of the 19th September 1876, the plaintiff Venkatesh having paid Rs 1,075 has purchased the right, title and interest in the abovementioned property of the original defendant Venkat" Venkatesh Pai was put in possession of the property which he had thus purchased on the 22nd June 1879 The defendant and appellant Achut Ramchandra Pai, his nephew, now represents him

The plaintiffs as the heirs of Venkat filed the present suit to recover possession of the property from the defendant on the 22nd June 1891, just twelve years after Venkatesh Pai had been put in possession It is not found when the plaintiffs respectively attained their majority, but their ages as given in the plaint are not challenged According to that statement the younger plaintiff became of age within three years of the date of suit It is not denied that the decree in execution of which the sale took place is binding on the plaintiffs as the sons of Venkat

The Subordinate Judge upon these facts dismissed the suit, holding that the sale was binding, as the provisions of the old Code of Procedure (VIII of 1859) had been sufficiently observed The District Judge upon review reversed that decision He was of opinion that there was an irregularity in the execution proceedings arising from the plaintiffs not being made parties to them, and that that irregularity had prejudiced the plaintiffs interest It is somewhat difficult to agree with the District Judge s view upon the latter point having regard to the mortgage to which the premises were at the date of the sale supposed to be subject, but it is unnecessary for us to consider that question, or whether it is open to us, as we are of opinion that the sale is binding on the plaintiffs

The sale having taken place under the old law, its validity must, of course, be determined by the provisions of that law Execution under section 210 of Act VIII of 1859 could be taken out either against the estate of the deceased judgment debtor or against his legal representatives, and the authoritative rulings under that Act show that a sale of property of a deceased judgment debtor was binding if the estate was sufficiently repre [543] sented *quoad* such property Here the widow of the deceased, who would be as the natural guardian of his infant sons in possession of the property, was upon the record and it is clear beyond doubt that it was the interest of the judgment debtor, and not of the widow which was intended to be sold We refer to the cases of *Ishan Chunder Mitter* v *Bakhsh Ali Soudagar*, Marsh, p 614 *General Manager of the Raj Durbhunga* v *Maharaja Coomar Ramaput Sing*, 14 M I A, 605 *Bissessur Lall Sahoo* v *Maharajah Luchmessur Singh*, L.R, 6 I A 233 *Sotish Chunder Lahiry* v *Nil Comul Lahiry*, I L R, 11 Cal., 45, *Dunput Sing Bahadoor* v *Ranee Rajessuree*, 15 Cal W R, 476, and *Chathakelan* v *Govinda Karumiar*, I L R, 17 Mad, 186 In this view of the law, it is unnecessary to consider whether, assuming that the infant sons of Venkat ought to have been represented upon the execution proceedings, and that the sale was, therefore, invalid, the sale could be treated as a nullity, or whether proceedings were not necessary to set it aside, and, if so, within what period such proceedings should be taken We must reverse the decree of the District Judge, and restore that of the Subordinate Judge with costs of the

appeals in this and the Lower Appellate Court on the plaintiffs. The cross appeal falls within this judgment. It must be dismissed with costs.

**Parsons, J.** :—I concur in dismissing the suit. The estate of the father of the plaintiffs having been sold in execution of a decree in proceedings taken under Act VIII of 1859, the utmost right that the plaintiffs could now have in order to set aside the sale would be to show that the decree was not binding on the estate in their hands by reason of the debt not being one for which that estate was liable. This they have failed to show. No ground, therefore, exists for setting aside the sale, and the plaintiffs have no title to the property in suit.

*Decree reversed.*

**NOTES.**

[ See likewise (1899) 24 Bom., 135 ; (1908) 2 S. L. R., 55.]

## [544] APPELLATE CIVIL.

*The 21st January, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Pirjada Ahmadmiya Pirmiya and others............(Original Plaintiffs) Appellants

*versus*

Sha Kalidas Kanji and others............(Original Defendants) Respondents.*

*Mortgage—Subsequent mortgage of same land—Decree on first mortgage—Sale in execution of some of mortgaged land—Purchase by subsequent mortgagees subject to their own mortgage - Effect of such sale—Redemption—Subsequent suit by mortgagors for redemption of lands other than those sold—Redemption of part of mortgaged property—Apportionment of mortgage-debt.*

In 1874 plaintiffs mortgaged to one Samaldas seven fields, of which four were Survey Nos. 22, 23, 40 and 41. In 1876, they mortgaged these same four fields with other lands to the defendants. In 1877 Samaldas obtained a decree upon his mortgage and in execution sold only Nos. 22, 23 and 41, which realized sufficient to satisfy his decree. These three fields were on the application of the defendants sold subject to their mortgage, and they themselves purchased them at the sale. The plaintiffs now sued to redeem the remaining lands comprised in the mortgage of 1876, exclusive of those which had been sold in execution.

*Held*, that they were entitled to redeem this part of the mortgaged property, as the mortgagees had themselves acquired the plaintiffs' (mortgagors') interest in the other part and so severed their claim under the mortgage.

*Held*, also, that the plaintiffs were entitled to redeem on payment of such portion of the mortgage-debt as remained after deducting the portion of it to which the lands purchased by defendants were liable.

**APPEAL** from the decision of J. Weir, Additional Assistant Judge of Ahmedabad.

* Appeal, No. 132 of 1894.

Suit for possession and declaration that the property in suit was not subject to certain mortgage liens. The plaintiffs sued under the following circumstances:—

On the 8th June 1874, the plaintiffs mortgaged to one Samaldas Survey Nos. 7, 22, 23, 32, 35, 40 and 41 for Rs. 6,995. The mortgage purported to be with possession, but possession was not given to the mortgagee.

On the 24th March 1876, the plaintiffs mortgaged with possession to defendants Nos. 1 and 2 (Kalidas and Nagar Vallabh) Survey Nos. 22, 23, 40, 41, 43 and 46 and five houses for Rs. 4,999.

[545] In 1877 Samaldas sued on his mortgage and obtained a decree, in execution of which he attached the property comprised in his mortgage-deed. Defendants Nos. 1 and 2 then applied to the Court that the property should be sold subject to their mortgage. The property was accordingly put up to sale, but Survey Nos. 22, 23 and 41 only were sold, enough money having been realized by their sale to satisfy the decree.

At the auction sale the property was purchased by defendants Nos. 3 and 4. Defendant No. 4 purchased in his own right and defendant No. 3 bought *benami* for defendants Nos. 1 and 2, with whom he was joint. The auction sale took place on the 4th February 1881, and the purchasers recovered possession in or about October 1882

In the year 1893 the plaintiffs brought the present suit to redeem the property comprised in the mortgage of 1876, with the exception of that portion of it which had been sold at the auction sale.

The Judge held that the plaintiffs were entitled to a decree for redemption of the property mentioned in the plaint, but he ordered them to repay to defendants Nos. 1 and 2 the whole of the original debt, *viz*, Rs. 4,999.

The plaintiffs appealed.

*Ghanasham N. Nadkarni*, for Appellants (Plaintiffs): –The Judge requires us to pay the whole debt due to defendants Nos. 1 and 2 under the mortgage of 1876. But as to part of mortgaged land, *viz.*, Nos. 22, 23 and 41, our equity of redemption was sold and is now the property of the defendants, who themselves bought it at the sale. They applied that these lands should be sold subject to their mortgage, and that was done. They, therefore, now hold those lands subject to their due share of the original mortgage-debt and the remaining lands which we now seek to redeem are only subject to the remaining portion of the mortgage-debt. But the order of the Judge makes them subject to the whole debt, thus exempting the land bought by the defendants. The debt should be apportioned on the whole of the mortgaged property—*Moro Raghunath* v. *Balaji Trimbak*, I. L. R., 13 Bom., 45.

[546] *Chimanlal H. Setalvad*, for Respondent No. 2 (Defendant No. 2).

*Govardhanram M. Tripathi*, for Respondent No. 4 (Defendant No. 4).

**Parsons, J.**—In 1874 the plaintiffs mortgaged to one Samaldas for Rs. 6,995 Survey Nos 7, 22, 23. 32, 35, 40 and 41 (Exhibit 70), but remained on in possession. In 1876 the plaintiffs mortgaged to the defendants Nos. 1 and 2 for Rs. 4,999 Survey Nos. 22, 23, 40, 41, 43, 46 and five houses and placed them in possession (Exhibit 56).

In 1877 Samaldas sued on his mortgage and obtained a decree in execution of which he caused the property mortgaged to him to be attached. Defendants Nos. 1 and 2 then applied to the Court stating their mortgage and asking that their charge on the property might be continued (Exhibit 21). Notices were issued to the parties to the decree, and an enquiry was held, the defendant's deed of mortgage was found to be proved, and the Court

ordered that "in case of notifications being issued under the plaintiffs' darkhast, the kind of interest that this applicant puts forward should be mentioned." The proclamation of sale accordingly mentioned the lien It further stated that the right, title and interest of the plaintiffs as now existing was to be sold (Exhibit 59) The memo of the sale (50) contains these words "Making mention of the mortgage charge of Nagar Valabh and Kala Kanji for Rs. 4,999, the auction-sale is made so that only the right, title and interest of the defendants Pir Miya and Mamdu Miya alone will be sold"

At the sale only Survey Nos 22 23 and 41 were sold enough money having been realised by their sale to satisfy the decree Defendants Nos 3 and 4 were the purchasers. Defendant No 4 was a purchaser in his own right, but defendant No. 3 bought *benami* for defendants Nos 1 and 2, with whom he was joint, so that really defendants Nos 1, 2 and 4 are the purchasers and present owners.

The certificate of sale states that "on the abovementioned patas (lots) Survey Nos 22 and 23, there is the san lien of Nagar Valabh and Kala Kanji under a deed for Rs 4,999, and moreover [547] on the pata (lot) No 22, there is the san lien of the abovementioned Nagar Valabh and Kala Kanji under a deed for Rs 500, and on pata (lot) No 41 there is the mortgage lien of the said Nagar Valabh and Kala Kanji claimable under the same deed for Rs 4,999 Subject to these liens which have been notified, the sale by auction has been made" The surplus money after satisfying the decree was paid to the plaintiffs (58)

There can, therefore, be little doubt on this part of the case as to what the defendants purchased It is quite clear that they bought the land subject to the charge created by the deed of mortgage (56), and the defendant No 4 admits that is what he bought (72) Of course, Samaldas need not have had the land sold subject to that charge, but he apparently did not oppose the application of the defendants Nos 1 and 2 that it should be so sold, and by order of the Court it was sold accordingly It was by the action of the defendants Nos 1 and 2, the mortgagees themselves, that this was done, and they also became the purchasers of a share of their mortgagors in the mortgaged property

The position, therefore, of the parties is this Survey Nos 22 23, 40, 41, 43 and 46 and five houses are held still subject to the charge created by the mortgage-deed (Exhibit 56) Defendants Nos 1, 2 and 4 have purchased the right the plaintiffs had to redeem Nos 22, 23 and 41, but the plaintiffs have the right to redeem the rest of the property

The plaintiffs brought this suit practically for the purpose of redeeming this property, and the Assistant Judge has allowed them to do so, but only on payment of the full mortgage debt of Rs 4 999 This is wrong It ignores the fact that the property purchased by the defendants was sold subject to the mortgage and is still burdened with the mortgage debt The plaintiffs can redeem a part of the mortgaged property since the mortgagees have themselves acquired the share of their mortgagors and so severed their interests under the mortgage See *Moro* v *Balaji*, I L R, 13 Bom, 45 This is also the present law under the Transfer of Property Act, sections 60 and 67 It will, therefore, have to be ascertained what proportionate amount of the mortgage-debt is charged on the pro [548]perty purchased by the defendants, for that has to be deducted from the whole amount in order to ascertain the amount that the plaintiffs have now to pay.

We ask the lower Court to find on this issue, *viz.*, what proportionate amount of the whole mortgage-debt due under the Exhibit 56 are the defendants liable for in respect of Survey Nos. 22, 23 and 41?

Evidence can be given by the parties, and the finding should be certified to this Court within a month.

*Issue sent down.*

**NOTES.**

[ The case where the sale was not so subject to mortgage was distinguished in (1900) 24 Mad., 96. See also (1904) 6 Bom. L R., 284 ]

[ 21 Bom 548 ]

## APPELLATE CIVIL.

*The 21st January, 1896*

PRESENT

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR JUSTICE PARSONS

Bapu and others............(Original Defendants) Applicants

*versus*

Vajir and others............(Original Plaintiffs) Opponents.*

*Civil Procedure Code (Act XIV of 1882), Secs 551, 577 and 584—Dismissal of appeal—Power of the lower Court to amend decree after dismissal of appeal—Practice—Procedure*

The dismissal of an appeal under section 551 of the Civil Procedure Code (Act XIV of 1882) leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed, and it remains the decree of the lower Court which can amend it, in order to bring it into accordance with its judgment.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Dhulia, with appellate powers.

The plaintiff sued to establish his right to have a mortgage-bond passed to him by the defendants registered under the Registration Act (III of 1877). The defendants having denied execution before the Registrar, registration of the bond was refused

The defendants denied execution of the bond

The Subordinate Judge (Rao Saheb Vaman M. Bodas) found that the execution of the bond by the defendants was not proved. He, therefore, rejected the claim.

[549] On appeal by the plaintiff the Judge found that the execution of the bond by the defendants was proved, and he passed the following decretal order:—

"I reverse the decree of the Court below and award the plaintiff's claim with costs Costs of the plaintiff in both the Courts should be borne by the defendants in addition to their own."

The defendants having preferred a second appeal (No. 653 of 1894), the High Court dismissed it under section 551 of the Civil Procedure Code (Act XIV of 1882)

Subsequently the plaintiff applied to the Judge for a review of his judgment in appeal, on the ground that it was necessary that the decree should contain an

* Application, No. 108 of 1895 under extraordinary jurisdiction.

order directing the registration of the document. The Judge ordered the decree to be amended as prayed for. The following is an extract from his judgment :—

"The Code of Civil Procedure, section 574 and section 579 require that the judgment and decree of an appellate Court shall specify clearly the relief granted. The decree in the present case simply says 'plaintiff's claim is awarded.' The Registration Act, section 77, says that the decree must be one directing the document to be registered. Under these circumstances, I think the decree must be amended under section 206 of the Code and not under section 630 of the Code."

The defendants applied to the High Court under its extraordinary jurisdiction, contending that the decree of the Judge in appeal having been superseded by that of the High Court in second appeal, the Judge had no power to pass any order, either under section 206 or section 630 of the Civil Procedure Code; that section 206 was not applicable; that the plaintiff having applied for a review of judgment, the Judge had no power to proceed under section 206, and that the amendment in the decree granted a relief not prayed for in the plaint.

A rule *nisi* was issued, requiring the plaintiff to show cause why the order of the Judge should not be set aside.

*Govardhanram M. Tripathi*, appeared for the Applicants (Defendants) in support of the rule :—The Judge had no jurisdiction to amend the decree after our second appeal was dismissed by the High Court. The Judge's decree became merged in the decree of the High Court, and the application for review or [550] amendment of the decree ought to have been made to the High Court—*Shivlal Kalidas* v. *Jumaklal Nathji Desai*, I. L. R., 18 Bom., 542

Next we say that the plaintiffs' application to the Judge was for review. The Judge, however, treated the application as one for the amendment of the decree. The procedure to be adopted under section 206 of the Civil Procedure Code is quite different from that to be adopted under section 630, and the Judge had no power to treat an application for review as an application for amendment. Further, the plaintiffs' suit was for the registration of a mortgage-deed. The Judge allowed the claim But the plaint originally did not contain a prayer for an order directing the registration of the document. This was a fresh prayer made in the application for the amendment. The Judge has by the amendment granted to the plaintiffs a relief which was not claimed in the plaint. The Judge had no authority to do so, either by granting a review or the amendment of the decree.

*Gokaldas K. Parekh*, appeared for the Opponent (Plaintiff) to show cause:—The second appeal was summarily dismissed under section 551 of the Civil Procedure Code. The High Court did not confirm the decree. A decree is drawn when a decree of the Lower Appellate Court is confirmed in second appeal, but no decree is drawn when a second appeal is dismissed. Therefore, in the present case, the High Court did not draw any decree, and there being no decree of the High Court, the Judge's decree remained intact, and there was no decree in the High Court in which it could become merged.

There being no decree of the High Court, the only tribunal before which we could go for redress was the Judge

As to the other points which have been urged, they are merely technical, and such as the High Court will not entertain under its extraordinary jurisdiction unless substantial justice is defeated.

*Govardhanram M. Tripathi*, in reply :—Reading sections 551, 577, 572 and 2 of the Civil Procedure Code together it is clear that an order passed under section 551 is a decree. When the [551] lower appeal Courts dismiss appeals under section 551, the parties come up to this Court in second appeal. But

an order under section 551 be not a decree, there can be no second appeal. It is, therefore, clear that the order dismissing the second appeal in this case under section 551 was a decree of the High Court, in which the decree of the Lower Appellate Court became merged. Moreover, the dismissal of the appeal includes the confirmation of the decree, and, therefore, the order of dismissal is virtually a decree.

**Farran, C. J** :—This case differs from those which have been cited to us, in that here the decree of the lower Court has not been confirmed by the High Court The High Court, acting upon the power given to it by section 551 of the Code of Civil Procedure, dismissed the appeal The change of language made in 1888 in that section by the Legislature shows, we think, that it was intended that there should be a difference between the results of a dismissal under it and of a confirmation under section 577, as, indeed, we think, there must be. Dismissing an appeal is, we think, refusing to entertain it as in the case of an appeal dismissed as being time-barred Where an appeal is dismissed under section 551, there is no decree of the High Court which can be executed, and the reasoning in the cases to which we have been referred does not apply.

Mr. Govardhanram argues that the dismissal of the appeal under section 551 is a decree and appealable under section 584 That may be conceded. Still it is clearly not one confirming the decree of the lower Court It leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed, and it remains, we think, the decree of the lower Court

The District Court had, therefore, jurisdiction to amend its decree to bring it into accordance with its judgment The other objections are of such a technical and unsubstantial character that we need not further consider them.

Rule discharged with costs.

*Rule discharged.*

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**NOTES**

[The Bombay High Court requires that the Court must write a judgment in such cases:— (1913) 37 Bom, 611 F B overruling (1911) 36 Bom, 116, *contra* (1897) 24 Cal., 759, see also (1908) 30 All, 290 dissenting from this case.

In the following cases, the Appellate Court alone was held to be the Court to which application should be made for amendment —(1898) 22 Mad, 293, (1900) 10 M L. J., 216, (1906) 4 C L J., 566, (1910) 11 C.L.J, 151, (1903) P R 8, (1908) 30 All, 290]

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**[552] APPELLATE CIVIL**

*The 23rd January, 1896.*

PRESENT

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

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Dadabhai Jamsetji............(Original Plaintiff) Appellant

*versus*

Maneksha Sorabji............(Original) Defendant Respondent.*

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*Limitation—Limitation Act (XV of 1877), Sec. 5—Sufficient cause—Appeal—Time for presenting appeal—Appeal to wrong Court.*

The presentation of an appeal to a wrong Court under a *bona fide* mistake may be "sufficient cause" within the meaning of section 5 of the Limitation Act (XV of 1877).

*Sitaram* v. *Nimba*, I L R, 12 Bom, 320, explained

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* Second Appeal, No. 77 of 1895.

SECOND APPEAL from the decision of T. Hamilton, District Judge of Surat.

The plaintiff sued the defendant in the Court of the First Class Subordinate Judge of Surat. His suit was dismissed on the 21st August 1891.

On the 24th November 1891, the plaintiff presented an appeal to the High Court, and it was duly admitted by a Judge on the 12th February 1892. On the 9th January 1893, the appeal was heard by a Division Bench of the High Court, which held that it did not lie to the High Court, and ordered that the petition of appeal should be returned for presentation to the proper Court.

On the 10th January the petition was returned to the plaintiff, and it was presented by him to the District Court at Surat on the 11th of January 1893.

The District Judge of Surat dismissed the appeal on the ground that it had been presented after the period allowed by law for the presentation of appeals had expired He observed —

"The appeal was presented to the High Court just within the prescribed period for appeal, *viz*, 3 months, *i e*, 2 months beyond the time allowed for appeal to the proper Court, *viz*, the District Court

"Plaintiff's pleader says that his client was taken ill immediately after the judgment of the lower Court was pronounced and wants to be allowed to file affidavits to that effect But it is not pretended even that plaintiff would have presented his appeal to the High Court earlier than he actually did or rather that it was actually presented for him by his step-brother The appeal was in time for the High Court in spite of plaintiff's dangerous illness, and no number of affidavits can affect the defendant's contention that the appeal is barred here

[553] "The whole time which elapsed before plaintiff presented his appeal in the wrong Court cannot be deducted under the clear ruling in I L R, 12 Bom, 320, which is binding on this Court The appeal is two months beyond time, and must be dismissed with costs"

From this decision the plaintiff preferred a second appeal to the High Court.

*Govardhanram M Tripathi*, for the Appellant (Plaintiff) —The plaintiff believed that his appeal lay to the High Court He presented it there in time, and it was admitted. The High Court, however, subsequently held that it was not the proper Court for the plaintiff's appeal The plaintiff's mistake was made in good faith, and the circumstances constitute 'sufficient cause" within the meaning of section 5 of the Limitation Act (XV of 1877)—*Huro* v *Surnamoyi*, I. L R, 13 Cal, 266 followed in *Krishna* v *Chathappan*, I L R, 13 Mad, 269. The case of *Sitaram* v *Nimba*, I L R, 12 Bom, 320, relied on by the District Judge is no authority in this case In that case the memorandum of appeal was not returned by the Court, as here, for presentation to the proper Court see also *Shrimant Sagajirav* v *S Smith*, I L R, 20 Bom., 736

*Nagindas T Marphatia* for *Ganpatrao S Rao*, for the Respondent —The time for presenting an appeal to the District Court is one month (thirty days) from the date of the judgment appealed against But in the present case the appeal was not presented to any Court until after the lapse of one month from the date of the judgment The plaintiff was negligent, he must suffer the consequences. The period that elapsed between the 21st August 1891, the day on which judgment was pronounced in the suit, and the 9th January 1893, when the High Court decided that no appeal lay to it, was wasted by the plaintiff. He ought during that time to have discovered his mistake without waiting for the High Court to find it out for him. Ignorance of law is no excuse—*Jag Lal* v. *Har Narain*, I L. R, 10 All., 524, *Ramjiwan* v *Chand*, I L R, 10 All., 587; *Husaini Begam* v *The Collector of Muzaffarnagar*, I. L R, 9 All, 11, *Bechi* v. *Ahsan-ullah Khan*, I. L. R, 12 All, 461, *Govinda* v. *Bhandari*, I L. R, 14 Mad., 81.

[554] **Jardine, J.**:—The admitted dates are as follows.—On the 21st August 1891, the Subordinate Judge passed a decision. On the 24th November, the plaintiff presented an appeal to the High Court, which was duly admitted by a Judge on the 12th February 1892. The High Court decided on the 9th January 1893, that the appeal did not lie to it, and ordered the return of the petition for presentation to the proper Court, which return was made on the 10th, and presentation on the 11th January 1893

We are satisfied that, in acting on the opinion that the appeal lay to the High Court, the plaintiff used good faith, and the admission of the appeal by a learned Judge confirms this view. The District Judge has, however, ruled as follows —"The whole time which elapsed before plaintiff presented his appeal in the wrong Court cannot be deducted under the clear ruling in *Sitaram* v. *Nimba*, I L. R, 12 Bom, 320, which is binding on this Court. The appeal is two months beyond time, and must be dismissed with costs" We are of opinion that the learned Judge is wrong, and that under the circumstances there was sufficient cause to extend the time for admitting the appeal within the meaning of that phrase in section 5 of the Limitation Act (XV of 1877).

But we find that in the case cited, *Sitaram* v *Nimba*, I L. R., 12 Bom., 320, West and Birdwood, JJ, held on the construction of section 5 of the Limitation Act (XV of 1877) that mere ignorance of law cannot be recognized as a sufficient reason for delay, and although such a *dictum* must be taken as made with reference to the particular case, *Richardson* v *Mellish*, 2 Bing at p. 248, the use of general expressions led the District Judge to treat the judgment as ruling that the maxim '*Ignorantia legis non excusat*" excludes from section 5 all cases where the cause of not presenting an appeal in time is that it had first been presented to a wrong Court Mr. Nagindas has relied on *Jag Lal* v. *Har Narain*, I. L R, 10 All, 524, in support of this view, but we think it clear from the report that the learned Judges held that, if the presentation to the wrong Court was shown to have been attended with *bonâ fides*, section 5 might apply, although the mere profession of ignorance of the law was not enough by itself In *Ramjiwan* v *Chand*, I L R., 10 All, at p 594, it is said "It [555] is no excuse merely to say that they preferred their appeal to a wrong Court by mistake" and also that to get the indulgence of section 5, they must show *bonâ fides* *Hiro* v *Surnamoyi*, I L R, 13 Cal, 266, is an authority for holding that where the period was exceeded by a *bonâ fide* mistake as to which Court the appeal lay, although the appeal was not presented to the wrong Court section 5 might be applied by the Court That case is followed by the High Court of Madras in *Krishna* v *Chathappan*, I L R, 13 Mad., 269, a case on all fours with the present The learned Judges say· "We think that section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood, the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence, nor inaction, nor want of *bonâ fides* is imputable to the appellant."

We think the above is a correct interpretation of section 5. The words "sufficient cause" are wide; and as is said *In re Manchester Economic Building Society*, 24 Ch. D, 488 at p 497, per Brett, M. R., "the Court has the power to grant the special leave, and, exercising its judicial discretion, is bound to give the special leave, if justice requires that leave should be given." At page 503, Bowen, L.J., relies on the judicial nature of the discretion as meeting the argument from inconvenience. *Pritchard* v. *Pritchard*, 14 Q. B. D., 55, is another authority of the same tenor.

We do not think the learned Judges who decided *Sitaram* v. *Nimba* intended to lay down that the maxim of law quoted must be imported into every matter arising under section 5, and the language used does not necessarily mean that. We, therefore, agree with the other High Courts in their construction of the section.

The Court now reverses the order of the District Judge and admits the appeal and refers it to the District Court for disposal according to law. Costs of this appeal on the respondent

*Order reversed Appeal admitted and referred for disposal*

NOTES

[A similar interpretation of '*sufficient cause*' was given in (1896) 23 Cal, 526, (1907) 34 Cal, 217, (1912) 16 I C, 425 (Cal), (1908) P R, 118, (1902) 23 A W N., 32 See also (1915) 28 I C., 82, (1914) 23 I C, 86]

## [556] APPELLATE CIVIL

*The 27th January, 1896*

PRESENT

SIR C. FARRAN, KT, CHIEF JUSTICE, AND MR JUSTICE PARSONS

Annaji Raghunath Gosavi and another.. . . (Original Defendants) Appellants

*versus*

Narayan Sitaram and others .. . . .(Original Plaintiffs) Respondents *

*Trust—Trustee—Devasthan—Manager—Hereditary trustee—Mistake by trustee as to true legal position—Management lax and improvident, but not fraudulent and dishonest—Appointment of a devasthan committee—Scheme of management*

A mistake by a hereditary trustee of a devasthan as to his true legal position does not of necessity afford a ground for removing him from his post of manager and entrusting it to new hands

The management of a devasthan being found to be lax and improvident but not fraudulent and dishonest, the Court declined to remove the manager but appointed a devasthan committee to supervise and control him and framed a scheme for the management of the trust

APPEAL from the decision of S Tagore, District Judge of Satara

Suit under section 539 of the Civil Procedure Code (Act XIV of 1882)—The plaintiffs prayed for the removal of the defendants as trustees and managers of a certain devasthan situate in the Satara District, that trustees should be appointed by the Court to manage it, that proper direction as to its future management should be given by the Court, &c, &c

The defendants contended that the suit was not maintainable under section 539 and denied the allegations of the plaintiffs with regard to their misconduct and the mismanagement of the property.

The Judge found that the endowment was a trust for public, religious and charitable purposes, that the suit was rightly brought under section 539 of the Civil Procedure Code, and that there had been mismanagement by the defendants in the administration of the trust He, therefore, framed a certain scheme for the management of the sansthan without, however, removing defendant No. 1 from his office as trustee. The following is an extract from his judgment:—

"With regard to the third issue (namely, whether there has been any mismanagement by the defendants in the administration of the trust?) I am of opinion that [557] the trust

* Appeal, No. 46 of 1895.

property has not been properly managed Defendant No 1 does not appear to take an intelligent interest in the affairs of the sansthan and, as far as I can judge he is not a good manager The accounts are left unsigned, and I doubt whether defendant No 1 ever takes the trouble to examine them He has lent his private money on interest to the shrine The estate is largely involved in debt and yet a math and a mandap have been erected at a cost of Rs [illegible]000 The defendant admits that the debts amount to Rs 10 000 Several lands have been let on permanent lease [illegible] and one property is admitted to have been mortgaged If the plaintiffs' witnesses are to be believed [illegible] is not paid to the celebration of the customary festivals and the maintenance of the *annachhatra* Considering the state of confusion and indebtedness in which the finances of the sansthan are I cannot wonder if these things are neglected I cannot say however that any instance of fraudulent or dishonest misappropriation [illegible] brought home to the defendants The plaintiffs have failed to satisfy the Court that the defendants were guilty of gross misconduct or gross dishonesty or that they were guilty of any defalcations or misappropriation Under all the circumstances I do not consider it necessary to [illegible] the extreme step of removing defendant No 1 from the trusteeship At the same time [illegible] the way in which the endowment has been generally mismanaged [illegible] defendants' assertion of their right to treat the trust property as their private [illegible] that the object of the endowment will be frustrated and the estate will [illegible] ruin if the present management is allowed to continue without [illegible] There can be no doubt that the sansthan [illegible] never to have been [illegible] integrity to the sacred and charitable purpose for which it was intended

The defendants appealed and the plaintiffs preferred cross objections under section 561 of the Civil Procedure Code

*Macpherson* (with *Daji A Khare*) for the Appellants (Defendants)

*Lang* (Advocate General) with *Vasudeo R [illegible]* for the Respondents (Plaintiffs)

**Farran C J** This was a suit filed by the plaintiffs under section 539 of the Civil Procedure Code against the defendants who are managing the devasthan property described in the pleadings The plaintiffs prayed that the defendants might be removed from the management of the devasthan and that trustees should be appointed by the Court to manage it that proper directions to regulate its future management should be given by the Court and that such other orders should be passed [illegible] its management as the Court should think fit

[558] The District Court of Satara has come to certain findings which have not been questioned in the appeal before us and which may be taken to be conclusively established They are (1) That the endowment is a trust for public religious and charitable purposes (2) That a suit like the present is in respect of it maintainable under the provisions of section 539 of the Civil Procedure Code

The position in connection with the sansthan which the defendants hold has not been exactly defined by the District Judge, but he has assumed that they are its hereditary managers and trustees That appears to be their true position The [illegible] award of the Peshwa in A D 1777 78 (Exhibit 87) contains the following passage - You (Raghunath Gosavi), your sons, grandsons, &c, from generation to generation should enjoy a moiety of the saranjam of the [illegible] (i e, deity), and the income of the offerings placed before the shri, whatever the same may come to, and continue to perform the annual festivals, distribute food and [illegible] (i e feed) the Brahmans Be this known ? The 6th Moon of Moharram (5th February 1778) The order is valid."

The first defendant is the eldest lineal descendant in the male line of Raghunath Gosavi The second defendant, his son Raghunath Annaji, assists him in the management of the endowment The District Court, while recognising its jurisdiction to remove even an hereditary manager or trustee for misconduct in his office (*Chintaman* v *Dhondi* I. L. R., 15 Bom 612) in the exercise of its discretion has declined to remove the defendant Annaji Raghunath from his trusteeship, but has appointed a devasthan committee which virtually supersedes him Against that judgment the defendants have filed an appeal, while the plaintiffs have taken [illegible] the removal of the defendants from the management [illegible] accounts

After a careful consideration of [illegible] we have come to the conclusion that sufficient ground [illegible] justify us in interfering with the discretion of the District [illegible] the defendant Annaji from [559] the trusteeship [illegible] true legal position is found by the District Court [illegible] the endowment free from [illegible] absolute owner There was however [illegible] to foster [illegible] which we have referred [illegible] I. L. R., 15 Bom 612 *Ibid* 625 [illegible] endowments and will take [illegible] expended so as to [illegible] the fulfilment of the [illegible] going [illegible] position, as disclosed by the light of the [illegible] the subject should of necessity [illegible] institution [illegible] Where the Court [illegible] better management in future [illegible] acted in time [illegible] there [illegible] counsel for the appellants [illegible] now recognise the [illegible] will no longer be open to them The District [illegible] defendants of fraudulent or dishonest [illegible] we think that no such misconduct has been brought home [illegible]

The Advocate General in [illegible] principally relied upon the evidence of Raghunath Babaji [illegible] servant of the sansthan, who in cross-examination deposes that [illegible] money at interest from the defendant [illegible] and defendant sometimes borrows from [illegible] remember his doing so at interest No particulars [illegible] witness. The defendant was not questioned upon [560] [illegible] examination Raghunath says ' We borrow money [illegible] without interest He sometimes borrows money [illegible] to accommodate the sansthan In this state of the evidence we cannot find that anything serious on this head is proved against the defendant

The grants in miras for premiums and the two mortgages may be evidence of bad management but are not of dishonesty The moneys received on the making of the grants in miras and those raised on the mortgages were credited in the books of the sansthan to be applied to its purposes or at all events the evidence is to that effect, and it is not disproved.

The case as to the building materials of the sansthan wall and as to trees of the sansthan being used by the defendants is not established

The defendants or the defendant Annaji, however, appear to owe money to the sansthan and to have done so for some time This is improper, and such sums as they or he owe to the institution they or he must repay The amount should be ascertained in execution But beyond this we see no necessity for taking a general account of the defendants management and, moreover, it was not specifically asked for in the plaint

The District Judge has found that the management of the defendant Annaji has been lax and improvident if not negligent and we agree with him in that respect and that it is desirable that efficient means of supervision and control over the defendants and the manager of the sansthan for the time being should be adopted At the same time we think that the actual management should rest with the manager The scheme which the District Judge has drawn up therefore appears to us to need modification and amendment

We would amend it by substituting the following

(1) Appoint a devasthan committee of three persons to supervise the management of the devasthan and of its property and to give general directions for their due administration

(2) Let it consist of (as in the Chinchwad Case) one member to be selected from amongst the descendants of Raghunath Gosavi [561] who may, but need not be the manager for the time being of the devasthan one member to be selected from the descendants of the junior branches of the family of the original grantees one member to be selected by or in accordance with the absolute discretion of the District Judge of Satara which member may but need not be an officer of the Court

(3) The District Judge of Satara shall nominate the said members after ascertaining from the members of the family or in such other manner as he may deem desirable who are eligible to act as such and what their qualifications are

(4) The members of the committee shall hold office for life but it shall be competent to the said Judge of his own motion or upon the application of any person interested in the devasthan to remove from the committee any member who may be found to be unfit or incompetent to continue a member of the committee

(5) Upon the death resignation or removal of any member of the committee the District Judge shall proceed to appoint another person in his place in the manner above set forth

(6) It shall be the duty of the manager for the time being—

(a) To manage the devasthan in accordance with the ancient practice, but subject to the directions of the committee to the extent hereinafter provided

(b) To keep in his charge all the moveable and immoveable property of the devasthan and to receive the rents and profits of the same, and to defray all reasonable and necessary expenses connected with the devasthan

(c) To keep true and correct accounts of all moneys received and disbursed by or on account of, the devasthan and to produce the accounts whenever called for by the committee and to afford them every facility for conducting their inquiries and discharging the duties of their office

(d) The manager shall not have power to alien, mortgage or charge the property of the devasthan or to grant land on miras or other perpetual tenure.

[562] (7) The duties of the devasthan committee shall be as follows —

(a) On taking charge of their office to examine the accounts and ascertain (1) the net income of the sansthan (2) the extent of its liabilities.

(b) The committee may from time to time examine the accounts of the sansthan, and after the account of each year are completed shall meet to examine, audit and pass them.

(c) To give directions so that the expenditure shall be kept within bounds and to provide for its distribution to its legitimate purposes including the salaries of servants and to make provision for the payment of interest upon the debts due by the devasthan and for the payment of such debts by degrees. Out of the annual income Rs. 1,000 should be set apart annually and applied towards the liquidation of the debts of the sansthan and the residue to meet current expenses. On the liquidation of the debts the amount of Rs. 1,000 above referred to should be carried to the general funds of the sansthan. When the affairs of the sansthan are placed on a sound footing, the surplus funds should be deposited in a bank or put in some suitable profitable investment as the committee may think fit.

(d) To see that the utsavs and festivals at the chief place of the sansthan are duly held at the proper time and that the furniture, jewels, utensils, &c are kept in proper custody and brought to proper use on suitable occasions.

(e) With the permission of the District Judge but not otherwise to mortgage any portion of the property of the devasthan in order to pay off the debts now due by the devasthan and to make provision in such mortgage for the payment of the said debts by instalments.

The amount of the debt (if any) due by the defendants to the devasthan when ascertained in execution and paid should be applied to reduce the debts due by the devasthan. The parties shall be at liberty to apply to the Court for further directions in the working out of this decree.

[563] The decree will be varied in the above particulars and in all other respects will be confirmed. The parties to bear their own costs.

*Decree varied.*

NOTES

[This was followed in (1905) 28 Mad 1? (on appeal) ( Mad 138 (1911) ( Mad, 164 (1911) 12 M L J 2?? 23 M L J 1 ?]

[21 Bom. 563]

## APPELLATE CIVIL.

*The 27th January, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Ganesh Jagannath Dev (Original Defendant), Appellant
*versus*
Ramchandra Ganesh Dev and another (Original Plaintiffs), Respondents.*

*Probate—Application for probate—Order refusing probate—Subsequent suit by executors [illegible] entitled under will to property of deceased—Res judicata—Probate and Administration Act (V of 1881), Sec. [illegible]—Civil Procedure Code [illegible] and 83—Succession Certificate Act (VII of 1889).*

[illegible] plaintiffs applied to the District Court [illegible] Probate and Administration Act (V of 1881) [illegible] will [illegible] defendants opposed the application [illegible] the evidence [illegible] the will [illegible] plaintiffs [illegible] present suit [illegible] the property of the deceased [illegible] restraining them in the enjoyment of it. The defendant contended that the suit was barred as *res judicata*.

*Held* that the [illegible] refusing probate of the will.

The refusal [illegible] not [illegible] the will [illegible] not the [illegible] will of the testator.

APPEAL from the decision of W. H. Crowe, District Judge of Poona, reversing the decree of R[illegible] V. G[illegible]pte, Subordinate Judge of Haveli, and remanding the case for retrial.

In the year 1890 the plaintiffs, as executors appointed thereby, applied to the District Court at Poona for probate of the will of one Jagannath Gajanan Dev.

The defendant opposed the application, which, however, was granted, and an order was made ordering probate to issue.

The defendant appealed to the High Court, which reversed the order of the Judge, holding that on the evidence before the Court, due execution of the will was not proved. (See Printed Judgments for 1891, p. 194.)

[564] The plaintiffs then filed this suit in the Subordinate Judge's Court as persons beneficially entitled under the will for a declaration that the property of the deceased belonged to them and for an injunction restraining the defendant from obstructing their enjoyment of it.

The defendant contended that the suit was barred by the previous order of the High Court rejecting the application for probate.

The Subordinate Judge dismissed the suit, holding that having regard to section 83 of the Probate and Administration Act (V of 1881) the decision of the High Court operated as *res judicata* between the parties.

* Appeal, No. 39 of 1895 from order.

On appeal by the plaintiffs the Judge reversed the decree and remanded the case for re trial and determination on the merits under section 562 of the Civil Procedure Code (Act XIV of 1882)

The defendant now appealed to the High Court against this order of remand

*Nagindas I. Marphatia* [illegible] for the Appellant (Defendant) The plaintiffs base their claim in this suit on the will which this Court has refused to admit to probate We submit that [illegible] is binding and conclusive and cannot be questioned [illegible] will to be proved is a decree, *in rem* [illegible] 360 This order must be equally conclusive [illegible] and cannot re-open the question [illegible] in effect, [illegible] between them and was finally decided

[illegible] J —Is it necessary to have probate [illegible] suit to recover property

Probate is necessary for the purpose [illegible]

*Ramdas V. Desai* [illegible] In this case the Hindu Wills Act [illegible] *Shaik Moosa v. Shaik Essa* [illegible] *res judicata* [illegible] I former [illegible] [565] [illegible] That finding, however [illegible] the will was [illegible] cannot prevent [illegible] *Jagannath* [illegible] I. L. R. 20 Bom [illegible] 20 Cal. [illegible] p 895 See also section 13 [illegible] of the Probate and Administration Act (V of 1881)

It is the grant of the probate that [illegible] *in rem* but a refusal to grant probate [illegible] the will was not proved cannot do so Section 59 of the Probate and Administration Act [illegible] probate conclusive but [illegible] probate

Again this suit has been brought in the Subordinate Judge's Court It could not be brought in the District Court in which the application for probate was made Under section 13 of the Civil Procedure Code (Act XIV of 1882 the suit must be such as [illegible] the District Court in order to make the finding in the former proceeding *res judicata*

**Farran, C J** The plaintiffs [illegible] under the provisions of "The Probate and Administration Act 1881" [illegible] Jagannath Ganpatrao Dev who died [illegible] 1890 of which will they alleged themselves to be executors [illegible] on the 14th July 1891, rejected the application on the ground [illegible] before the Court the execution of the will was not proved [illegible] defendant had entered a caveat against that application [illegible] against the order of the District Judge [illegible] granted it The proceedings were accordingly [illegible] proceedings under section 83 of the Act

The plaintiffs have now filed the present suit as the persons beneficially entitled under the will for a declaration that the property of the deceased belonged to them and for an injunction to restrain the defendant from obstructing them in the enjoyment of it The defendant contended before the Subordinate Judge that the suit was barred as being *res judicata*, and his [566] plea was allowed. The District Judge, on appeal, held that it was not so barred, and

remanded the suit for trial upon the merits Against that remanding order the defendant has preferred the present appeal

We agree with the District Judge that the order on appeal of the High Court of the 14th July 1891 does not debar the plaintiffs from filing the present suit The judgment in *Shaik Moosa* v *Shaik Essa*, I L R, 8 Bom, 241, determines that such a suit as the present can be maintained by a Hindu in cases to which as here the Hindu Wills Act is not applicable, without the necessity of proving the will under Act V of 1881 The circumstance that the Court has refused to grant probate of the will clearly cannot render probate necessary in cases in which it was optional for the party interested under the will to apply for it It merely relegates the parties to their former position

The contention of the pleader for the appellant was that as the grant of probate under the Act is conclusive proof so long as the grant remains unrevoked, of the title of the executors and of the genuineness of the will admitted to probate *Komoll chun* v *Nilruttun* I L R 4 Cal 360 a similar consequence but in an opposite sense must flow from the refusal of the Court to grant probate This is not so The conclusiveness of the probate rests upon the declared will of the Legislature as expressed in section 59 and 1[illegible] of the Act There is no section which declares that any corresponding result in an opposite sense shall flow from the refusal to grant it From a refusal to grant probate it by no means follows that in the opinion of the Court the will propounded is not the genuine will of the testator It may be based on entirely different grounds Doubtless under the provisions of Act VII of 1881 such refusal until a fresh application shall be successfully made may operate to prevent the executor recovering debts due to the deceased but it has, so far as we know, no other disenabling effect

It has however been further argued that the issue which has to be determined in this suit has already been directly and substantially in issue and has been heard and determined between [567] the same parties in the contentious proceedings taken under Chapter V of Act V 1881 In point of fact however no issue was ever raised throughout these proceedings and the High Court only held that on the evidence on the record the due execution of the will had not been proved It came to no conclusion as to whether it was a forgery or not Such a finding cannot we think be treated as a final decision of the Court upon the genuineness or otherwise of the will The Act does not in express term preclude a fresh application on the part of the executors when they are in a position to support it with more complete proof

Without therefore deciding whether if an issue upon the question of forgery had been raised and decided, it would have concluded the parties in the present suit we are of opinion that the decision of the District Court in the present case is correct and we accordingly confirm the order with costs on the appellant

*Order confirmed*

NOTES

[Similar decision were given in (1910) 14 C W N 924, (1906) 2 N L R, 123]

[21 Bom. 567]

## APPELLATE CIVIL.

*The 28th January, 1896.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Yadao Babaji Suryarao.... .......(Original Plaintiff) Appellant

*versus*

Ambo and others...... ....(Original Defendants) Respondents*

*Mortgage—Apportionment of mortgage-debt—Question of apportionment first raised in second appeal—Practice.*

A plaintiff, who had purchased part of certain mortgaged property and sued for possession, obtained a decree ordering that he should get possession on payment of the whole mortgage-debt. He did not in the lower Court ask that the mortgage-debt should be apportioned, but did so in second appeal to the High Court. Under the circumstances the High Court refused to interfere with the decree. The plaintiff had a remedy by suit for contribution.

SECOND APPEAL from the decree of L. G. Fernandez, First Class Subordinate Judge, A. P., of Thana.

In 1885 the first and second defendants mortgaged the plots of land in dispute together with some other land for Rs. 300 to one Martand.

[568] In 1890 they sold the lands in dispute to the plaintiff for Rs. 300 and executed a sale-deed to him.

In 1893 Bhaskar (defendant No. 3), who was the heir of Martand, sued them on Martand's mortgage and obtained a decree for Rs. 600. As defendants Nos. 1 and 2 could not pay the sum within the time allowed by the decree, they received Rs. 200 more from Bhaskar (defendant No. 3) and sold him the lands.

The plaintiff now sued defendants Nos. 1 and 2 for possession of the land sold to him in 1890. Defendant No. 3 was subsequently added as a party.

Defendants Nos. 1 and 2 alleged that although they had executed the sale-deed to the plaintiff, he had not completed the sale by paying the purchase-money, and they, therefore, had sold the lands in question together with the other mortgaged property to Bhaskar (defendant No. 3).

The Subordinate Judge found that Bhaskar (defendant No. 3) had purchased with knowledge of the previous sale to the plaintiff, and he ordered that possession should be given to the plaintiff on his paying Rs. 600 (the amount of the decree on the mortgage) to Bhaskar (defendant No. 3), and passed a decree accordingly.

In appeal the Judge confirmed the decree.

The plaintiff appealed to the High Court, contending that as the mortgage to Martand included other property, the whole of the mortgage-debt should not be made payable out of the lands which he (the plaintiff) had purchased.

*Narayan G. Chandavarkar* and *T. R. Kotwal*, for the Appellant (Plaintiff):—The burden of the mortgage-debt ought to be apportioned between the plaintiff and defendant No. 3, who have each bought a part of the mortgaged property. It is inequitable to order the plaintiff to pay the whole—*Lomba v. Vishvanath*, I. L. R., 18 Bom., 86, at p. 91; *Nawab Azimut Ali Khan v. Jowahir*, 13 Moo. I. A., 404.

* Second Appeal, No. 271 of 1895.

*Mahadev B Choubal*, for the Respondents —It is too late now to raise the question of apportionment The debt cannot be [569] apportioned without taking evidence of the respective values of the lands

**Jardine, J** — It has been admitted that the plaintiff might have been entitled, on pleading it in the Courts below, to the benefit of the doctrine of apportionment of the mortgage-debt over the two parts of the mortgaged property, as in *Lombi v Vishvanath* I L R, 18 Bom, 86 We have been urged to pass a similar decree and thus allow the sum to be paid to be ascertained in execution although the matter does not appear to have been mooted in the Court below or suggested itself to either of the Judges Such a course prolongs litigation and tends to draw to the High Court matters which are more easily examined by lower Courts, a result objected to in *Queen Empress v Chagan* I L R 14 Bom 331 at p 342 Where otherwise there might be a failure of justice especially where there is no other remedy, or where some special circumstance exists such as the acknowledged ignorance of a party, the intricacy of the law or the passing of a new statute or of a judgment altering the interpretation such indulgence as has been sought has often been given But it is not denied that the doctrine of apportionment is not one of recent introduction into the law and we see no circumstance, and have been shown no authority for treating it in a special way It is admitted that the plaintiff has a remedy by suit for contribution We refrain therefore, from interfering with the decree on the above ground

We notice that the lower Court of appeal has failed to give effect in its decree to its finding that the plaintiff is entitled to the rent claimed namely Rs 30 from the defendants Nos 1 and 2 We therefore amend the decree by making that provision and in other respects confirm it Costs of this appeal on the appellant

*Decree amended*

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## [570] APPELLATE CIVIL

*The 28th January, 1896*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE

Tapiram (Original Plaintiff) Appellant

*versus*

Sadu (Original Defendant) Respondent *

***Practice - Procedure Amendment of plaint- Discretion of the Judge—Code of Civil Procedure (Act XIV of 1882), Sec 53***

The amendment of a plaint under section 53 of the Code of Civil Procedure (Act XIV of 1882) is in the discretion of the Judge and is not the right of the suitor in all circumstances It is not enough for a plaintiff to show that the amendment does not alter the character of the suit

SECOND APPEAL from the decision of G C Whitworth, District Judge of Khandesh

Certain houses and land belonged to four brothers *viz*, Hussain, Ismail, Nasarali and Sarafali of whom Hussain and Ismail mortgaged them to the defendant Sadu, who entered into possession

* Second Appeal, No. 427 of 1895

In execution of a money decree afterwards obtained against the other two brothers Nasaralli and Sultanali their right title and interest in the property were sold and were purchased by the plaintiff Tapiram, who sought to obtain possession and was obstructed by [illegible] defendant Sidu. The plaintiff then brought this suit to eject Sidu and [illegible] obtain possession of the property.

Subsequently the plaintiff applied to amend his plaint so as to claim only the share of Nasarali and Sultanali [illegible] co-defendants in the suit.

The Subordinate Judge [illegible] rejected the application on the ground that it sought to convert a suit [illegible] partition and he dismissed the suit.

In appeal [illegible] District Judge [illegible] Subordinate Judge.

Plaintiff preferred a second appeal [illegible] to the High Court.

[illegible] Appellant [illegible] The suit will [illegible] present [illegible] plaintiff [illegible] sue for an undivided [illegible] [571] [illegible] Hussain [illegible] Kasinathy [illegible] Sitaram, [illegible] Indranath [illegible] P. J. 1880 [illegible] P. J. 1885 [illegible] 190 [illegible] P. J. 1891 [illegible]

[illegible] was not called upon.

**Jardine J** [illegible] amended [illegible] circumstances [illegible] showed, as the plaintiff [illegible] the suit. In [illegible] it was expressed that [illegible] enough for a plaintiff to show that [illegible] the suit. In the present case the District Judge [illegible] the plaintiff [illegible] over. We think the suit [illegible] the decree with costs.

*Decree confirmed*

NOTES

[illegible]

## [572] INSOLVENCY JURISDICTION

*The 16th December 1896*

PRESENT

MR JUSTICE STRACHEY.

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In the matter of Runchod Khushal an Insolvent

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*Insolvency—Insolvent Act (Stat 11 and 12 Vict c 21), Sec 86—Purchaser of scheduled debts Right of purchaser to be paid full amount of such debt Transfer of Property Act (IV of 1882), Secs 135 and 139.**

An insolvent having filed his schedule in April 1881 obtained his personal discharge in September 1881 and on the same day judgment was entered up against him for the amount of his scheduled debts under section 86 of the Insolvent Act (11 and 12 Vict c 21) The schedule contained the names of thirteen creditors The insolvent afterwards settled with four of them The remaining nine whose aggregate claims amounted to Rs 1,180 7 0 sold their claims Certain assets belonging to the insolvent estate having subsequently come into the hands of the Official Assignee the purchasers claimed to be paid the full amount of the scheduled debts which they had bought It appeared that the debts in question were debts incurred on certain promissory notes passed by the insolvent The insolvent contended that under section 135 of the Transfer of Property Act (IV of 1882) the purchasers were only entitled to the amount which they had actually paid for the debts they had bought

*Held* that they were entitled to be paid the full amount of the scheduled debts. If the debts at the time of purchase were to be regarded as debts in respect of promissory notes section 139 of the Transfer of Property Act applied and if the claim was under the judgment entered up against the insolvent then clause (*d*) of section 135 applied

INVESTIGATION of claims to dividends under Rule 36 of the Bombay Rules and Orders under the Insolvent Debtors Act (Stat 11 and 12 Vict, c 21)

The insolvent filed his schedule in April 1881 Thirteen persons were entered in it as creditors and the total of the debts due to them was Rs 1,600 7 0

In September 1881 the insolvent obtained his personal discharge under section 47 of the Insolvent Act and on the same [573] day judgment was entered up against him for the amount of the scheduled debts under section 86 of the Act in the name of the Official Assignee

The insolvent subsequently settled with four of the thirteen creditors mentioned in his schedule but the remaining nine whose aggregate claims amounted to Rs 1,180 7 0 assigned over these claims to three persons, *viz*, Ali Mahomed Vulley, Gordhan Purushotam and Shaik Boolun

In 1893 the insolvent inherited some immoveable property from his father and in 1896 the Official Assignee at the instance of the above mentioned three purchasers caused the right, title and interest of the insolvent in the

*Sections 135 and 139 of Act IV of 1882 Chapter VIII—

"135 Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and the incidental expenses of the sale, with interest on the price from the day that the buyer paid it

"Nothing in the former part of this section applies —

(*a*) Where the sale is made to the co heir to, or co-proprietor of, the claim sold,
(*b*) Where it is made to a creditor in payment of what is due to him,
(*c*) Where it is made to the possessor of a property subject to the actionable claim,
(*d*) Where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment."

"139 Nothing in this chapter applies to negotiable instruments."

property so inherited by him to be advertised for sale by auction in execution of the decree entered up against him as above mentioned

The sale, however, was stopped by payment to the Official Assignee of the whole amount of the decree held by him viz Rs 1 600 7 0

The insolvent alleged that the three assignees had bought in the claims of the original creditors for 4½ annas in the rupee and he contended that under section 135 of the Transfer of Property Act (IV of 1882) they were not entitled to receive from the Official Assignee more than the sums which they had actually paid with interest thereon from the date of their purchase and that the balance of the amount in the hands of the Official Assignee should be refunded to him (the insolvent)

The Official Assignee did not admit the insolvent's contention and he moreover demanded from the insolvent in addition to the Rs 1 600 7 0 already paid to him a further sum of Rs [illegible] interest on the scheduled debts In default of payment of this additional sum he threatened to proceed with the sale of the property

In September 1896 the insolvent obtained a rule calling upon the Official Assignee to show cause why he should not be restrained from proceeding with the sale and why satisfaction should not be entered up on the judgment entered up against the insolvent in 1881

**[574]** When the rule came on for hearing it was arranged that the Court should first, under Rule 36 of the Rules under the Insolvent Act decide the question as to the amount which the assignees of the scheduled debts were entitled to. The insolvent alleged that they had only paid 4½ annas in the rupee as the consideration for the assignments but they contended that they were entitled to be paid the full amount of the scheduled debts assigned to them with interest thereon from the date of the judgment in 1881

The matter now came on under Rule 36 for investigation and determination of the claim of the assignees

*Anderson* for the Assignees —It is unnecessary to inquire into the amount of consideration paid by us for the assignment of the debts We have bought the scheduled debts and are entitled to be paid them in full Section 135 clause (d) of the Transfer of Property Act IV of 1882 does not apply What was bought was not an actionable claim but in any event clause (d) of section 135 excludes this case from the operation of the section Further the debts we bought were debts due on promissory notes as stated in the schedule and section 139 of the Act (IV of 1882) therefore does not apply [illegible]

*Davar* for the Insolvent —We contend that section 139 does not apply For it is clear that what the assignees bought was something quite distinct from the promissory notes on which the original debts were incurred Those notes had no force and were not in existence when the assignees bought the claims against the insolvent They were merged in the judgment which was entered up in 1881 What the assignees bought was the right title and interest of the Official Assignee under that judgment It is in virtue of that judgment that the Official Assignee now claims to bring the insolvent's property to sale not in virtue of the promissory note The note became valueless when judgment was passed

We contend therefore that section 135 applies and that the assignees are not entitled to more than they paid for the claim they bought Clause (d) of that section does not apply The judgment there referred to is clearly a judgment of a civil Court **[575]** in an ordinary suit The judgment entered

up in this case under section 86 of the Insolvent Debtors Act is a judgment of a special kind. It is not one affirming the claim, nor one that the creditors can individually or collectively enforce. It is a comprehensive judgment comprising many claims passed under a special provision of a special law.

**Strachey J** The assignees here contend that they are entitled to receive from the Official Assignee the full amount of the debts entered in the schedule as due to the creditors whose claims they have purchased. The insolvent contends that under section 135 of the Transfer of Property Act (IV of 1882) they cannot get more than the price they paid for these claims.

It appears that the claims which the assignees have purchased were originally claims against the insolvent in respect of promissory notes passed by him to the several creditors whose names are [illegible] in the schedule. If, at the time of the purchase, these claims still retained that character, it is clear that section 139 applies, and that the insolvent cannot contend that the assignees are not entitled to the full amount of the scheduled debts, for the operation of section 135 is expressly excluded. Mr. [illegible] has therefore been obliged to argue that what the assignees [illegible] against the insolvent under the judgment [illegible] under section 86 of the Insolvent Debtors Act [illegible] such a claim to be an actionable claim within Chapter VIII of the Transfer of Property Act, clause (f) of section 135 applies [illegible] the benefit of the [illegible] provisions [illegible]. [illegible] I must hold that the assignees are entitled to the full amount of the scheduled debts which they have purchased.

The question as to the amount of the interest to be paid on these debts stands over.

Attorneys for the Assignees: Messrs [illegible]

Attorneys for the Insolvent: Messrs [illegible]

## [576] ORIGINAL CIVIL

*The [illegible] January 18[illegible]*

PRESENT

Mr. C. FARRAN, Chief Justice, and Mr. Justice Strachey [illegible]

Jumnabai [illegible] Plaintiff

v.

Vissondas Kuttonchund [illegible] Defendant.*

*Appeal [illegible] — Non-payment of stamp [illegible] — Security for costs of [illegible] — Exceptional circumstances — Civil Procedure Code (Act XIV of 1882), sec. 549 [illegible] Procedure*

The plaintiff [illegible] appearance under section [illegible] of the Civil Procedure Code (Act XIV of 1882) [illegible] applied to have it restored to the list for hearing, [illegible] application [illegible] the 21st September 1896. On the 17th October 1896, [illegible] appeal *in forma pauperis* against the order of the 21st September [illegible] appeal. On the 4th December 1896 [illegible] petition for leave to appeal *in forma pauperis* was rejected and she was directed

* Suit No. 123 of 189[illegible]

by the Court to appeal in the [illegible] way if he desired to appeal On the 11th December 1896 he applied for further time to pay the stamp fee on the memorandum of appeal and to deposit the usual security The Court [illegible] the stamp [illegible] but gave her time to furnish security until the opening of the Court after the Christmas vacation On the 21st December he tendered to the office of the Court [illegible] proper stamp [illegible] to have it affixed to her memorandum of appeal [illegible] on the ground that it was [illegible] late The plaintiff then [illegible] applied [illegible] stamp [illegible] should be [illegible] and the appeal filed

*Held* that the application [illegible] the [illegible] 11th December [illegible] the [illegible] should be considered as if the stamp had [illegible] the memorandum of appeal [illegible] the 21st December [illegible] up That being so the memorandum of appeal [illegible] presented [illegible] 17th October 1896 and consequently within the time [illegible]

The appellant [illegible] the [illegible]

[illegible]

[illegible] that [illegible] 519 of [illegible] Act XIV [illegible] the [illegible]

[illegible]

THIS [illegible] under [illegible] the Civil Procedure Code Act XIV of 1882 [illegible] September 1896

**[577]** On the 17th October 1896 [illegible] for leave to appeal *in forma pauperis* [illegible] 21st September [illegible]

On the [illegible] December [illegible] application [illegible] leave to appeal *in forma pauperis* was rejected and the plaintiff was directed by the Court to proceed in the usual way [illegible] to appeal

On the 11th December 1896 the plaintiff applied to the Court to give her time to pay the stamp fee on the memorandum of appeal and to deposit the usual security The Court [illegible] the stamp fee but gave the plaintiff time to furnish security until the opening of the Court after the Christmas vacation

On the 21st December 1896 the plaintiff tendered to the office of the Court the proper stamp asking to have it affixed to her memorandum of appeal but the officer refused [illegible] on the ground that it was [illegible] late

The plaintiff then applied to the Court to [illegible] that the stamp should be received and that the appeal should be [illegible] She also asked that the time for [illegible] security should be extended

The Plaintiff (Appellant) in person

*Lang* (Advocate General) for the Defendant [illegible] the application and referred to *[illegible]* I L R 12 [illegible] *Yakut un Nissa* v *Kishore* I L R 19 Cal 747 [illegible] *of North Arcot* I L R 16 Mad 78 [illegible] As to the deposit of security section 549 of the Civil Procedure Code (Act XIV of 1882) *[illegible]oshaullah* v *Ahmadullah* I L R 13 Cal [illegible]

**Farran C J** — The application of the plaintiff to have her case restored to the board for hearing was rejected on the 21st September 1896 On the 17th of October following she presented a petition for leave to appeal from that order *in forma pauperis*, annexing thereto a regularly drawn but unstamped,

memorandum [578] of appeal The Court took the petition into consideration and on the 4th December rejected the application to appeal *in forma pauperis*, directing the applicant if she still desired to appeal, to proceed in the usual way This impliedly carried with it a direction to pay the stamp fee on the memorandum of appeal and to deposit the security for costs required by the rules within a reasonable time On the 11th December the appellant petitioned the Court to give her time to pay the stamp fee on the memorandum of appeal and to deposit the usual security The Court made no order as to the stamp on the memorandum of appeal but gave the appellant time to furnish security until the opening of the Court after the Christmas recess

On the 21st December the appellant tendered the stamp proper to be affixed to the memorandum of appeal to the officer of the Court but he declined to receive it as being far too late

The appellant now asks that the stamp may be received and that the appeal may be filed The application is opposed by counsel for the Respondent

We think that as the Court made no order as to the day when the stamp fee should be paid the officer ought to have received it and affixed the stamp to the memorandum of appeal and that we must treat the case as though the stamp had been affixed to the memorandum of appeal on the 21st December So treating it and the opposition of the Advocate General as an application to take the appeal off the file we think following the decisions in *Patcha* v *Sub Collector of North Arcot* I L R 15 Mad 78 and of this Court in Suit No 2 of 1892 (unreported) and the principle laid down in *Skinner* v *Orde* L R, 6 Ind Ap 126 we must regard the memorandum of appeal as presented on the 17th October 1896 and consequently in time so far as the statute of limitation is concerned The case *Keshav* v *Krishnarao*, I L R 20 Bom, 508, is we think distinguishable The proper stamp will therefore now be affixed to the memorandum of appeal

The appellant also asks that the time for her giving security be further extended on the ground that in the exceptional state [579] of affairs now prevailing in Bombay she has been unable to raise the requisite money to pay into Court as security for the respondent's costs We think that section 549 of the Civil Procedure Code Act XIV of 1882) does not absolutely preclude our making the order if the circumstances are such as to render it just that we should do so We cannot lay down a hard and fast rule that the Court can in no case after the time for giving security is passed, allow the appellant further time for giving security The Allahabad High Court appears to have thought that it could not do so and its ruling was followed in Calcutta and Madras *Ilahi Bakhsh* v *East Indian Railway Co* I L R 1 All 687 *Budri Narain* v *Sheo Koer* I L R 11 Cal 716 *Shrajudin* v *Krishna* I L R 11 Mad 190 but the ruling of Privy Council in *Balwant Singh* v *Daulat Singh*, I L R 8 All 315, is not quite consistent with these authorities That was the case of restoring an appeal but if the Court can restore an appeal after dismissing it under section 549 it can we think under similar circumstances attain the same result without a *pro forma* dismissal Here the refusal of the Court officer to accept the stamp of the memorandum of appeal would naturally have the effect of preventing the appellant from lodging the security for costs It is true that that is not the ground on which she now asks our indulgence, but still we think that she ought to have the same opportunity of giving security as if her appeal had been stamped when she tendered the stamp fee She could not have applied for extension after that refusal earlier than she has done

We do not, however, extend the time further than to put her in the same position as she would have been in had her memorandum of appeal been stamped when she tendered the fee

The order on this part of the application will be that the time for appellant s furnishing security be extended until 4 P M on Thursday next the 4th February If it is not then furnished the appeal will be set down for dismissal on Friday the 5th February Costs costs in the appeal

Plaintiff (Appellant) in person

Attorneys for the Defendant (Respondent) —Messrs *Little & Co*

NOTES

[See now C P C 1908 cc 148 wh h expre sly gives C urts p wer t enlarge time See also (1910) 34 Bom 589 (1897) 22 B m 849 (1907) 9 B m L R 204 (1904) P [illegible] 81 1909) I R 78 (1911) [illegible] C 73 (Punjab) (1904) 26 All [illegible]29 (1893) 26 Cal 925 ]

## [580] ORIGINAL CIVIL

*The 29th January 1897*

PRESENT

SIR C FARRAN KT CHIEF JUSTICE AND MR JUSTICE CANDY

Fatmabai and another Plaintiffs

*versus*

Pirbhai Virji Defendant

*Limitation Act (XV of 1877) Sec 22 Suit by heirs of deceased Mahomedan Suit originally filed in time by one heir Another heir subsequently made co plaintiff beyond time of limitation Letters of administration obtained only by second plaintiff—Parties Practice Procedure*

The plaintiff a wid w and h r f th b ji Mah medan sued n a promiss ry note dated 21 t Oct b r 1892 passed by the defendant t her deceased husband The suit was filed on the 9th Oct ber 18[illegible] Disput s subsequently arose between her and her father in law as to the successi n t her husband pr perty and he appli d t the High Court for letters of administrati n On the [illegible]th S ptember 189[illegible] the plaintiff s father in law on his applicati n was made a co-plaintiff in the suit S bsequently th plaintiffs came t t rms and the widow withdrew her applic tion f r lett rs f administrati n and her father in law applied for and obtained letters f administration instead On the [illegible]th November 18[illegible]6 the suit came n f r hearing The first pl intiff did n t produce any lett r f administrati n r certificate under the Succession Certificate Act VII of 1889 The second plaintiff produced the letters of administration obtained by him

*Held*, that the suit was barred by secti n 22 of the Limitation A t (XV of 1877) When the second plaintiff was added as a party the suit was barred as against him If the letters of administration had been obtained by the plaintiff Fatmabai her suit would not have been barred and the Court could have passed a decree in her favour

Section 22 of the Limitation Act (XV of 1877) in terms appl es as well to pl int ff suing in their representative capacity as in their pers nal capacit

*Held* also that the second plaintiff was pr perly join d as party plaintiff When one or more heirs sue there is no objection to joining all t make the representation complete

CASE stated for the opinion of the High Court by C M Cursetji Third Judge of the Bombay Small Cause Court under section 617 of Civil Procedure Code (Act XIV of 1882)

* Small Cause Court Suit, No 25937 of 1895

"The following are the facts of the case. The suit was originally filed by the first plaintiff Fatmabai alone on the 9th October 1895, as the widow and heir and legal representative of Mahomed Jan Mahomed, deceased.

"The claim is on a promissory note of Rs. 500, dated 21st October 1892, passed by the defendant to the said Mahomed Jan [581] Mahomed. The summons in suit was not served till the 18th January 1896.

"Meantime disputes having arisen between the said plaintiff Fatmabai and her father-in-law Jan Mahomed Jetha about the succession to the property of the said deceased, Fatmabai applied to the High Court for letters of administration. Pending such application the defendant appeared in this suit with his vakil Mr. Rele on the 25th March last, he admitted this claim to be due, but denied Fatmabai's right to recover the debt without letters of administration or certificate of heirship under Act VII of 1889 It was also urged by the defendant that Jan Mahomed Jetha claimed from him the same debt as heir and legal representative of his son the said Mahomed Jan Mahomed. This suit continued to be postponed from time to time pending the disposal of Fatmabai's application for letters of administration.

"On 9th September 1896, Mr Manchashankar, vakil, appeared on behalf of the said Jan Mahomed Jetha and applied that his client be made a co-plaintiff with the consent of the plaintiff Fatmabai This application was granted and the summons was accordingly amended by making the said Jan Mahomed Jetha party-plaintiff with Fatmabai.

"On the 14th November 1896, this suit coming finally on the board, the second plaintiff, the said Jan Mahomed Jetha, produced letters of adminis tration to the estate of his son the said Mahomed Jan Mahomed obtained by him alone The first plaintiff Fatmabai does not produce any such letters or any certificate under Act VII of 1889 It appears that the plaintiffs having come to terms the first plaintiff withdrew her application for letters of admi nistration and allowed the second plaintiff to take out the same. She has, in fact, practically assigned over her claim and all interest in this suit to the second plaintiff The plaintiffs are Khoja Mussalmans They are the only surviving heirs of the said Mahomed Jan Mahomed, deceased, and they and the said deceased had been living together as members of a joint family.

"The defendant now pleads that this suit is barred under section 22 of the Indian Limitation Act of 1877 The ques-[582]tions which thus arise, and which I have the honour to refer, are —

"(1st) Is the plaintiff No 2 properly joined as party plaintiff? and

(2nd) If yes, then on the facts and under the circumstances above stated is this claim barred as against him?"

As to the first question the learned Judge of the Small Cause Court was of opinion that the second plaintiff had been properly made a party and referred to *Chunder Cooma v Gocool*, I L R, 6 Cal, 370.

As to the second question he thought the claim was not barred. He referred to *Suput Singh* v. *Imrit Tewari*, I. L. R, 5 Cal., 720; *Ganpat* v. *Adarji*, I. L. R., 3 Bom, 312, *Boydonath* v. *Grish Chunder*, I. L. R., 3 Cal., 26; *Saminatha* v. *Muthayya*, I L R., 15 Mad, 417, *Kasturchand* v. *Sagarmal*, I. L. R., 17 Bom., 413, *Vanni* v *Crooke*, I. L. R., 2 All., 296, *Pragi Lal* v. *Maxwell*, I. L. R., 7 All, 284, *In re petition of Ramdas*, I. L. R., 10 Bom., 107; *Lachmin* v. *Ganga Prasad*, I. L R, 1 All., 485, *Govindappah* v. *Kondappah*, 6 Mad. H. C. Rep., 131; *Janaki* v *Hafiz Mahomed*, I. L. R., 13 Cal., 47.

He passed a decree for the amount claimed and costs in favour of the second plaintiff contingent on the opinion of the High Court.

*Lang* (Advocate-General), for the Defendant He referred to the Limitation Act (XV of 1887), section 22, Succession Certificate Act (VII of 1889) section 4, *Sheetanath* v *Promothonath* I L R 6 Cal 303 *Ramsebuk* v *Ramlall*, I L R, 6 Cal, 815

*Anderson*, for the Second Plaintiff He cited *Pragi Lal* v *Maxwell*, I L R, 7 All, 284 *Kasturchand* v *Sajarmal* I L R 17 Bom 413 *Kalidas* v *Nathu Bhagvan*, I L R 7 Bom 217 *Sulochini* v *Cumar Ganoda* I L R, 14 Cal 400 *Krishnaji* v *Vithu* I L R 18 Bom, 305

**Farran, C J** —We think that the second plaintiff was properly joined as party plaintiff Section 4 of Act VII of 1889 **[583]** does not preclude the heirs of a deceased Khoja from filing a suit to recover a debt due to his estate but only prevents the Court from passing a decree in favour of such heir except on the production of probate or a certificate of the nature referred to in the section When one or more heirs sue there is no objection to joining all to make the representation complete so far as it can be complete without probate or certificate

The answer to the second question depends substantially upon this whether an heir of a deceased Mahomedan added as a party in a suit to recover a debt due to the deceased is a new plaintiff within the meaning of section 22 of the Limitation Act If he is it follows that when the plaintiff Jan Mahomed was added as a plaintiff the suit was barred as against him, and the fact that he subsequently obtained letters of administration to the estate of the deceased cannot we think operate to remove that bar If the letters had been granted to Fatmabai her suit clearly would not have been barred, and the Court could have passed a decree in her favour It is it must be allowed a curious anomaly that the result of the suit should depend in so far as limitation is concerned upon which of the plaintiffs took out letters of administration to the estate of the deceased but though we cannot help regretting the result we feel constrained to hold that the section in terms applies as well to plaintiffs suing in their representative as in their personal capacity The proviso to it shows we think that plaintiffs suing in their representative capacity are plaintiffs within the contemplation of the Legislature As to that particular class of plaintiffs when the action has been instituted in the lifetime of the deceased it shall as regards them be deemed to have been instituted when the deceased filed it There is no special provision for representatives suing after the death of their intestate or testator The same reasoning seems to us to apply to them as was held to apply to the joint surviving co-parcener in a Hindu family in *Kalidas* v *Nathu* I L R 7 Bom 217

When it is once allowed that representative plaintiffs are within the scope of the section, it seems to us to follow that the adding of a plaintiff in his representative capacity (the suit being filed after the death of the intestate) is the adding of a **[584]** new plaintiff within the section The representatives are the plaintiffs who sue The estate is not a persona capable of filing a suit

Counsel for the plaintiffs relied on the ruling in *Sulochini Dabi* v *Cumar Ganoda*, I L R 14 Cal, 400 and from it asked us to draw the deduction that when the only change made in a suit is in adding or substituting parties for the purpose of more correctly representing the right originally asserted the change is not within the scope of the section It is not, however easy to reconcile that decision with the exact wording of section 22 of the Limitation Act, and it would be unsafe to rely upon any general deductions drawn from it The cases of *Kasturchand* v *Sagarmal* I L R, 17 Bom, 410, and *Pragi Lal* v *Maxwell*, I L R, 7 All, 284, were also relied on, but they were decided

upon the ground that all the partners in the firm sued were impliedly made defendants in the suit brought against the firm sued in its own name and are obviously not authorities upon the question before us.

To prevent hardship it might be desirable to lay down the law in the sense contended for by Mr. Anderson, but it seems to us that if we were to do so, we should be making and not interpreting the law. If the law is too stringent, it is for the Legislature and not for the Courts to mitigate its severity. Its provisions do appear to us to operate harshly as well in the case of the representatives of a deceased person as in the case of joint promisees; but in the former case any plaintiff by taking out letters of administration to the estate of the deceased can relieve himself of the apparent hardship.

We answer the second question in the affirmative. Costs costs in the case.

Attorneys for the Plaintiffs.—Messrs. *Ardesir Hormusji and Dinsha.*

Attorneys for the Defendant.—Messrs. *Payne, Gilbert and Sayani.*

NOTES.

[See likewise (1909) 33 Mad. 115; (1907) 34 Cal., 612; (1903) 7 C. W. N., 817; (1915) 29 I. C., 634 (Mad.).]

## [585] APPELLATE CIVIL.

*The 28th January, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Ningapa ........ (Original Defendant No. 1) Appellant

*versus*

Dodapa ........ (Original Plaintiff) Opponent.*

*Jurisdiction—Mamlatdar—Head karkun taking temporary charge of office of Mamlatdar—Decree made by him—Mamlatdars' Courts Act (Bombay Act III of 1876), Sec. 3 (1)†—Bombay Land Revenue Code (Bombay Act V of 1879), Sec. 15.‡*

A karkun taking temporary charge of the office during the absence of the Mamlatdar on casual leave is not a revenue officer ordinarily exercising the powers of a Mamlatdar within the meaning of section 3 (1) of the Mamlatdars' Court Act (Bombay Act III of 1876). He is an officer exercising on an extraordinary occasion some such powers under the Bombay Land Revenue Code (Bombay Act V of 1879) section 15. Therefore a decree passed by him in a possessory suit is a decree made by an unauthorized person purporting to exercise a jurisdiction which no competent authority had conferred upon him.

* Application No. 201 of 1895 under the extraordinary jurisdiction.

† Section 3 (1) of the Mamlatdars' Courts Act (Bombay Act III of 1876):—

3. In this Act, unless there be something repugnant in the subject or context,—

(1) The word "Mamlatdar" shall include any revenue officer ordinarily exercising the powers of a Mamlatdar and any other person who may be specially authorized by the Governor in Council to exercise the powers of a Mamlatdar under this Act.

‡ Section 15 of the Land Revenue Code (Bombay Act V of 1879):—

15. If a Mamlatdar or Mahalkari is disabled from performing his duties, or for any reason [illegible] his taluka or mahal, or dies, such subordinate as may be designated by orders to be issued from time to time in this behalf by the Collector shall succeed temporarily to the said Mamlatdar's or Mahalkari's office and shall be held to be the Mamlatdar or Mahalkari under this Act until the Mamlatdar or Mahalkari resumes charge of his taluka or mahal or until such time as a successor is duly appointed and takes charge of his appointment.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code Act XIV of 1882) against the decision of Rao Saheb Narayan Ganesh, Mamlatdar of Sampgaon in the Belgaum District

Suit in the Mamlatdar's Court to recover possession of certain land from the first defendant The first defendant had got possession of the land in question under a decree (No 2 of 1895) which had been obtained in the Court of the same Mamlatdar during his absence on leave and while his head karkun was in temporary charge of his office The plaintiff had sued to get [586] back the lands, contending that the karkun had no jurisdiction to try the former suit or to pass the decree and that the decree was therefore, illegal The plaintiff joined the head karkun and the village officers, who gave possession to the first defendant in execution of his decree, as co-defendants in the suit

The Mamlatdar allowed the plaintiff's claim holding that the decree obtained by the first defendant was passed without jurisdiction and was not binding, inasmuch as the head karkun had not been appointed Mamlatdar by the Commissioner during his (the Mamlatdar's) temporary absence on casual leave, and, therefore had no authority to decide the suit under the Mamlatdars' Act (Bombay Act III of 1876)

The first defendant applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling on the plaintiff to show cause why the decision of the Mamlatdar should not be set aside

*Mahadeo V Bhat*, appeared for the Applicant (Defendant No 1) in support of the rule —We ask that the decision of the lower Court in this suit be set aside The Mamlatdar had no jurisdiction to entertain this suit because we had obtained possession in due course of law by executing the decree which we had obtained in the previous suit

[FARRAN, C J —Your decree was not passed by the Mamlatdar It was passed by his clerk while he himself was absent on casual leave ]

Section 3 of the Mamlatdars Act and section 15 of the Land Revenue Code invest the Mamlatdar's head clerk with authority to act for him in his absence If the head clerk had no authority to pass a decree, the plaintiff ought to have applied to get the decree set aside He allowed the proceedings to go on without objection and this is acquiescence on his part *Vishnu Sakharam* v *Krishnarao Malhar*, I L R, 11 Bom, 153 We were lawfully in possession, because it was given to us by the Patil and Kulkarni, who are the village officers empowered to execute the Mamlatdar's decrees A third person in execution of a decree does not derive any right to sue -*Ramchandra Subrao* v *Ravji*, I L R, 20 Bom, 351

[587] *Chitgupti* (with *Dattatraya A Idaunji*) appeared for the Opponent (Plaintiff) to show cause The decision of the lower Court restoring us to possession was right and should not be set aside The head karkun of the Mamlatdar was not a Mamlatdar under the Mamlatdars Act See Rules compiled by the Legal Remembrancer, p 518. During the absence of the Mamlatdar, the head karkun was a revenue officer under section 15 of the Land Revenue Code, but he was not a Mamlatdar under section 3 of the Mamlatdars Act A subordinate of a Mamlatdar put in charge of his office does not thereby become a Mamlatdar The fact that we did not question his authority is of no importance Our acquiescence could not give him jurisdiction *Meenakshi Naidoo* v *Subramaniya Sastri*, L R, 14 I App 160 Under section 44 of the Indian Evidence Act we have a right to show that the head karkun had no authority to pass the decree

**Farran, C J** —We are of opinion that a karkun taking temporary charge of the office during the absence of the Mamlatdar on casual leave is not a revenue

officer ordinarily exercising the powers of a Mamlatdar within the meaning of section 3 of the Mamlatdars Courts Act, 1876 He is an officer exercising on an extraordinary occasion some of such powers under the Bombay Land Revenue Code of 1879, section 15 His so called decree was, therefore, a decree made by an unauthorized person purporting to exercise a jurisdiction which no competent authority had conferred upon him The dispossession which followed upon such a decree was a dispossession otherwise than by due course of law We cannot, therefore, interfere in this case We dismiss the rule with costs

*Rule dismissed*

NOTES

[ This was followed in (1900) 25 Bom 318 ]

## [588] APPELLATE CIVIL

## FULL BENCH

*The 31st January, 1896*

PRESENT

SIR C FARRAN KT CHIEF JUSTICE MR JUSTICE JARDINE MR JUSTICE PARSONS, MR JUSTICE CANDY AND MR JUSTICE RANADE

The Collector of Broach (Original Applicant) Appellant

*versus*

Venilal Keshavbhai and others (Original Opponents) Respondents *

*Bhagdari Act (Bombay Act V of 1862) Secs 1 3 and 5†—Civil Procedure Code (Act XIV of 1882) Sec 266 (c)—Bhagdari village—bhag—Homestead meaning of the word—Attachment*

Per FARRAN C J and JARDINE, PARSONS and RANADE JJ —The superstructure of a house belonging to a bhag in a bhagdari village is exempt from attachment under the provisions of the Bhagdari Act (Bombay Act V of 1862)

* Second Appeal Nos 936 937 938 939 and 940 of 1893

† Bhagdari Act (Bombay Act V of 1862) sections 1 3 and 5

1 No portion of a bhag or share in any bhagdari or narvadari village other than a recognized sub division of such bhag or share shall be liable to seizure sequestration attachment or sale under the process of any civil Court and no process of such Court shall be enforced so as to cause the dismemberment from any such bhag share or recognized sub division thereof, of any homestead building site (gabhan) or premises appurtenant or appendant to such bhag or share or recognized sub-division thereof

3 It shall not be lawful to alienate assign mortgage or otherwise charge or incumber any portion of any bhag or share in any bhagdari or narvadari village other than a recognized sub division of such bhag or share or to alienate assign mortgage or otherwise charge or incumber any homestead building site (gabhan) or premises appurtenant or appendant to any such bhag share or recognized sub division appurtenant or appendant thereto, apart or separately from such bhag share or recognized sub division thereof Any alienation assignment mortgage charge or incumbrance contrary to the provisions of this section shall be null and void and it shall be lawful for the Collector or other chief revenue officer of the district whenever he shall upon due inquiry find that any person or persons is or are in possession of any portion of a bhag or share or of any homestead building site (gabhan) or premises appurtenant or appendant to such bhag or share in any bhagdari or narvadari village other than a recognized sub division of such bhag or share in violation of any of the provisions of this section, summarily to remove him or them from such possession and to restore the possession to the person or persons whom the Collector shall deem to be entitled thereto, and any suit brought to try the validity of any order or orders which the Collector may make in such matter must be brought within three months after the execution of such order or orders

5 Nothing in this Act contained shall be construed as prohibiting the alienation, assignment, mortgaging, charging or incumbering any bhag or share, or recognized sub division

[589] *Per* CANDY J —Having regard to the decision in *Pranjivan* v *Jaishankar* 4 Bom H C Rep A C J 46 and the object of the Bhagdari Act (Bombay Act V of 1862), it is doubtful whether the Legislature intended to exempt from attachment the materials of a house belonging to a bhag

SECOND APPEALS from the decision of R S Tipnis Assistant Judge with full powers at Broach, confirming the decrees of Rao Saheb Kapuram M, Subordinate Judge of Jambusar

Certain creditors of one Lakhi R y ip obtained decrees against him and in execution attached a certain house site with its superstructure The Collector of Broach thereupon applied under section 2 of the Bhagdari Act (Bombay Act V of 1862) to raise the attachment alleging that the said house site with its superstructure was part of a bhag standing in the names of Lakhi Rayaji and Lala Pertap and could not be sold or alienated from the bhag

The decree holder withdrew his claim against the house site but contended that he was entitled to attach and sell the superstructure

The Subordinate Judge held that the Bhagdari Act did not prohibit the attachment and sale of the superstructure of the house and rejected the Collector's application regarding it but removed the attachment of the house site or *gabhan*

On appeal by the Collector the Judge confirmed the order of the Subordinate Judge

The Collector (appellant) preferred a second appeal

Rao Saheb *Vasudev J Kirtikar* (Government Pleader) for the Appellant (Applicant)

*Chimanlal H Setalvad* and *Manubhai N Mehta* for the Respondents (Opponents) in Second Appeals Nos 939 and 940

[590] The appeals came on for hearing before a Division Bench composed of CANDY and RANADE JJ who differing in opinion referred the following question to a Full Bench —

Whether the superstructure of a house belonging to a bhag in a bhagdari village is exempt from attachment under the provisions of Bombay Act V of 1862

*Lang* (Advocate General with Rao Saheb *Vasudev J Kirtikar* Government Pleader) appeared for the Appellant (Applicant) The question is as to the meaning of the word 'homestead' in the Bhagdari Act (Bombay Act V of 1862) There is no dispute that under the Act the site cannot be sold but it is contended that the superstructure can be removed and sold by the judgment creditor Sections 1 and [illegible] of the Bhagdari Act prohibit alienation of a bhag or any portion of it We submit that the word 'homestead' includes in its ordinary popular sense the site the building on it and its appurtenances and that none of these can be sold Words are to be construed in their general popular sense Maxwell on Statutes p 69 The Bhagdari Act has not made a distinction between gabhan (site) and house tenement As to the meaning of the word 'homestead,' see Wharton's Law Lexicon Webster's Dictionary Johnson's Dictionary &c They all support our contention Section 266 of

of any bhag or part of any bhag in any bhagdari village [illegible] together with its homestead building site (gabhan) and other [illegible] appurtenances [illegible] such alienation assignment mortgage charge [illegible] is unlawful [illegible] the object and intent [illegible] this Act being to prevent the [illegible] shares or recognized sub divisions thereof in such bhagdari or narvadari village [illegible] and also to prevent the severance of homestead building sites (gabhan) and other premises appurtenant or appendant to bhags or shares or recognized sub divisions of bhags or shares, from the same or any of them.

the Civil Procedure Code (Act XIV of 1882) has laid down that the house of an agriculturist cannot be sold

*Chimanlal H Setalvad* appeared for the Respondents (Opponents) —Under the Bhagdari Act the word 'homestead' means only the site or land as distinguished from the superstructure *Pranjivan* v *Jaishankar*, 4 Bom H C Rep, A C J, 16 The object of the Bhagdari Act was to prevent dismemberment of bhagdari estates *Manohar* v *Chutabhai*, I L R, 8 Bom, 347 The evil which the Act was to remedy was the curtailment of Government revenue The bhagdars began alienating their lands, and the lands being thus alienated there was a decrease in Government revenue. But the sale of the superstructure would not in any way curtail the revenue Section 266 of the Civil Procedure Code is not applicable to the present case [591] because the judgment debtor is a bhagdar and not an agriculturist The object of the Code is to protect an agriculturist, while that of the Bhagdari Act is quite distinct The Gujarati official translation contains the expression *gharthani jamin* (building site) which shows what the intention of Government was in using the word homestead

Section 3 of the Bhagdari Act prevents alienation by a bhagdar If, as contended homestead includes the superstructure then a bhagdar would not be allowed to remove and sell an old dilapidated superstructure howsoever desirous he might be to do so We rely on the referring judgment of CANDY J

**Farran C J** The question referred to the Full Bench in these appeals is "whether the superstructure of a house belonging to a 'bhag' in a bhagdari village is exempt from attachment under the provisions of Bombay Act V of 1862

I answer the question in the affirmative The considerations which may be urged in support of an affirmative or negative answer to it are so fully set out in the referring judgments that it will be sufficient for me briefly to indicate the salient points which, in my opinion, necessarily determine the meaning which ought to be put upon the statute

The enacting section upon which the question arises is (section 1) as follows — No portion of a bhag or share in any bhagdari or narvadari village other than a recognized sub division of such bhag or share shall be liable to seizure sequestration attachment or sale by the process of any civil Court and no process of such Court shall be enforced so as to cause the dismemberment from any such bhag or share or recognized sub division thereof of any homestead building site (*gabhan*) or premises appurtenant or appendant to such bhag or share or recognized sub division thereof The object of that enactment appears from the preamble of the Act which states that it had been found that the permanence of the tenure known as the *bhagdari* and *narvadari* tenures was endangered by the increasing practice of attachment and sale by civil process of the homesteads and building sites (gabhan) appurtaining or appendant to the constituted bhags and that it was desirable to prevent the alienation, assignment [592] mortgaging charging or incumbering of any portion of any bhag or of any homestead building site (gabhan) or premises appurtenant or appendant to any bhag &c The bhag and its homestead and gabhan and premises were treated as a homogeneous whole The object was, therefore to preserve the tenure known as the bhag tenure which was considered to be endangered by the dismemberment of the homogeneous whole caused by the increasing practice of attachment and sale by civil process of, *inter alia*, the homesteads and building sites appurtaining and appendant to the bhags The reason for the enactment as distinguished from its object probably was to protect Government in collecting the revenue from the village. The matter is

fully discussed in *Manohar Ganesh* v *Chutabhai* I L R, 8 Bom, 347 With the reason which led to the passing of the statute we are not directly concerned The object of the Act should however be borne in mind when considering the meaning of its several clauses That object is carefully set out in the preamble which I have read It is I think worthy of notice that it is stated in that preamble that decree holders were in the habit of attaching the "homesteads" and the *gabhan* or village sites We have no evidence before us as to whether when they attached sites upon which buildings were erected they attached both the site of the house and the building upon it or confined themselves to the mere site but seeing that it is most probable I should say almost certain—that attaching creditors when seeking satisfaction of their claims would attach the whole at that time available asset of their debt as and not merely one of its component parts I think that we are justified in assuming that the practice was to attach both site and building when the site was built upon, and I conclude that the framers of the Act seeking an appropriate word to describe the composite asset so attached used the word homestead which we find in the preamble as peculiarly appropriate word to describe the dwelling-house of a Hindu house holder of the cultivating class If that is its meaning in the preamble it should I think have the same meaning assigned to it in the body of the enactment unless there are very strong reasons to the contrary In my opinion there is nothing in the [593] body of the Act to show that a different meaning should be assigned to it from that which most naturally attaches itself to it in the preamble

Now in determining the meaning of a word used in a statute not being a term of art we ought to assign to it its ordinary natural or popular meaning In general statutes are presumed to use words in their popular sense *uti quitur vulgus* —Maxwell on Statutes page 69 This is a well established rule of construction In colloquial language I can hardly doubt that an ordinary educated English man speaking of a homestead would intend to express by the word both the house itself and its immediate surroundings not perhaps very definitely determined in his mind Popular dictionaries certainly assign that meaning to the term Webster bracketts the words homestead and homestall and interprets them to mean the place of a mansion house the enclosure or ground immediately connected with the mansion Farmstead he defines as a farm with the buildings upon it homestead Latham s Dictionary (founded on Todd s Johnson) defines it as Homestall farm building about a house quoting the passage from Dryden which has been referred to —

'Both house and homestead into seas are borne
And rocks are from their old foundations torn

and that from Carlyle s French Revolution Pt III b 1 Ch VII Richardson does not refer to stead as one of the compounds of home but he quotes Cowper as to its synonym homestall And homestall thatched with leaves Tennyson speaks of the smouldering homestead In classical English "homestead is, I think clearly not used as exclusive of the buildings of the home In Wharton s Law Lexicon and in Stroud s the definition of homestall is 'a mansion house and Webster gives its legal signification as a person s dwelling house with that part of his landed property which is about and contiguous to it We have not been referred to any English writer who uses the word as meaning the site of a house to the exclusion of the building upon it To my mind it conveys the idea of a mansion of the more homely kind, or of a farmstead, with their contiguous buildings and curtilage and I think that used in connection with a Hindu [594] residence in a village it includes the site of the building, the dwelling-house, the trees, wells and shrine and all the

appendages which together constitute the usual surroundings of the ordinary Hindu village home

I am not satisfied that even etymologically it means the site of the house exclusive of the building The latter component of the word (from the same root as the Latin *star* ) rather denotes something fixed or stable, the fixed place of the home as distinguished from a nomadic residence and it is evidently in that sense that Webster interprets the word when he denotes it ' the place of the mansion The meaning which he assigns to homestead makes that sufficiently clear The place (*positus*) of the home and the site (*situs*) of the house do not appear to me to be synonymous expressions Etymological considerations are however I think out of place when interpreting the meaning of a word used in a legislative enactment If you go back to the etymological meaning of an English word you often find it widely differing from its present accepted signification Such being as I conceive the admittedly accepted both popular and legal meaning of the word I can find nothing in the context, scope or object of the Act under consideration which should induce us to hold that the Legislature intended to use it in an unusual and unfamiliar sense

It is suggested that the effect of this interpretation will be to prevent a bhagdar from pulling down his house and selling the materials in order to build a new one I do not find that such a procedure is forbidden by the Act and even if such a consequence flowed from our ruling I doubt whether it would be sufficient to justify us in attaching an unusual meaning to a well known word

The fact that the translator of the Act understood the word as meaning the site of a house and mistranslated it does not affect the question The official translation of an Act has as pointed in *J ha Laikhi v Ramchandra* I L R 16 Bom 689 no legislative force or sanction

It is unnecessary for me to refer to the several cases decided in reference to the Act It is admitted that the meaning of the [595] word homestead has not directly come under the consideration of this Court or been judicially determined In Broach the one of the predecessors of the Assistant Judge from whose decision this appeal is brought interpreted it in accordance with my view

Lastly it cannot be said that the interpretation which I have indicated in any way defeats the professed object of the Act Rather I should say that it tends to advance it The utmost which can be argued is that that interpretation is not absolutely necessary to effect the purpose which the Legislature had in view So much may be conceded but as I have said I think that its tendency is to advance the declared object of the Act To me it appears to be a dangerous practice for a Court of law to endeavour to find a recondite meaning in the words of an Act of the Legislature because in its opinion the Legislature has expressed more than was necessary to effect its purpose

**Parsons** and **Ranade JJ** We concur

**Jardine J** I concur with the Chief Justice on all points, and would do so silently were it not that after judicial debate this Bench is not all of one opinion The word homestead is a household word and much like other such words used in decisions and deeds about dwelling houses No authority has been shown either in the law or the language for treating the word " homestead as limited to the site, and leaving out the building used as a home I will first deal with *homestead* as a term of law From the law dictionaries of Jacob and of Wharton we find that homestead homestall= mansion and then Webster tells us that in law it means ' a person's dwelling

place with that part of his landed property which is about and contiguous to it" the courtyard or curtilage. The first inquiry is, what does "mansion" mean at law? *Mansio* and *domus* are found in Domesday; Kenelm thinks they may be distinguished (Libri Censualis. Introduction 77) The word comes through the Norman French like the word manor, with the sense of *sedes*, an abiding place. *Manerium dicitur a manendo secundum excellentiam sedes magna fixa et stabilis.* Thus says Coke of Manor: and then refers us to Bracton, Fleta [596] and the Mirror: "in these ancient authors you shall see the difference *inter mansionem, villam, et manerium*" (Coke on Litt., 58 a) The great lawyer deals fully with the subject when treating "of Burglarie" (Coke 3 Inst, 64) The indictment saith, *Domus mansionalis*, a mansion or dwelling house.

"*Domus mansionalis* is divided into two branches, *viz*, the inset edifices, as hall, parler, buttry, kitching and lodging chambers, &c, and the outset buildings, as barns, stables, cowhouses, dairies, &c., all these are parcels of the mansion house, and will pass by the name of *domus mansionalis*" Again, "Our ancient authors and old records did expresse burglary under this word *hamsukne* or *hamsokne*. This first is derived from two Saxon words, *viz*, of *ham*, that signifieth a mansion house, *domus mansionalis*, which to this day we call our home; and *suckne* or *soecen*, that is *seeken*, as much as to say, as to seek a man in his house to slay or rob him" Again, "others derive *hamsokne* from *ham*, which of both sides is considered to be a mansion house" Coke also quotes the Mirror "*car droit est que chescun eyt quiet en son hostel*" The whole passage requires study, as also chapter 15 of Burning of houses, whence it appears that Fleta uses the words *aedes*, and Britton using the word mansion as altered from Latin into Norman French calls it *meason* and the Mirror *maison home*. Hawkins (1 P C, 129), writing of Burglary follows in most things Coke—" And Sir Edward Coke seems to say, that the breaking a church, &c, is, therefore, burglary because the church is the mansion-house of God" Britton's words about Bourgeysours (Brit, Bk 1, Ch 11), are *eglises ou autre mesouns* In another place (Brit, Bk 2 Ch. 9, S 6), he varies the spelling "*principal maner ou mes*" which Nickols translates as "principal manor or mansion" It would seem these terms applied then to the houses bought by farmers, free men, not villeins.

In Termes de la Ley under the word *Mease*, maison and mansion are treated as the same French word, "which is no other but a place of abiding and habitation" But while "house" means [597] only the matter of building, *Mease* or *messuage* shall be said of all the mansion place, and the curtolage shall be taken as parcel of the messuage In Brooke we find – "Nota Anno 3 Ed., 4, Fo. 3, Fuit agre que terre poet estre parcell dun mease (Br. Abrid, 151)" In *Sury* v. *Albon Pigot*, Popham, 166, the plaintiff declares that he was possessed of the rectory of M in Barkshire of which a curtilage was parcel "By the name of messuage the garden and curtelage shall pass" (Plowden Folio 171 a) This is Coke's view, Coke on Litt., 5 b and though in the Note by Hargrave we are referred to a contention that messuage extends to the curtilage, though not to the garden, but that *domus* only comprehends buildings, this bye gone opinion (Williams Real Prop of Corporeal Hereditaments, p 17) is not the same contention as my brother CANDY favours. I can find no suggestion, even in the law that any of these words signifying place of abode was ever thought to mean only the soil down to the centre of the planet In Chapter 7 of Magna Charta we find the widow's quarentine for dower (2 Inst, 16)—*Maneat in capitali messuagio mariti sui, per quadraginta dies*, which Coke translates—"She shall tarry in the chief house of her husband by forty days." He means the capital messuage of Glanvill (Glanvill, 131, 155), which is the manorial house.

or best of several manorial houses and might even be a castle See *Doe dem Rose Biddell* Ad and Ell, N S 682 and *Dominus Gerrard* v *Dominam Gerrard*, 1 Lord Raym 72 This law would be unmeaning if the word, Latin, French or English used for house and home means only the ground after the building is razed It is used in the old Abridgments and Reports for the tenement to which attaches prescription for common as in the more recent cases *Hockley* v *Lamb*, 1 Lord Raym 726 *Emerton* v *Selby*, 2 Lord Raym 1015 Also it is said in English in 36 Eliz in the King's Bench The house of every one is the proper place to preserve his goods (Popham 52) A widow, possibly burdened with a *ventre sa mere*, never could be housed on a bare site in the England of John or here in India under the law of maintenance The camp is for [598] wanderers and strangers and pilgrims as appears by the cases on tents and booths The hermit had his cell and the outlaw went to the green wood As a general rule we may safely follow Coke who says (Coke on Litt 56 b) " House messe or mason called in legall Latine messuagium containeth as hath been said, the building curtelage, orchard and garden" I assumed before from the law dictionaries that homestead as a term of law is much the same as mansion Those writers appear to me borne out by what Coke says about home

No use of the word homestead in any statute or legal authority has been shown us I infer therefore that it was not much used in writings We know that Latin and Norman French constituted for a long time the language [of the Court ?] Sir Walter Scott writes in Ivanhoe At Court and in the castles of the great nobles where the pomp and state of a Court was emulated Norman French was the only language employed and in Court of Law the pleadings and judgments were delivered in the same tongue Blackstone has some eloquent remarks on the French phrase whereby the Queen assents to laws Even after Styles had given up Norman French under the Commonwealth Siderfin began again under Le Roy Charles le II, calling himself "*Jades d l Milieu Templ*, *Londres* in his curious title page and of course called a house a mease or meason in his black letter reports *e g*, *Nevill* v *Hamerton* Sid, 79, where an enclosure of common was argued bad — '*Quia ne dit que son meason est auncient meason neque que son curtil dge est straight*' Even under Victoria phrases like *autrefois acquit* and *cestui que trust* are heard in her Courts and when we search the Abridgments for Husband and Wife the title is Baron and Feme No wonder then that Coke writing in English had to explain how mansion meant the home The general words lasted long in law such as *terre* and *tenement* and *domus* someof them modified by adjectives and others altered in common discourse but not much in law Mansion and messuage, have I think not altered as terms since Coke defined them, although 'dwelling house' is now generally adopted in indictments for burglary and homestall is treated [599] by Russell 2 Russ on Cr Bk 4, Ch I S 3), who quotes Blackstone, as including the curtilage But mansion has changed in common use since castles ceased to be it has two meanings as Latham tells us—' Lord's house in a manor manor house manse (hence when used in a more general sense as a place of residence it always conveys the idea of a place of magnitude and importance) abode house ' Messuage ' has become purely technical, and thus ' homestead ' not being needed in a law where ' mansion" and messuage" have long been defined has been left to literature I think, however, that if Coke had bought a freehold abode as a homestead he would have been startled, if the vendor had come next day with masons and carts to remove the materials of the house The only instance of which I am aware of the law ignoring these materials is an argument in 1659 in *Hill* v *Bunning*, Sider, 17 that

a cottage is different from a messuage, and is not of any account at law, and (*quod fuit concessum*) could not like a messuage be the object of a common recovery Cottagers, *qui cottagia et curtil gia teneant*, were but little above bondmen, and 31 Eliz, Cap 11, had been passed to stop the increased building of cottage See Coke, Coke on Litt, 5 b 2 Inst, 736 These things perhaps explain the argument

"Homestead," a purely Saxon word, meant something better than the huts of the depressed and enslaved classes squatting on the lord's waste or border or curtilege, and after the Conquest must have meant something not so grand as the lord's abode, rather such a place as a sturdy franklein might in Shakespeare's phrase stall himself in or a freeholder might establish as his home to have and to hold for his children for some of these middle class men had in Chaucer's time comfortable homes like the lord's reeve or steward—

'His woning was ful fayre up on an heeth
With grene trees shadwed was his place

I am of opinion then, that as a word of law homestead means the same as mansion or messuage and if mansion is too stately and messuage too technical, and farm possibly confined to the [600] fields *Hockley v Lamb ubi supra*) — it is an appropriate term for a ryot's farmstead in India Sir M R WESTROPP, who drafted the Act was very learned in the law He must have known that the scholarly Colebrooke had found it necessary to explain as well as translate mansion and the terms patrimonial house principal messuage &c, in Harit and Manu, Coleb H L Bk 5 Ch 1, Pl 46 and in Vyasa held the word field used as a place of abode to mean the house and garden Bk 5 Ch 3 Pl 139, Coleb Bk 5 Ch 3 Pl 364 It would have been obvious to a lawyer of such varied learning that the phrases often used by us in judgments such as family house, ancestral house dwelling house are too inexact to be used in a statute, as we see in *Vinjali v Dinnah* 1 Ben L R 72 O J, where Chief Justice PEACOCK formally distinguishes the dwelling house of the family from dwelling houses which belong to an ancestor, as a mere matter of investment or productive property The word selected *viz* homestead, seems exact enough, especially as there is no real difference between the legal meaning and the common

I think that circumstance would sway the Legislature in choosing words to affect an Indian people Although terms from English conveyancing are used, the Act is to govern persons under Hindu law, and the law makers knew quite well that the need of a house as a home in all senses of that word is under the sacred law one of the holy songs which are chanted by every breeze For Colebrooke explains the saying of Ratnakara that a wife is a home, by the fact that the sacrament of marriage is the gateway to the great order of grihasthas *i e*, holders of houses, to whom thereupon the getting of a son becomes a duty leading to union with Brahma, Manu, 11, 28 As a dwelling house in England is fixed with the notion of dower and free bench, since the Church fastened them on our law, so a lawyer can never think of the Indian dwelling, except as a residence where the family must be maintained The mansion is not to be given away, and not wantonly to be split up. Katyayana declares that a man may not give away his dwelling house, Coleb Bk 2, Ch 4 S 2 Pl 19, and in the case cited above Sir BARNES PEACOCK adopts the view that he must reserve 'one [601] house, without which he himself or his family might want a dwelling." Then Jaganatha is quoted on this text as showing that house' is meant generally, comprehending a pond supplying water for common use or the like the meaning being, adds that learned Chief Justice, that whatever is appurtenant to a dwelling is to be retained with the dwelling Here the widow has a right to

abide: and Sir B. PEACOCK added that he did not remember a case in which an attempt had ever been made, by a Hindu son, whether natural or adopted, to turn his mother out of the house in which his father left her at the time of his death The authorities I have cited support the view we have come to, and which the Chief Justice has expressed for us about the courtyard being included: and also our view that "homestead" is used as including the fabric, since the other view would be highly repugnant to the general law. I come then to the opinion that "homestead" is used in the Act as meaning a messuage, which is at the same time a mansion-house.

But there is also some difference of opinion about the present meaning of this word seemingly dropped out of our law, and now I pass from the sages of the law to the masters of the language. Now there seems to be not one who uses homestead as meaning only a site, just as there is no authority for saying that "woning" and "place" in the passage from Chaucer mean only *situs*, and not *locus* or *positus*. Longfellow has a fine pictorial passage in Evangeline—

"Day with its burden and heat had departed and twilight descending,
Brought back the evening star to the sky, and the herds to the homestead."

To use Coke's terms, the poet describes the inset and the outset, the herds of kine being milked in the farmyard, the farmer at his own fireside It would be foolish to hold that the cows were to get under the foundations to be milked. There is a passage in Silas Marner where George Eliot brings out the meaning in a picture of a rural village—

"Two or three large brick and stone homesteads with well-walled orchards and ornamental weathercocks, standing close upon the road and lifting more imposing fronts than the rectory, which peeped from among the trees on the other side of the [602] churchyard, a village which showed at once the summits of its social life, and told the practised eye that there was no great park and manor-house in the vicinity: but that there were several chiefs in Raveloe who could farm quite badly at their ease."

The phrase "brick and stone homesteads" shows the brick and stone to be part of the homestead Our mother-tongue like Magna Charta is our birthright: we brought it here: it shall not be explained by Gujarati But it is a fair test of the meaning of an ancient word as it is of an overpowering statute to inquire, has such a thing ever been seen or approved before? If not, I would in the sedate words of Sir THOMAS BROWNE about the two-headed snake "crave leave to doubt until we have the advantage to behold."

As our conclusions are affected by the methods we use, I must add that, in my opinion, the Gujarati translation is no more a guide to the meaning, than a translation of Coke would be to him, or than a translated judgment of Sir MICHAEL WESTROPP would be to a lawyer whose wide learning and deep research put us in mind of Coke. In *Queen-Empress* v. *Maganlal*, I. L. R., 14 Bom., 129 an extra judicial opinion, although written by a learned jurist, and made into a State document was not treated as any authority on the legal meaning of necessity. Much less then can an unskilled person define a term of law, on which after argument we are not all agreed; although, as the case of Prohibitions del Roy shows, the decision of causes is committed to the Judges on the ground that by long study and experience they can apply the artificial reason and judgment of the law.

**Candy, J** - The further argument in this case before the Full Bench has not removed the doubts expressed by me in my referring judgment

For the argument amounted to this, that we are bound to construe the word "homestead" in its ordinary popular sense which must mean simply a house, and that the decision reported in the 4th volume of the Bombay

High Court Reports was no authority, the house in that case being *ex hypothesi* not a "homestead."

[603] As the facts of that case have been apparently misunderstood I will briefly refer to them. The house in question was built by a member of the bhagdar's family on a portion of the village site appendant to that bhag It was attached and sold in execution proceedings, and the bhagdar then sued the purchaser to compel him to remove the house The defence was that the site of the house was not part of the bhag but this fact was found against the defendant in both the Subordinate and District Courts The Chief Justice Sir R COUCH and NEWTON J, on the facts found said "By the Bhagdari Act it was not competent to the defendant to purchase more than the materials of the building The Act prevents the defendant acquiring any right in the gabhan or wada" (enclosed ground) If these words have any meaning at all they must mean that under the special provisions of the Bhagdari Act process could issue for attachment and sale of the materials of a house appendant to a bhag. If *ex hypothesi* the case did not fall within the special provisions of the Bhagdari Act, then it is impossible to understand the direct reference to the Act Sir R COUCH and Mr Justice NEWTON were Judges whose interpretation of an Act cannot lightly be ignored

Next, as to the ordinary popular sense of the word 'homestead, no doubt Maxwell says (p 69) "*In general* statutes are presumed to use words in their popular sense and then he gives certain exceptions and proceeds (p 75) "But it is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject matter in reference to which the words are used finds its most frequent application However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject matter While expressing truly enough all that the Legislature intended, they frequently express more in their literal meaning and natural force and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter They are to be construed as parti[604]cular if the intention be particular that is, they must be understood as used in reference to the subject matter in the mind of the Legislature, and strictly limited to it

And again, page 96 'It is, therefore an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the Act, and as not altering the general principles of the law '

Now the primary meaning of "homestead must be 'the place of the home " *Stead* is a totally different word from *stall*, *vide* dictionaries *passim*, and whatever connection there may be in *stead* with the root *st* which is found in words like the Latin verb *stare*, it is obvious that the idea of fixedness and stability is more easily connoted with the site or place, which cannot be moved, rather than a building which can at any time be taken away *Stead* is derived from the Anglo Saxon *stede* and its first meaning is 'place in general ' "From this sense," says Wedgewood, "we have homestead the home place, bedstead" And in Stormonth's Dictionary I find "*Homestead, the ground on which a house stands, and the enclosed ground surrounding it*" Then, as to the classical use of the word, the weight of authority is doubtless in favour of the inclusion of dwelling-house. As to its legal sense I have been unable to find the word in any statute of the British Parliament, or in any Act of the Indian Legislature except this Bombay Act V of 1862 In the Homestead

Acts of the United States, as I have shown in my referring judgment, the word includes a large tract of culturable land, which in the Act in question is, it is admitted, quite outside the "homestead"

Lastly, as to the popular sense, I venture to think that this is so vague and undefined that it offers us no real assistance With the greatest deference to the opinion of my learned colleagues I doubt whether the only popular sense of the word is a mansion with contiguous buildings and curtilage That no doubt may be one sense, but I think that the popular sense is even wider As an illustration of what I mean I append to this judgment a cutting from the London *Times* of 14th October [605] 1895 It is a review of Mr Walter Lawrence book lately published, "The Valley of Kashmir" The reviewer says "It seems doubtful whether the Kashmir system is not wiser than that of British India in so far as the Kashmir cultivators are denied the right of selling their *land* Acting on the advice of Mr Lawrence, the Kashmir Government has decided that the title given by the new settlement to the cultivators, heretofore serfs may not be alienated by sale or mortgage This means, of course, that the Kashmir cultivator will have to pay a higher interest for borrowed money than he would have to pay if he could pledge a first class security such as his *homestead* Mr Lawrence was perfectly aware of the fact, but he considered that high interest was a less evil than the expropriation of the cultivators from their land if they were allowed to alienate it" It is obvious that the word homestead is here used in a wide popular sense meaning ancestral lands The title given by the new settlement to the cultivators which cannot be pledged as security for debt is the title of the cultivated land, not of the mansions The evil mentioned is the expropriation of the cultivators from their lands not from their houses Of course I do not quote the extract for any other purpose than to show how the word is used in a popular journal of the present day But it is a striking instance of the wideness and vagueness of the popular sense of the word. In brief, it is a farm, but that is just the sense which is excluded from the section now under consideration, which deals with the farm land in other words As an illustration of the way in which the meaning of the word *stead* has been developed from its primary sense of *place* to a *farm*, I may refer to Jamieson's Etymological Dictionary of the Scottish Language (1882) where the author under 'stead steading, steddyng' gives first the primary meaning of *stead* and quoting Rudiman says that it is commonly taken for the foundation or ground on which a house or such like stands, or the tract or impression made in the earth and appearing when they are taken away then comes the secondary meaning, a farm house and offices, and thirdly the word is used for a farm itself

An apt illustration of the sense in which the word *homestead* has been interpreted *in the very Act now under consideration* is to [606] be found in Baden Powell's Manual of the Land Revenue systems and the Land Revenue of British India (1882) The learned author writing of the bhagdari and narvadari tenures says (p 386) "The main object of the Act of 1862 was to prevent confusion being introduced by the sale or mortgage of the sites for habitation (ghabhan) *and the homestead land belonging to each share or bhag (apart from the share in the village land)*, and also to prevent portions of the land other than recognized shares being sold, and so obliterating the ancient and recognized divisions and sub divisions" The same passage is repeated in the edition of 1892 Vol III, p 268 the words in brackets being omitted In both cases the sense is the same it is evident that the author like Sir R COUCH and Mr Justice NEWTON was clearly of opinion that the Act did not forbid the alienation of a bhagdar's house apart from the site

One word as to the official translation of the word "homestead."—Of course it has no legislative sanction if it had, there would be an end of the question But I have shown the highest authority—*Jetha Parkha* v *Ramchandra*, I L R, 16 Bom, at pp 697, 698,—in favour of consulting, though to a limited extent, the official vernacular version of an Act and in my humble opinion to assume that the Official Translator to Government must have mistranslated the word is in reality begging the question "Ghaitharni zamin" means and can only mean land on which houses stand

No doubt the affirmative answer to the question put by the referring Bench must tend to advance and not defeat the object of the Act for the greater must always include the less The attachment and sale by civil process which were endangering the permanence of the bhagdari and narvadari tenures may in some instances have covered the houses as well as the sites but it is evident that the danger to the joint village tenure would arise not from the sale of the materials of a house but from the introduction to the land of outsiders, not belonging to the bhag If the permanence of the tenure would not be endangered by the attachment and sale of the house apart from the site, then it seems to me somewhat of an assumption to say that because creditors must have attached houses and sites therefore home[607]stead in the preamble of the Act must mean houses as well as sites That is why I venture to doubt whether the Legislature intended to go further than the necessity of the case required Mr Baden Powell basing his remarks on Mr Pedder's well known report describes (p 583) how in these villages we have a proprietary body in possession of a certain area they build the village on a convenient site called in Guzerathi, *gam tham houses* and bits of land for their support &c Such a house built on a portion of a bhagdar's gabhan would be a house appurtenant or appendant to that bhag But the Act says (section 3) that it shall not be lawful to alienate and assign mortgage or otherwise charge or encumber *any* homestead &c, appurtenant or appendant to any such bhag apart or separately from any such bhag There is no limitation It is not enacted that only a bhagdar may not alienate charge or encumber, &c The official gabhan register makes no distinction between various sorts of houses

Were the matter *res integra* and were there ground for assuming that the object of the Legislature was simply to relieve a class generally from indebtedness or to prevent the bhagdars from being turned out of house and home" the doubts which I have indicated might not have been expressed But on the contrary the Act expressly contemplates the bhagdars estates, including the homesteads being sold or mortgaged so long as the bhags are not broken up It is unnecessary however, to pursue the subject further as I understand that my learned colleagues have no doubt upon the point, the affirmative answer to the question referred must in future govern this and other similar cases arising under the Act

*Order accordingly*

*Note* —From the records of the High Court it appears that the draft of the Act which eventually became Bombay Act VI of 1862 was prepared by the Judges of the Sudder Dewanee Adawlut (Messrs R Keays W Hart and H Hebbert) in accordance with a request by Government on a reference with regard to the case of *The Collector of Broach* v *Jeysebhoee Kooshal* (1 Morris, 132)

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## [608] APPELLATE CIVIL

*The 3rd February, 1896*

PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE AND MR JUSTICE PARSONS

Gopal Sadashiv Palekar and others . . . . (Original Plaintiffs) Appellants

*versus*

Nageshwar Sitaram Phansalkar and others . (Original Defendants) Respondents *

*Khoti Settlement Act (Bombay Act I of 1880) —Survey register - Defendants entered by Survey authorities as occupancy tenants —Suit by plaintiffs for reversal of Survey Officer's decision and for declaration that defendants were ordinary tenants Decision of Survey Officer as to tenure not final Khot holding dhara land*

A Survey Officer under the Khoti Settlement Act (Bombay Act I of 1880) having determined and entered in the survey register that the defendants held the lands in suit as occupancy tenants the plaintiffs who were the khots of the village objected to the decision and brought a suit for its reversal and to obtain a declaration that the lands were held by them on the dhara tenure and that the defendants were ordinary tenants thereof The Judge dismissed the suit in appeal holding that the survey entry was conclusive proof of the tenant's liability and that it gave no cause of action to the plaintiffs

*Held* reversing the decree that the decision of the Survey Officer as to tenure is not final and that a suit like the present will lie

A khot of a village can hold dhara land

SECOND APPEAL from the decision of T Walker, District Judge of Ratnagiri, reversing the decree of Rao Saheb Parashram B Joshi, Subordinate Judge of Rajapur

The plaintiffs sued for a declaration that they were dharekaris of the lands in dispute which were situate in the village of Tervan alleging that there was no khoti land in the village that notwithstanding that the whole village was dharekari the defendants had fraudulently induced the Special Assistant Collector to apply the rules of the Khoti Act (Bombay Act I of 1880) to the village and got the lands entered as khoti and themselves as occupancy tenants

The Subordinate Judge found that the plaintiffs were owners of the lands in dispute and allowed the claim in the terms of the prayer of the plaint, which was that (a) the lands be entered in the Government books as plaintiffs dhara, that (b) defendants name be erased, and that (c) it be declared that there were no khoti rights in the lands and the Khoti Act did not apply

[609] The following is an extract from the Subordinate Judge's judgment —

"The village of Tervan is dharekari, but there are hereditary khots whose duty it is to collect Government revenue from dharekaris and credit it to Government, and for which the hereditary khots obtain certain remuneration The khots of dharekari villages are like *patils* in the villages above the Ghats They have no right to claim any more *vasul* from dharekaris beyond that fixed by Government These khots are like *talatis*"

On appeal by the defendants the Judge reversed the decree The following are extracts from his judgment —

"That plaintiffs are in the position of the khots of this village is proved by their having in that capacity seized upon the khota of Hari Narayan Palekar, who died without heirs,

* Second Appeal, No 708 of 1893

instead of allowing it to pass to Government under section 72 of the Land Revenue Code The Khoti Act, therefore, applies to this khoti village, and the Survey authorities have rightly framed registers showing the various tenants as dharekaris, quasi dharekaris and occupancy tenants. Their entry is conclusive proof of the tenant's liability under section 17 of the Khoti Act.

"The relief sought by plaintiffs must thus be refused For, while the Collector will amend the record in accordance with any decree obtained by the parties the survey entry gives no cause of action I cannot therefore order plaintiffs' name to be entered in his books, nor defendant's to be erased and as above shown, the Khoti Act does apply

"As regards the declaration that plaintiff are dharekaris I am of opinion that it also must be refused as not arising between the parties A dharekari is a person who holds land, in perpetuity or for thirty years on payment of Government assessment to the khot It would be absurd to pass a decree that plaintiffs are their own dharekaris and this is not what they really want They probably wish to declare that defendant have no rights in the land, but they do not state whether defendants are tenants at will yearly tenants, trespassers or what they are and on this ground also I am justified in throwing out the claim. It discloses no cause of action, and there is besides no demand for consequential relief "

The plaintiffs preferred a second appeal

*Ganesh K Deshmukh*, for the Appellants (Plaintiffs)

*Manekshah J Taleyarkhan* for the Respondents (Defendants)

**Parsons J** The Assistant Judge has not gone into the merits of the appeal but has dismissed it on the preliminary point that the suit would not lie In this he is wrong The Survey Officer under the Khoti Settlement Act, 1880, had determined and entered in the survey register that the defendants held the lands in suit as occupancy tenants The plaintiffs objected to that decision and entry, and they brought this suit [610] for its reversal and to obtain a declaration that the lands are held by them on the dhara tenure and that the defendants are ordinary tenants thereof

That the decision of the Survey Officer as to tenure is not final, and that such a suit as the present will lie was hardly disputed before us and has now been settled by the Full Bench decision in *Antaji Kashinath v Antaji Mahadev*, P J for 1896 p 1 I L R, 21 Bom 480 The fact that the plaintiffs are the khots of the village does not seem to us to affect the case for a khot can hold dhara land just as any one else can The Subordinate Judge disposed of the suit on its merits and the Assistant Judge should have heard the appeal also on its merits and determined the real point at issue between the parties, *viz*, whether the lands are the dhara lands of the plaintiffs or whether the defendants are the occupancy tenants thereof within the meaning of the Khoti Settlement Act

We reverse the decree of the lower Appellate Court and remand the appeal for legal disposal Costs to be costs in the cause.

*Decree reversed*

[21 Bom 610]

## APPELLATE CIVIL

*The 3rd February, 1896*

PRESENT

MR JUSTICE PARSONS AND MR JUSTICE CANDY

Purshotamdas Maneklal (Original Plaintiff) Appellant

*versus*

Bai Mani . (Original Defendant) Respondent*

*Husband and wife—Restitution of conjugal rights—Defence—Plea of impossibility of sexual intercourse Legal defences to suit for restitution—Judge has no discretion to refuse decree except when legal plea is proved*

A plea by a wife that sexual intercourse with her is impossible owing to her incurable disease or physical malformation is not in itself a good defence to a suit by the husband for restitution of conjugal right

A Judge has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife in refusing to return to live with her husband, and he cannot abstain from passing a decree in favour of a plaintiff spouse because he considers that it would not be for the benefit of either party that the decree should be granted

[611] *Dadaji v Rukmabai* I L R 10 Bom 301 followed

Where, therefore the Lower Appellate Court found that there was no cruelty but that the suit was brought by the husband as a counter move to defeat the claim of the wife for separate maintenance and a considerable time after she had ceased to live in his house and because on the last occasion when she returned to live with him she left the house crying,

*Held*, that these circumstances were not sufficient in law to justify the Court in refusing the husband's claim for restitution of conjugal rights

SECOND APPEAL from the decision of T Hamilton, District Judge of Surat, in Appeal No 99 of 1893

Suit by a husband for restitution of conjugal rights The defendant pleaded cruelty and that the plaintiff had superseded her by marrying a second wife

The Subordinate Judge passed a decree for the plaintiff The defendant appealed and in appeal urged (*inter alia*) that she might not to be compelled to live with her husband as by reason of her state of health sexual intercourse was impossible

The District Judge of Surat reversed the decree of the lower Court and dismissed the suit In his judgment he said —

"Defendant appeals on the ground (*inter alia*) that she ought not to be compelled to live with her husband as sexual intercourse is impossible and as her state of health is bad

"Although this plea was not specifically raised in the lower Court, it can, I think be allowed in appeal as the facts now alleged by the defendant were admitted by plaintiff in the lower Court

"The marriage has admittedly never been consummated owing to some physical malformation of the defendant They have now been married some twelve years and defendant is said to be twenty five years of age Doctors have been consulted, and the case appears to be a hopeless one Consequently plaintiff has taken a second wife

"I am not aware if a marriage between Hindu adults is voidable, as it is amongst Christians by reason of a physical impossibility to sexual intercourse A plea such as is now raised by defendant is a good answer to a suit for restitution of conjugal rights in England.

* Second Appeal, No 245 of 1895.

It is more than enough, for it is a plea that the marital relation does not and never did exist There is I believe no decision of any High Court on the point now raised by defendant As suits for restitution of conjugal rights are foreign to Hindu law, strictly speaking, though allowed now a days I think I shall be justified in adopting the rule of canon law, and in holding that defendant cannot be compelled to live with her husband "

The plaintiff appealed to the High Court

*Shivram Vithal Bhandarkar* for the Appellant (Plaintiff)

**[612]** *Vagindas Tulsidas* and *Ganpat Sadashiv Rao*, for the Respondent (Defendant)

The following authorities were cited *Ricketts* v *Ricketts* 35 L J, P and M, 92 *Dadaji* v *Rukmabai* I L R 10 Bom 301 *Scott* v *Scott* 34 L J P and M, 23 *B* v *M* 2 Robert 580 *P* v *S* 37 L J P and M, 80, *Norton* v *Seton* 3 Phill 147 *A* v *B* 31 L J P and M 81 *Lewis* v *Hayward* 35 L J P and M, 105 *Inda* v *Kaunsilia* I L R, 13 All 126

**Parsons J** This suit was brought by the appellant for restitution of conjugal rights against his wife the respondent The defence was cruelty The Subordinate Judge held this unproved and passed a decree for the appellant The District Judge on appeal took up one only of the grounds of appeal and disposed of the appeal on it though it was a plea not raised in the Court of First Instance He considered that he could do this because the facts alleged by the defendant were admitted by the plaintiff in the lower Court We are of opinion that the facts were not so clearly admitted as to justify the neglect to follow the proper practice *viz* to raise an issue on a new plea and decide it only after allowing the parties a full opportunity of adducing evidence thereon The District Judge assumes physical malformation and that the case is a hopeless one The Subordinate Judge says only that the defendant has some incurable disease about her hip bone No medical evidence has been taken No issue was framed We are therefore at a great disadvantage in dealing with the case

The only point we can raise is this *viz* Is a plea by a wife that sexual intercourse with her is impossible owing to her incurable disease or physical malformation in itself a good defence to a suit by the husband for restitution of conjugal rights? In that point we decide in the negative In Browne and Powles work on Divorce (5th Ed) at p 141 it is stated that the impotency of the petitioner with a prayer for a decree of nullity is clearly an answer (to a suit for restitution of conjugal rights) as that sets up a denial of the marriage (*Ricketts* v *Ricketts* 35 L J P and M 92) And so **[613]** also would be any other ground for nullity of marriage The last sentence clearly means a ground on which the defendant in the suit could ask for a decree of nullity It is obvious that a defendant could not set up his or her own adultery or cruelty as a defence to the suit This is clearly laid down in *Dadaji* v *Rukmabai*, I L R, 10 Bom, 301 where SARGENT C J concludes his judgment in these words "Civil Courts cannot with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances) recognise any plea of justification other than a marital offence by the complaining party as was held to be the only ground upon which the Divorce Courts in England would refuse relief in *Scott* v *Scott* 34 L J P and M 23" At page 192 of the same work it is said "If at the time of its solemnization either of the parties to the marriage is impotent the marriage is voidable *ab initio* and the Court may pronounce a decree declaring it null and void *B* v *M* 2 Robert, 580 and *P* v *S*, 37 L J, P and M 80 But a suit for nullity on this ground can only be brought by the party who suffers the injury Therefore the impotent party cannot sue on the ground of his own impotency —*Norton* v.

*Seton*, 3 Phill, 147, *X* v *Y*, 34 L J, P and M, 81, *Lewis* v *Hayward*, 35 L J, P and M, 105' Marriage does not exist solely for sexual intercourse. The reciprocal duties and obligations of the husband and wife under Hindu law will be found exhaustively discussed by MAHMOOD, J, in the case of *Binda* v *Kaunsilia*, I L R, 13 All 126 It would manifestly be wrong to allow one of the parties to withdraw from the performance of the duties and obligations binding on him on a ground which gives him no just cause of complaint and of which the other party does not complain

We reverse the decree of the Lower Appellate Court and remand the appeal for a legal disposal on the merits Costs to be costs in the cause

*Decree reversed and case remanded*

On remand the District Court reversed the decree of the [614] Subordinate Judge and dismissed the plaintiff's claim The following is an extract from the judgment

"I agree with the view of the lower Court that on the evidence in the case legal or gross cruelty is not proved by defendant against plaintiff Nor has this point been seriously pressed in appeal The main contention for defendant has been that in spite of gross cruelty not being proved there are sufficient reasons to justify the Court in refusing to compel defendant to return to her husband's house * * * It is admitted by the plaintiff himself that although he and defendant were married some eleven years before this suit defendant had only lived with him four or five months since the marriage and that she had been living with her father It is not denied that for all these years plaintiff made no provision for his wife Again the [illegible] This was in defiance of the rules of his caste and he was fined Rs 500 on this account by his caste The cause of this second marriage is clearly owing to the fact of the marriage between plaintiff and defendant never having been consummated [illegible] defendant's bodily defects It is true as pointed out by the High Court in their order of remand that marriage does not exist solely for sexual intercourse The fact however that this marriage has never, and, apparently can never be consummated has an important bearing on the *bona fides* or otherwise of plaintiff's present claim He has let the defendant live so many years away from him and admits that he is satisfied with his second wife It is only when defendant had instituted several proceedings against him in 1892 (e g. for maintenance and also a criminal charge of bigamy) that he was found bringing this present claim for restitution of conjugal rights Though before the Magistrate on 31st July 1892 plaintiff professed his willingness to receive his wife back again yet there can be no doubt (as held by the lower Court) that he did not treat her properly when she returned for defendant left the house crying at once as plaintiff admits Having regard to all these facts it may reasonably be inferred as urged for defendant that the present suit is not brought *bona fide* but as a counter move to defendant's claim for maintenance"

From this decision the plaintiff preferred a second appeal to the High Court S A 595 of 1896

*Shivram Vithal Bhandarkar*, for the Appellant (Plaintiff)

*Ramdatt Vithoba Desai* for *Nagindas Tulsidas*, for the Respondent (Defendant)

The following cases were cited in argument —*Laigi* v *Sheonarain*, I L R, 8 All, 78, *Bai Premkuvar* v *Bhika* 5 Bom H C Rep, 209, *Uka* v *Bai Heta*, P J, 1880 p 322 *Vasapa* v *Ningi* P J, 1878, p 6, *Dadaji* v *Rukmabai*, I L R, 10 Bom, 301 *Scott* v *Scott*, 34 L J, P & M, 23, *Binda* v *Kaunsilia*, I L R 13 All, 126.

[615] **Farran, C J** - We think that the District Judge is not correct in holding that the cases show that a Judge has a discretion in refusing a decree for restitution of conjugal rights for other causes than those which in law

justify a wife from refusing to return to live with her husband and that he cannot abstain from passing a decree in favour of a plaintiff spouse, because he considers that it would not be for the benefit of either side that the decree should be granted.

The law which we are bound to follow upon this subject is, we think, that laid down in *Dadaji* v *Rukmabai* I L R 10 Bom 301 where Sir CHARLES SARGENT, C J, says "It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties but as long as the law remains as it is, civil Courts in our opinion, cannot with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances) recognise any plea of justification other than marital offence by the complaining party as was held to be the only ground upon which the Divorce Courts in England would refuse relief in *Scott* v *Scott* 34 L J Pr. & M, 23" That decision was given after all the cases upon the subject which have been relied upon by the respondent before us and in the judgment of the District Judge had been cited and was a most carefully considered judgment. It has been adopted as the correct view in *Binda* v *Kaunsilia* I L R 13 All, 126 and ought we think to be considered as settling the law It would in our opinion, lead to great doubt and difficulty if any other view of the law were adopted

Here the District Judge has held that there was no cruelty but that the suit was brought by the husband as a counter move to defeat the claim of the wife for separate maintenance and a considerable time after his wife had ceased to live in his house and because on the last occasion when the wife returned to live with her husband she left the house crying These are not, in our opinion circumstances sufficient in law to justify the Court in refusing the plaintiff's claim The plaintiff by his pleader expresses his willingness to allow the defendant a separate room [616] in his house and to supply her with food and raiment On this undertaking being given, which should be embodied in the decree, we reverse the decree of the District Judge and restore the decree of the Subordinate Judge Each party to bear his and her own costs throughout

*Decree reversed*

NOTES

[In (1912) 13 I. C, 609 (Oudh) legal cruelty was found and so it was distinguished from this decision ]

[ 21 Bom 616 ]

APPELLATE CIVIL

*February 1896*

PRESENT

MR JUSTICE JARDINE, AND MR JUSTICE RANADE

Bhana . (Original Plaintiff) Appellant

*versus*

Chindhu. . . . . . (Original Defendant No 1) Respondent *

*Hindu law- Joint family—Family debt -Liability of family property—Manager—Decree against a manager Execution sale Auction purchaser*

Where family property is sold in execution of a decree obtained against a brother as manager of a joint Hindu family, for a family debt contracted by his father and himself and

* Second Appeal, No 1 of 1895

a brother the interest of all the members of the family passes to the auction-purchaser though they have not been joined as parties to the suit or to the execution proceedings.

SECOND APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge with appellate powers at Dhulia

Ramsing Megha, and Meherchand and Ramdas, two of his five sons, borrowed money from Chindhu the defendant, and passed an acknowledgment (*khata*) for the amount

Ramsing died and Ramdas being absent Chindu sued Meherchand on the khata and obtained a decree against him In execution of this decree Chindhu attached and sold certain fields which were the ancestral property of Meherchand and his four brothers The property was sold as Meherchand's

Ramdas, the absent brother subsequently sold his interest and that of his three minor brothers in these fields to the plaintiff who brought this suit against Chindhu to recover 4/5ths of the fields in question which Chindhu had bought at the execution sale

Both the lower Courts rejected the plaintiff's claim They found that Meherchand was manager of the joint family, and [617] that the debt for which Chindhu's decree was passed was a joint family debt

The plaintiff preferred a second appeal to the High Court

*S S Setlur* (with him *Trimbuck R Kotwal*) for the Appellant In this case only one of five brothers was sued Three of them were not parties in the transaction which gave rise to the claim The decree has been passed against one brother individually and not as manager of the family, and the property sold in execution was stated to be his property Under such circumstances the Court will not hold the family property liable—Mayne's Hindu Law, section 290 *Deendayal's case* L R 4 I A, 247

*Macpherson* (with him *V R Bolas*) for the Respondent —The case of *Daulat Ram* v *Mehr Chand*, I L R, 15 Cal, 70 has been interpreted in *Vishnu* v *Venkatrav* P J 1889, p 248 It has been found by both the Courts below that the father and his two adult sons borrowed for family purposes On Ramsing's death his eldest son Meherchand became the new manager *Jankibai* v *Mahadev*, I L R, 18 Bom, 147, is a much stronger case

**Jardine J** On the facts found, and in the absence of other special circumstances, I am of opinion that the decree should be confirmed with costs See *Vinuti* v *Babaji* I L R 15 Bom 87 *Vishnu* v *Venkatrav*, P J, 1889, p 24 *Pandu* v *Maniklal*, P J 1891 p 124 *Basaya* v *Fakirgavda*, P J, 1892 p 111 and *Jankibai* v *Mahadev* I L R, 18 Bom, 147

**Ranade, J** —The only point in dispute between the parties is the extent of the interest which the auction purchaser, who in this case is also the judgment creditor, acquired under his certificate of sale The acknowledgment (ruju khate) was passed by the father and two of his sons, and the father being dead, and one of the sons being absent, the suit was brought against the other son Meherchand, and in execution of the decree the property in dispute was sold as Meherchand's

The absent brother subsequently sold his own right and the rights of three minor brothers to the appellant, and on the strength of this purchase-deed, the present suit was brought to [618] recover 4/5ths share of the property which the judgment creditor had purchased, and of which he obtained possession through Court unopposed

Both Courts have found it as a fact that Meherchand was manager of the family of the five brothers, that the debt was a joint family debt, and

that the two adult sons joined with their father in executing the ruju khate. They also found that the sale was intended to be of the whole house, and not of Meherchand's share only therein

It is contended, however before us that as the four brothers were not parties, their interests could not be affected by the execution proceedings It was suggested by Mr Setlur, counsel for the appellant, that the general rule being that nobody should be prejudicially affected by the proceedings to which he was not a party, the Courts should be cautious not to extend the operation of such decrees to cases like the present, if they are not expressly covered by the rulings referred to as authorities on respondent's behalf Mr Mayne, however, has, after discussing all the decisions of the Privy Council on the point, summed them up by laying down six propositions in all and the third of these propositions states, on the authority of *Deendayal's case* L R 4 I A, 247, as also of two later cases *Baboo Hurdey Narain* v *Pundit Rooder Perkash Misser*, L R 11 I A, 26 *Nanomi Babuasin* v *Modun Mohun* L R, 13 I A, 1, "that a creditor may enforce payment of the personal debt of a father, not being illegal or immoral by seizure and sale of the entire interest of father and son, and it is not absolutely necessary that the sons should be parties to the suit or to the execution proceedings Of course the words right, title and interest of the judgment debtor are themselves ambiguous and it is a mixed question of law and fact to determine what the Court intended to sell, and what the purchaser expected to buy *Appaji* v *Krishna* I L R 15 Bom 13, and *Jankibai* v *Mahadev* I L R 15 Bom 117 In the absence of special circumstances showing a larger intention only the interest of the judgment debtor passes by the sale *Vasudev* v *Balaji* I L R 15 Bom, 87 The special circumstances must be such as those found [619] in *Nanomi Babuasin* v *Modun Mohun* L R 13 I A 1 *Meenakshi Naidu* v *Immudi Kanaka* L R, 16 I A 1 and *Mahabir Pershad* v *Moheswar Nath*, L R, 17 Cal, 589 As a representative case of the absence of such special circumstances, SARGENT C J referred to *Laboo Hurdey Narain* v *Pandit Rooder Perkash Misser*, L R 11 I A, 26

In the present case the debt was one in which the two adult sons joined with the father There was no concealment in the plaint why the father and the other brother were not joined as parties It is found as a fact that the son sued was manager of the joint family The debt was a family debt The sale realized the full price of the house, and the creditor obtained possession unopposed The appellant's deed of purchase was executed *pendente lite* and after the attempt to raise the attachment had failed There is thus no reason shown why the decree of the lower Court should be disturbed We dismiss the appeal and confirm the decree All costs on appellant

*Decree confirmed*

NOTES

[See also (1911) 33 All 72 P C, as regards the representative capacity of the managing members of joint Hindu families, (1900) 3 Bom L R 122 (1900) 3 Bom L R, 97 (1900) 16 C. P L R, 19]

[ 21 Bom 619 ]

## APPELLATE CIVIL.

*The 3rd February, 1896.*

PRESENT :

MR. JUSTICE JARDINE, AND MR. JUSTICE RANADE.

Narayan and another ...... .(Original Plaintiffs) Appellants

*versus*

Ganpat and others ..... .....(Original Defendants Nos 1 to 9) Respondents,*

and

Ganpat and others . .. .(Original Defendants Nos 1, 2, 3 and 9), Appellants

*versus*

Narayan and another... .... .....(Original Plaintiffs) Respondents.*

*Mortgage – Mortgage by joint owner – Mortgagee becoming purchaser of part of mortgaged property – Redemption – Redemption of part of mortgaged property – Apportionment of mortgage debt – Right of mortgagee to keep security entire – Right of purchaser of mortgagee's interest to sue for partition Joint possession – Practice*

When a mortgagee acquires by purchase the interest of some of the mortgagors, he acquires only a right to sue for partition after the redemption of the entire security has been effected He must first surrender or restore the mortgage security and then urge what title he may have acquired by the purchase

[620] The general rule is that a mortgagee has a right to insist that his security shall not be split up, but in the following cases there is no objection to do so and to rateably distribute the mortgage-debt —

(a) When the mortgagee does not insist on keeping the security entire.

(b) When the original contract itself recites that the mortgagors join together in mortgaging their separate shares

(c) When the mortgagee has himself split up the security, e. g, when he buys a portion of the mortgaged estate In this case he is estopped from seeking to throw the whole burden on that part of the property still mortgaged with him

In 1872 the plaintiffs' father (Khushal) and brother (Bapu) mortgaged seven lots of land with possession to the father of defendants Nos 1, 2, and 3 Four of these lots were subsequently sold to defendants Nos 4 to 8 with the consent of the mortgagees, who continued in possession of the remaining three lots In 1878 in execution of a decree, Bapu's interest in these latter three lots was sold and was purchased by defendants Nos 1, 2 and 3 In 1889, the defendants Nos 1, 2 and 3 sold these three lots to defendant No. 9. In 1891 the plaintiffs (sons and brothers of the original mortgagors) sued to redeem all the lands comprised in the mortgage of 1872 The first Court as to the first four lots held that defendants Nos 4 to 8 had been in adverse possession of the first four lots for more than twelve years and that as to them the suit was barred. As to the remaining three lots it passed a decree for redemption of the plaintiffs' three-fourths share of the lands and directed that on payment within six months by them of Rs 500 to defendant No. 9 (who stood in the place of defendants Nos. 1, 2 and 3) they should be put in possession of the lands jointly with defendant No 9. In appeal the decree was confirmed as to the first four lots, but as to the remaining three lots the Judge found that the mortgage debt had been paid and that a sum of Rs. 348-5 0 was due from the mortgagees in possession (defendants Nos. 1, 2, 3 and 9) to the plaintiff He, therefore, ordered payment of three fourths of this amount by defendant No. 9 to plaintiffs, and directed

* Cross Second Appeals, Nos. 575 and 625 of 1893.

that they should be put in possession of their three fourths share of the lands jointly with defendant No 9 On appeal to the High Court as to the right to redeem the said three lots,

*Held* that the plaintiffs were entitled to redeem the whole of the said three lots which had been admittedly mortgaged in 1872 and not merely a three fourths share thereof and were also entitled to the whole of the surplus sum of Rs 348 found due by the mortgagees in possession

*Held* also that defendant No 9 who had acquired from the mortgagees (defendants Nos 1 2 and 3) the equity of redemption in part of the mortgaged property was not entitled to possession of his share jointly with the plaintiff The mortgaged property should first be restored to the plaintiffs and then defendant No 9 might bring a separate suit for partition

SECOND APPEALS from the decision of Rao Bahadur N N Nanavati First Class Subordinate Judge, A P at Dhulia

Suit for redemption The land in question consisted of seven lots which in 1872 had been mortgaged with possession by the [621] plaintiffs father and brother (Khushal and Bapu) to one T the father of defendants Nos 1, 2 and 3

In the same year one of the lots was sold by the mortgagors with the consent of the mortgagee to defendants No 4 and 5 similarly another was subsequently sold in the same year to defendant No 6 and a third to defendant No 7 and in 1876 a fourth lot was sold to defendant No 8

The three remaining lots remained in the possession of the defendants No 1 2 and 3 (the sons of the original mortgagee) In 1878 the mortgagors interest in them was sold in execution of a decree against them and it was purchased by defendants Nos 1 2 and 3 who duly obtained formal possession, being already in possession as mortgagees This decree was against Khushal and Bapu but in the certificate of sale it was stated that what was sold was the right title and interest of Bapu and in the list of property which had been attached in execution these lands were also mentioned as belonging to Bapu

In 1889 defendants Nos 1 2 and 3 sold these latter three lots to defendant No 9

In 1891 the plaintiffs (the sons and brothers of the original mortgagors) brought this suit for the redemption of all seven lots of land comprised in the mortgage of 1872

Defendants Nos 4 to 8 pleaded adverse possession for more than twelve years and that the suit was barred by limitation

Defendants Nos 1 2 and 3 as to the four lots sold to defendants No 4 to 8 pleaded limitation, and as to the three lots sold to defendant No 9 they contended that the plaintiffs right to redeem had been extinguished by the execution sale at which they had purchased the mortgagors equity of redemption

The Subordinate Judge held that as to the four lots held by defendants Nos 4 to 8 the plaintiffs claim was barred by limitation As to the remaining three lots, he held that by the sale in execution one fourth share therein had passed to the purchasers (mortgagees) and that the plaintiffs (mortgagors) were, therefore, only entitled to redeem three fourths jointly with defendant No 9 He ordered, therefore that the plaintiffs might redeem on payment within six months of Rs 500 to [622] defendant No 9 who stands in the place of the mortgagees (defendants Nos 1 2 and 3) together with his costs of this suit in satisfaction of the mortgage debt due on three fourths of the fields mentioned in the plaint On payment being made within the aforesaid period, the plaintiffs will be put in possession of their three fourths share in the fields jointly with defendant No 9"

On appeal the Court confirmed the decree of the lower Court as to the four lots held by defendants Nos 4 to 8, but as to the three remaining lots he

found on taking the accounts that the mortgage-debt had been paid off, and that a surplus of Rs. 348-5-0 was due by the mortgagees in possession (defendants Nos. 1, 2 and 3) to the mortgagors (plaintiffs). He, therefore, ordered as follows:—

"The defendant No. 9, who stands in the place of the mortgagees (the defendants Nos 1 to 3), must, therefore, pay three-fourths of this surplus to the plaintiffs over and above the restoration of three-fourths of these three fields by him to them * * * Plaintiffs be put in possession of their three-fourths share therein jointly with the defendant No. 9. * * "

From this decree the plaintiffs appealed to the High Court, and the defendants Nos. 1, 2, 3 and 9 filed a cross appeal

*Visaji* and *Balaji Abaji Bhagvat* for the Appellants (Plaintiffs) :—The plaintiffs are entitled to redeem the whole of the three lots in question and not only three-fourths, and defendant No 9 is not entitled to joint possession with them. He stands in the place of defendants Nos 1, 2 and 3, the mortgagees. They purchased the right of Bapu at the execution sale. Bapu had an interest jointly with the plaintiffs in these lands The purchase by the defendants of his interest gave them only a right to sue for his share by partition after all the lands had been redeemed. Their purchase of this share did not affect the right to redeem the whole security given by the mortgage of 1872. Whatever right they had, is vested now in defendant No. 9, but that right can only be exercised after redemption of the whole mortgage security - *Naro* v. *Vithalbhat*, I. L R., 10 Bom, 648, *Mora Joshi* v *Ramchandra*, I. L. R., 15 Bom, 24.

**[623]** *Scott* and *Daji Abaji Khare* for Respondents (Defendants Nos. 1, 2, 3 and 9). -By the execution sale the whole interest in the three lots in dispute passed to defendants Nos 1, 2 and 3. The decree was against both Khushal, the father of the plaintiffs, and Bapu, their brother, and the interest of both passed by the sale. The land was either joint family property standing in Bapu's name or it was Bapu's exclusive property. In either case the whole interest was sold to the purchasers *Hari Vithal* v *Jairam Vithal*, I L. R, 14 Bom, 597. The mortgagors themselves severed the security by selling part of it to third persons with consent of mortgagees.

*Visaji* in reply —Both the lower Courts have found that the interest of the plaintiff's father Khushal was not sold at the execution sale and that Bapu was not the manager of the family, as Khushal was alive at the date of the sale--*Appaji Bapuji* v. *Keshav*, I. L R, 15 Bom., 13 at p. 19, *Maruti Sakharam* v. *Babaji*, I. L. R., 15 Bom., 87.

**Ranade, J.** - These are cross appeals from the decision of the First Class Subordinate Judge of Dhulia rejecting the original plaintiffs Nos. 1, 2's claim for the redemption of four lands, and awarding them joint possession with defendant No 9 of a three fourths share in the remaining three lands, and directing defendant No 9 to pay to plaintiffs a three-fourths share in Rs. 348-5-0, being the surplus left after satisfying the mortgage-debt.

The mortgage of which redemption was sought was effected by plaintiffs' father and their brother Bapu in 1872, and included seven lands in all, but four of these had been alienated by Bapu to defendants Nos. 4—8 more than twelve years before the institution of the suit, which suit was accordingly held to be time-barred in respect of these lands. Bapu's right, title and interest in respect of the remaining three lands were purchased in an execution sale by defendants Nos. 1, 2, 3, who represented the original mortgagee, and were subsequently in 1889 transferred by them to defendant No. 9. There was no bar of time in respect of this part of the claim, and both the lower Courts have held that

these sale transactions affected only Bapu's share, and plaintiffs [624] were accordingly allowed joint possession with defendant No 9 of their three fourths share in these lands It is from this decree that both plaintiffs and defendants Nos 1, 2, 3 and 9 have preferred the present cross appeals, plaintiffs contending chiefly that they were entitled to redeem the whole of these three lands, while the defendants contended that the sale of Bapu's interest transferred to them the whole interest of all the mortgagors and not Bapu's share only

In regard to the contention of the plaintiffs (appellants in Second Appeal No 575 of 1893), I feel satisfied that the lower Court of appeal was in error in awarding joint possession of a three fourth share in the three lands to the plaintiffs, and directing the defendant No 9 to refund to plaintiffs three fourths share in the surplus left after satisfying the mortgage debt If the plaintiffs had a right to redeem the mortgage of these lands that right entitled them to sue for the redemption of the whole of these lands Indeed if they had brought the suit in the first instance to redeem only their share in the mortgaged lands such a suit splitting up the mortgage security could not have been maintained under the rulings of this Court which have held that when a mortgagee acquires by purchase the interests of some of the mortgagors he acquires only a right to sue for partition after the redemption of the entire mortgaged property has been effected He cannot resist the claim for redemption based on the mortgage admitted by him He must first surrender or restore the mortgage security and then urge what title he may have acquired by purchase

In the present case the respondent defendants did not claim any equitable relief by way of contribution and apportionment Their defence was that the transfer of Bapu's interest made them owners of the entire property Plaintiff appellants also claimed to redeem the whole and not any portion of the mortgaged lands The parties having thus joined issue on this basis both the lower Courts were in error in apportioning the mortgage security and debt in the way they have done The burden of bringing a partition suit has been thus cast upon the plaintiff appellants, when it should properly fall upon the mortgagees and their assigns

[625] Looking at the authorities it will be found that the view taken by the Madras High Court in *Ramu* v *Kuttu* I L R 6 Mad 61 has been expressly dissented from in several decisions of this Court The Madras High Court held in the case noted above that in such cases the mortgagor must first by a regular partition suit ascertain his share before he sues for redemption The judgment cites no authorities and it does not appear that the peculiar incidents of a mortgage contract were fully considered So far back as 1876 it was held by a Division Bench of this Court (MELVILL and NANABHAI HARIDAS, JJ) that such a mortgagee must first restore the security and it will be then open to him in another suit to establish any rights he may have acquired by purchase—*Santaji* v *Bayaji* P J for 1876 p 17 This view of the law was affirmed in *Alikhan* v *Mahamadkhan* I L R 10 Bom 658 which ruling is of special interest, for it makes a clear distinction between the mortgagee purchasing a portion of the equity of redemption, and a mortgagee succeeding to it by right of inheritance While in respect of the mortgagee's rights as purchaser, it was ruled that he should surrender the security and then establish his claim as purchaser, in respect of the rights which devolved on him by inheritance, the right of contribution and apportionment in redemption was upheld This same view was again given effect to in *Bhikaji* v *Lakshman* I L R, 15 Bom, 27 The authorities bearing on this subject were fully considered in *Naro* v *Vithalbhat* I L R 10 Bom 648 and again in *Vishnu* v *Venkatrav*, P J for 1889, p 248, and finally in *Mora Joshi* v *Ramchandra*, I. L R, 15 Bom, 27,

in which last case, as also in *Bhikaji* v *Lakshman*, I L R, 15 Bom, 27, the ruling in *Vamu* v *Kuttu* I L R, 6 Mad, 61, was expressly dissented from

Of course there are special circumstances in which the Courts have allowed some of the mortgagors or part purchasers of the equity of redemption to redeem a part of the mortgage security on payment of a proportion of the mortgage debt The Privy Council case *Nawab Azimut Ali Khan* v *Jowahir Sing*, 13 M I A 404 repre [626] sents one class of such cases In that case the suit was brought by the purchaser of one out of the sixteen mouzahs mortgaged to redeem his purchase and the mortgagee in that case did not insist on the redemption of the whole mortgage The general rule appears to be that a mortgagee has a right to insist that his security shall not be split up *Huricchur Singh* v *Dabee Sahoy* Cal W R 1864 p 260 *Moulvie* v *Julboo* Cal W R 1864, p 75,— but of course (1) when he does not insist on such a right *Asanshb* v *Vamana*, I L R 2 Mad 223 *Ram Kristo* v *Mussamut Ameeroonissa* 7 Cal W R p 314 *Mirza Ali* v *Jarasundari* ? Cal W R p 150 *Kesree* v *Seth Roshun Lal* 2 N W P 4 or (2) where the original contract itself recites that the mortgagors join together in mortgaging their separate shares or (3) where the mortgagee has himself split up the security *Kunj Mal* v *Puran Mal* I L R 2 All 565 *Marana* v *Tenlyala* I L R 3 Mad 230 *Nawab Azimut Ali Khan* v *Jowahir Sing* 13 M I A 404 *Nathu Sahoy* v *Lalah Amir* 15 Beng L R 303 *Mahtab Rai* v *Sant Lal* I L R 3 All 276 there can be no objection to rateably distribute the mortgage debt In the last class of cases the mortgagee himself splits the security by buying a portion of the estate mortgaged and he is very properly held to be estopped from seeking to throw the whole burden on the part of the property still mortgaged with him It was on this principle that in the present case the mortgage charge has been apportioned between the four lands sold away with the mortgagee's consent by the mortgagor Bapu and the remaining three lands Lastly contribution was allowed in the case where the mortgagee succeeded by inheritance to a part of the mortgaged estate *Ilikhan* v *Mahamadkhan* P J for 1881 p 319

In so far as the three lands in dispute are concerned the facts of the present case do not fall within any of the special classes noted above, and the lower Courts were therefore not justified in departing from the current of decisions which require mortgagees to restore possession of the mortgaged property and refer them to a separate suit for partition

[627] The respondents pleader Mr Khare admitted that the decree for joint possession was not formally correct but he contended that the informality was not of a sort which justified interference in second appeal I cannot for reasons set forth above accept this view and the decree must be accordingly amended

In the other appeal Mr Scott for defendant Nos 1 to 3 and 9 contended that the transfer of Bapu's interests conveyed the whole property This contention was made to rest on two inconsistent grounds namely, (1) that these three properties were Bapu's self acquired property, and, (2) that Bapu was manager of the joint family and his acts bound them all Both the lower Courts have however found distinctly that the properties were not self acquired, and that Bapu's interests sold were not those of a manager of the joint family We must therefore disallow the contention and reject this appeal

In Appeal No 575 we vary the decree of the lower Court, so far as to direct that defendant No 9 should restore the three lands in dispute Nos 9, 17 and 19 of Mahalkhedi into plaintiffs possession and pay Rs 348 5 0 to the plaintiffs The respondents Nos 1, 2 3 9 should pay appellants costs of this appeal, and bear their own costs, and pay the respondents' costs in Appeal

No 625 Appellants in appeal No 575 to pay the costs of the respondents-defendants Nos. 4 to 8

**Jardine, J.** —I concur in holding that the authorities just cited cover the first point argued and in the decree proposed

*Decree varied*

## NOTES

[See, however, (1915) 26 I C 191 (Mad) (1911) 11 I C 100 (Punjab)]

## [628] APPELLATE CIVIL

*The 4th February 1896*

PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE AND MR JUSTICE PARSONS

Trikamlal Jamnadas . (Original Defendant) Applicant

*versus*

Kalidas Dalpatram (Original Plaintiff) Opponent *

*Contract —Sale of goods Contract to supply goods at fixed price Duty imposed on material subsequently to date of contract Liability to supply goods Indian Tariff Act (VIII of 1894) Sec 10 †*

On 2nd November 1891 the defendant contracted to supply the plaintiff with a certain quantity of dhotars made of European or Egyptian yarn No 80 at the rate of 225 pairs each month for a period of one year In January 1894 an import duty of five per cent was imposed by Government on the yarn The defendant thereupon declined to supply the dhotars unless the plaintiff paid the duty in addition to the contract price

*Held* that under section 10 of Act VIII of 1894 the defendant could call on the plaintiff to pay the duty which he had paid on the yarn that is he could add so much to the contract price as would be equivalent to the duty which he himself had paid The question was whether the dhotars supplied to the plaintiff were actually made out of yarn on which duty had been paid by the defendant

APPLICATION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) against the order of Rao Bahadur Krishnamukharam A Mehta Judge of the Court of Small Causes at Ahmedabad

On the 2nd November 1891, the plaintiff and the defendant entered into a contract, under which the defendant agreed to supply to the plaintiff dhotars for one year at the rate of 225 pairs per month The dhotars were to be made of European or Egyptian yarn woven in the defendant's mill

* Application under extraordinary jurisdiction No 216 of 1895

† Section 10 Act VIII of 1894 —"In the event of any duty of custom or excise on any article being imposed, increased, decreased or remitted after the making of any contract for the sale of such article without stipulation as to the payment of duty where duty was not chargeable at the time of the making the contract or for the sale of such article duty paid where duty was chargeable at that time,—

"(a) If such imposition or increase so takes effect that the duty or increased duty as the case may be, is paid the seller may add so much to the contract price as will be equivalent to the duty or increase of duty and he shall be entitled to be paid and to sue for and recover such addition and

"(b) If such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the purchaser may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty and he shall not be liable to pay or be sued for or in respect of such deduction "

In January 1895 an import duty of five per cent was levied on the yarn under article 44, Schedule IV, of the Indian Tariff [629] Act (VIII of 1894) as amended by the Cotton Duties Act (XVI of 1894) The defendant thereupon declined to supply dhotars unless the plaintiff paid an increased price The plaintiff then brought this suit for Rs 300, damages for breach of contract, alleging that for the four months from 2nd November 1894, till the 2nd March 1895, the defendant ought to have supplied 900 dhotars, but had only supplied 167 during that period

The Judge found the defendant had committed a breach of the contract and was liable for damages He, therefore, passed a decree in plaintiff's favour for Rs 256 2 0 The following is an extract from his judgment -

"The defendant admits in his deposition that on the date of the agreement with the plaintiff he had with him 1 000 lbs of such yarn in his possession and that he ordered out 4 000 lbs more for preparing the dhoties in his mill He further stated that these 4 000 lbs of yarn would be sufficient to prepare three thousand pairs of dhoties At that rate the 1 000 lbs of yarn were quite sufficient for 750 pairs The plaintiff's pleader has examined the defendant's account and has found out that 1 918 lbs of such yarn was received by the defendant before the date of plaintiff's agreement and defendant's pleader admits this It would thus appear that the defendant had with him sufficient quantity of European or Egyptian yarn for 1 500 pairs of dhoties on which he had to pay no duty During the first four months of the contract the defendant had to supply to the plaintiff 900 pairs only, whilst he had yarn sufficient for 1,500 pairs yarn for which no duty was paid The plaintiff, therefore, is not liable to any duty so far as this claim is concerned

'Supposing however that the defendant had had to pay an import duty on all the yarn that was required for the preparation of the dhoties agreed to be given to the plaintiff still the plaintiff cannot be liable for that The defendant's pleader relies on section 10 of the Tariff Act, (see *ante* p 628) Here the contract was for the sale of dhoties and not for the sale of yarn The article contracted to be sold was dhoty and not yarn whilst the duty was leviable on yarn The schedule does distinguish the yarn from the piece goods, and I do not think the defendant can claim to recover from the plaintiff any duty that he might have to pay for the yarn

The defendant applied to the High Court under the extraordinary jurisdiction, contending that the plaintiff was liable for the duty that there was no understanding that the yarn in stock was to be used in manufacturing the dhotars to be supplied to the plaintiff that the defendant was not bound at once to buy in at the date of the contract all yarn required for the plaintiff's dhotars and that the defendant was entitled to buy in from time to time such yarn as might be required for the said dhotars A [630] *rule nisi* was issued calling on the plaintiff to show cause why the decree should not be set aside

*Chimanlal H Setalvad*, appeared for the Applicant (Defendant) in support of the rule

*Manekshah J Taleyarkhan*, appeared for the Opponent (Plaintiff) to show cause

**Farran, C J** —The subject of the contract was Egyptian yarn made up into dhotars Upon this article a duty was imposed by Act XVI of 1894, Schedule IV, article 44 Section 10, therefore, of Act VIII of 1894 would apply, and the applicant could call on the opponent to pay the duty paid, that is, he could add so much to the contract price as would be equivalent to the duty he had paid We think that the lower Court has not properly considered

the latter point The question is not whether the applicant had yarn in stock out of which the dhotais could have been made, but whether the dhotais were actually made out of that yarn or out of yarn on which duty had been paid by the applicant It is only in the last case that he could ask for an increased price.

We make absolute the rule, reverse the decree, and remand the case for a fresh trial with reference to the above remarks Costs to be costs in the cause

*Rule made absolute*

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**[21 Bom 630]**

## APPELLATE CIVIL

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*The 5th February 1896*

PRESENT

SIR C FARRAN KT CHIEF JUSTICE AND MR JUSTICE PARSONS

The Surat City Municipality (Original Defendant) Appellant*

*versus*

Ochhavaram Jamnadas (Original Plaintiff) Respondent

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*Municipality — District Municipal Act (Bombay Act VI of 1873) Sec 21, Cls 1 and 2 — Amendment Act (Bombay Act II of 1884) Sec 27 Cl 7, and Sec 32 Tax imposed by Municipality*

In 1891 the Municipality of Surat appointed a Committee to revise the taxation of the city proposing to reduce some of the existing taxes and impose others with a view (*inter alia*) of obtaining a better water supply for the city A scheme of taxation drafted by the Committee was subsequently adopted by the Municipality and it included a new house or property tax The Municipality then issued a notice with regard to this additional tax under the provisions of section 21 of Act VI of 1873 setting forth [631] the particulars of the proposed tax and requiring objections to be lodged within a fortnight from the date of the notice A number of objections were received which were laid on the table for twenty [illegible] days for perusal and consideration by the Municipal Commissioners At the end of that time a special meeting of the Commissioners was held at which it was resolved that the objections were invalid, and the scheme and the rules with regard to the levying of tax were forwarded to Government and were sanctioned The plaintiffs sued for an injunction restraining the Municipality from levying the tax contending that it was illegal on the grounds (1) that the [illegible] Municipality desirous of imposing the tax for any of the purposes [illegible] by the Act inasmuch as the Commissioners who passed the resolution to impose the tax did not know for what purpose the tax was to be imposed (2) that the resolution imposing the tax was illegal because the notice calling the meeting of the Commissioners which passed the resolution did not specify this tax as the object of the meeting (3) that the notice given under section 21 of Act VI of 1873 was bad as it did not state the purpose of the proposed tax (4) that the nature and the amount of the tax were not sufficiently stated in the notice (5) that the notice ought to have stated the mode in which the valuation of property for the purpose of the tax was to be made, (6) that the objections of the rate payers were not sufficiently considered (7) that it did not appear whether the tax was to be paid in advance or not and (8) that the assessment of the tax was made on a wrong basis

*Held*, that the purpose of the tax was sufficiently known to the Commissioners, (2) that the resolution imposing the tax was not invalid although the notice convening the meeting

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* Appeal, No 145 of 1895

did not specify the object of the meeting (3) that the notice need not specify the purpose of the tax (4) that as to the nature and the amount of the tax the notice was sufficient, as it stated that the amount would depend on the valuation of the property, (5) that the notice need not define the mode of valuation (6) that the objections were sufficiently considered, (7) that the tax was to be paid partly in advance (8) that the assessment would not affect the validity of the tax but would give a right of appeal to have the valuation set right.

*Held* therefore that the tax was legally imposed

APPEAL from the decision of Rao Bahadur V V Paranjpe, First Class Subordinate Judge of Surat

Suit for an injunction restraining the defendants from levying house-tax from the plaintiff The proceedings of the Municipality of Surat are regulated by the District Municipal Act (Bombay Act VI of 1873) and the Amendment Act (Bombay Act II of 1884) of which the following are the provisions material to this report

"Section 21 Clause 1 Every municipality desiring from time to time to impose any tax toll or other impost for the purposes of this Act shall give notice of such intention, and shall in such notice define the nature of the tax toll or impost the class of persons or property to be made liable thereto and the amount to be imposed

"Clause 2 Any inhabitant of the municipal district objecting to such tax toll or impost may, within a fortnight from the date of the said notice, send his objection in [632] writing to the municipality and the municipality shall take such objection into consideration and report their opinion thereon to the Government in Council

"Section 27 The following provisions shall be observed with respect to the proceedings of a municipality —

"Clause 7 Except with the permission of the presiding authority no business shall be transacted and no proposition discussed at any general meeting unless it is mentioned in the notice convening such meeting and is brought forward by the presiding authority or by any Commissioner who has given notice ... the President or in the case of a special general meeting unless mentioned in the written request for such meeting

"Section 32 Every municipality shall, as soon as conveniently may be after it has been constituted make and may from time to time alter or rescind rules consistent with this Act and with the principal Act

"(a) regulating the conduct of its business and the delegation of any of its powers or duties to one or more committees

* * * *

(h) prescribing subject to the provisions of the principal Act the tolls, cesses, taxes or other imposts to be levied in the municipal district for municipal purposes and the fees to be charged for licenses or permissions granted under section 22 of the said Act and the times and mode of levying or recovering the same

* * * *

"Provided that

* * * *

(k) No rule made under this section shall have effect unless and until it has been approved by the Governor in Council or by such officer as he appoints in this behalf"

In August 1891 the Municipality of Surat at a general meeting appointed a Committee to revise the taxation of the city with a view to reduce some of the existing taxes and impose others, in order that the town might (*inter alia*) obtain a good water supply The Committee accordingly drafted a scheme which it submitted with a report to a general meeting of the Municipality on the 17th and 18th May 1892 The scheme which it suggested was adopted by the meeting The scheme included (*inter alia*) the imposition of a house and property tax

Correspondence with Government on the subject subsequently took place which is immaterial to this report and on the 23rd November 1892, another special general meeting of the Municipality was held at which the revised scheme of taxation was again discussed and again adopted with reference to the house and property tax and a further resolution was passed "that the following schedule of house and property tax be adopted and steps [633] taken under section 21 of the Municipal Act VI of 1873" Then followed rules giving the classification of houses, &c

The Municipality having as above stated adopted the scheme proposed by the Committee issued a notice dated the 3rd December 1892 with regard to the House and Property Tax as required by section 21 of Act VI of 1873 as follows —

NOTICE

"In accordance with the resolution of the Municipality, dated the 23rd November 1892 notice is hereby given that the following schedule of house and property tax is proposed to be added to Appendix B of the Municipal Rules

"SECTION IV.

"*House and Property Tax*

"1 A house and property tax shall be levied on houses factories, shops and warehouses, on stores and on spaces and places used for storing property or for trades or for manufactures or for keeping carts, livestocks, &c, according to the following classification'

(Then followed a schedule setting forth the rate of taxation in different classes of property)

'2 The tax shall be payable by the owners or their agents If the owner or his agent cannot be found, payment may be demanded from the occupier or occupiers

'3 As soon as possible for the year 1893 94 and on or before 1st April in every subsequent year, a classification list shall be prepared by the Managing Committee of all houses buildings and other property on which the tax is imposed containing (a) the name of the street or division in which the property is situated (b) the designation of the property either by name or number sufficient for identification (c) the name of the owner or his agent (d) the name of the occupier if any (e) the class in which it is assessed (f) the amount of tax assessed thereon For the purpose of framing the classification list for 1893 94 the Managing Committee shall employ an officer specially selected by the Municipality"

(Then follow thirteen rules which need not be set out, and the notice concluded as follows)

"Objections against the imposition of the above tax will be received by the undersigned within the period of a fortnight from the date of this notice and placed thereafter before the Municipality for consideration

In compliance with the invitation contained in the last clause of the above notice, a large number of objections were received, and as required by clause 2 of section 21 of Act VI of 1873 a meeting of the Municipality was held on the 20th December 1892, to consider them, and it was unanimously resolved that the objections should be laid on the table for twenty one days for perusal and consideration by the Commissioners

[634] At the end of that time, *viz*, on the 14th January 1893, another special meeting was held to consider the objections At that meeting it was ultimately resolved after discussion that "the Municipality having considered

the objections, and being of opinion that they are invalid, the rules passed on the 23 d November 1892 be forwarded for sanction by Government" An amendment was proposed that the objections received should be severally considered and disposed of but this amendment was lost

On the 21st June 1893 the scheme was sanctioned by Government

On the 25th November 1893 it was resolved at a special meeting, after the work of assessment had actually commenced that the term 'assessed' should be defined and the definition added to the rules Some trifling additions and amendments were made, and a notice with regard to them was duly issued and objections invited One objection only came in and it was considered at a special general meeting on the 5 h January 1894 The additions and amendments were adopted and then submitted to Government for sanction, which was granted by Government Resolution dated 8th March 1894

Thus the whole scheme of the house and property tax comprised in sixteen rules became complete on the 8th March 1894 The work of assessing properties was however going on in the meantime under directions given to the specially appointed Assessing Officer as to how valuations should be made The directions permitted the Assessing Officer to make valuations on consideration of rents as well as other matters but consideration of rents was wholly excluded by the definition of the term assessed as given in the rules The work of preparing classification lists was finished on the 15th January 1894 that is before the definition of the term assessed and other amendments of the rules were sanctioned by Government The classification lists were adopted by the Managing Committee after the date of the Government sanction, namely 8th March 1894 As required by Rule (1) a public notice was given to that effect that the lists for the year 1894 95 would be ready on the 28th March 1894

[635] On the 14th August 1894 the Municipality having presented to the plaintiff a bill for payment within fifteen days of Rs 1 12 0 as the first instalment of the house tax since 1st April 1894 the plaintiff brought this suit for an injunction restraining the Municipality from levying the house tax upon him He contended that the tax was illegally imposed the provisions of Bombay Act VI of 1873 not having been observed

The Subordinate Judge granted the injunction prayed for and passed a decree for the plaintiff He held the tax illegal finding (*inter alia*) that the notification of the 3rd December 1892 was invalid quite and also that all the objections sent in had not been considered The following extracts from his judgment are necessary in order to follow the judgment of the appeal Court —

"30 The several steps in the machinery for imposing a tax as laid down in section 21 are as follows

(1) Desire or intention of a Municipality to impose a tax for the purposes of the Act

(2) Giving notice of such intention

(3) Requisite contents of the notice —(a) the nature of the tax, (b) the classes of persons or property to be made liable thereto, and (c) the amount to be imposed

(4) Liberty granted to inhabitants of the municipal district to take objections, if they have any to the imposition of the tax

(5) Consideration of such objections by the Municipality

(6) Report of the Municipality stating its opinion on the merits of the objections after such consideration to be submitted to the Governor in Council

(7) The decision of the Governor in Council."

"(14) We have next to see how far the provisions of the 2nd paragraph of section 21 have been complied with. In accordance with notice (Exhibit 30) numerous petitions of objections, more than six-thousand, signed by 10,458 persons, were received from people. By a resolution passed by the Municipality, they were laid on the table of their office for a period of 21 days, for being read by the several Commissioners. On the expiry of that period a special meeting was convened for considering them. When the meeting assembled, a majority of 16 members to 7 pronounced all of them as invalid. It is alleged that they were not, as a fact, considered at all. That they were not read at the meeting except perhaps a very few, is an admitted fact. It was, indeed, a physical impossibility to read all of them, filed as they are in not less than eleven large files, in the course of two hours for which the meeting held its sitting. It appears from its proceedings that two amendments were proposed to the original proposition, one for reading all the petitions, and the other for reading the English petitions, but they both were rejected. Mr. Bejanji says that in a previous meeting not a single member had taken objection to the petitions being laid on the table, and they having been placed [636] there sufficient opportunity was given to the members to read them. This fact coupled with the statement made in the proceedings, Exhibit 33, to the effect that they were considered, must be regarded as sufficient to satisfy the requirement of the law in that behalf. He urges that this Court has no power to inquire how they were considered and what amount of thought was given to them. On the other hand the counsel of the plaintiff say that the mere statement, that they were considered, will not do. They urge that there ought to be a joint discussion and debate about them, in the meeting itself. Now let us see what was actually done in this behalf. The proceedings of the meeting do not help us much. They make the bare statement that the objections were considered, but supply no further information as to the way in which it was done. We have, therefore, to look into the oral evidence to ascertain this point. There are thirty members on the Municipal Board including the President. Eighteen of the Commissioners and the Secretary of the Municipality are examined as witnesses. It appears from their depositions that only three of them (Nos. 182, 195 and 236) read all the petitions. One witness, No. 143, says that he did not read any petition at all, neither did he ever go to the Municipal Office for reading them. From the evidence of the rest of the witnesses it can be seen that all the petitions were not read by any of them. One read fifty, another one thousand, a third four or five thousand and so on. This much was done while the petitions were lying on the table. When the subject came before the meeting, there was some conflict in the evidence as to whether any petitions were read there at all. Some say that not a single petition was read, and amongst these is one who voted in favour of the tax, and who was afterwards appointed the special officer for preparing classification lists (Exhibit 101), while others say that a few petitions were read. Some depose that the President asked the Commissioners to state their opinions as to the objections, when some of them said what they thought about them. It does not appear that a regular discussion on each point taken in the objections, took place. One of the witnesses, No. 195, says that when he used to go to read petitions as they were lying on the table, he had discussion with other Commissioners who too came there to read. Taking the above as all what occurred at and out of, the meeting, let us see whether it satisfied the requirement of the law. Mr. Bejanji contends that sufficient opportunity was given to the Commissioners to go through and consider the petitions, and if some or many of them did not avail themselves of the opportunity, it was not the fault of the defendant. This argument may look plausible at the first sight,

but if we look into it a little deeper, its hollowness would be apparent. A Municipal Corporation is one whole body consisting of several Commissioners. Each Commissioner forms a part of that body, just as one limb is a part of the body of one individual person. As this individual person has no existence independently of his several limbs, so the corporate body has no existence independently of its several members. Now suppose one single person is required by law to consider a thing and report his opinion thereon, and also suppose that he says: 'I gave myself, that is, all the parts of my body and mind, sufficient opportunity to consider the matter. They neglected. Was it my fault? I say, however, that I considered that matter, and my opinion is that it is improper and invalid!' Can it be said that the person has obeyed the direction of the law? Certainly not. In the same way, affording opportunity to the Commissioners is alone not sufficient. The proper question to be decided is whether the objections were or were not, as a matter of fact, considered. A bare statement to that effect in the proceedings [637] will not do when there is evidence to the contrary. It is said that the mode of considering the objections by laying them on the table for a time, was resolved upon by the unanimous decision of all the Commissioners. It may be so. But it does not satisfy the requirement of the law when it is found that they were not so considered. It was not, moreover, meant by that resolution that it should be the final consideration. The object of it was, as is said by one of the witnesses, to enable the Commissioners to make them acquainted with the objections, and thus to be ready to discuss the matter in the meeting and give votes as to their merits. If it could be shown that all the Commissioners, or at least those who were present at the meeting, had read all the objections or had, at least, got them read or explained to them, and if after having done this they or the majority of them had given their opinion that they were invalid, then that would have been the joint action of the board, and the direction of the law been regarded as substantially fulfilled. But this was not done and, therefore, I find that the direction of law remains unfulfilled. It may be said that as there were so many petitions, they could not be conveniently read in the meeting. Quite true. It would certainly be a wearisome task. The work would take several weeks, if not months, to finish. The proposal, therefore, to lay them on table for the Commissioners to read at their leisure was very proper. But as most of the Commissioners did not take advantage of it, as they ought to have done, and as they did not read all the petitions as they were bound to do, there was only one remedy left and it was to have all the petitions read at the meeting. It might be urged why those Commissioners who were diligent and who had gone through all of them should be again troubled for the fault of others. The answer is that it was an unavoidable thing for passing the scheme through machinery to the last stage. I have compared a corporate body to an individual body. By carrying the analogy a little further it may be said, that as when some parts or limbs of a body refuse or become unable to carry on their proper functions, the rest of the parts or limbs are made to suffer the inconvenience: so if some of the members of a corporate body do not do their work properly, the others must necessarily put up with the inconvenience, if they wish to carry any particular aim of the body to a successful end; if they have not so much patience, they are at liberty to cease to be its members.

"(45) The objections were submitted to Government through the Collector (who is also the President of the Municipality) and the Divisional Commissioner. These officers passed their several opinions on them. The Collector observed that 'out of 6,243 petitions more than 6,000 were presented by the hands of one individual. They bear the impress of having been the work of a

few hands. For instance 1,138 are in the handwriting of a single man and *apparently* signed by a few men also' It is further remarked that 'no less than 3 000 of the signatures now submitted do not contain the father's name and 5 9?4 give no address By this means, identification is made impossible' (See Exhibit 245) By making these remarks it is suggested that a large number of the petitions was not genuine This criticism made *ex parte* without proper inquiry, cannot be accepted in a judicial proceeding as a true indication of the nature of the petitions It, moreover, is not the opinion of the Municipal body but the individual opinion of the Collector The Divisional Commissioner passed a different but equally unfavourable, opinion He said 'it was a physical impossibility to read over in the meeting the whole of 6 283 petitions. It was, no [638] doubt, with the amiable object of creating this impossibility that most of the petitioners were made to sign individual petitions instead of the usual practice of drawing up united statements of all the arguments against the proposal Besides, it was felt that if the Municipality devoted several days to hearing all the papers, rattled over one after the other, the real arguments would escape notice in the mass of verbiage (see Exhibit 82) I believe there is considerable force in these remarks Though the petitions may not have been generally written with the intention ascribed to them by the Divisional Commissioner, yet the result was just the same I do not think the people acted wisely in drawing up so many separate petitions There could not possibly be a separate and a new argument in each petition The people seem to have lost sight of the principle that quality rather than quantity deserves attention, and if the quantity is allowed to increase beyond its reasonable limits, it brings in the risk of what little quality there may be, of being altogether disregarded. It would have simplified the matter if they, as remarked by the Divisional Commissioner had drawn up a few representations stating their objections and reasons against the tax It would have served their purpose far better if that purpose was simply to have their objections properly considered by the Municipality and the Governor in Council, and not to create unnecessary difficulties in their way If the inhabitants of any place or some individual Commissioners of any Municipality are found to have a marked tendency of throwing obstacles and causing delay in the discharge of business the Government have it in their power to abolish the Municipality altogether, or suspend it for a time, and have the work done by their own officers But so long as this is not done, all the citizens have the privilege and choice of sending individual or joint petitions and it will not be just and proper to refuse to consider individual petitions because the more convenient way of making joint representations was not followed, though the work would entail and require a good deal of labour and time Unless each and all of the petitions are read out, it will not be possible to judge whether they do or do not contain a valid argument. By reading a few or even most of them, the idea of what the rest may contain, cannot be had The Government have recently issued a circular (Exhibit 94) laying down the manner in which a Municipality should act under section 21 In paragraph 3 of it, they require that the report of the Municipality should set forth each objection taken by the people, with its opinion I refer to this document, not because it enacts any new rule, but because the Government have also recognized the necessity of each objection being considered and reported on. For the foregoing reasons, I find that, in the present case, the Municipality failed to consider the objections of the people in the way in which they ought to be considered This is the most serious of all the irregularities which invalidate the tax"

"51. It is also contended by the plaintiff that Rule 7 does not clearly show whether the tax is to be paid in arrears or in advance. It mentions the

due dates of half yearly instalments of the year 1893 94 and of the succeeding years The financial year of the Municipality begins with the 1st April and ends with the 31st March The scheme was not complete before the first year was nearly at its close and for that reason the tax of that year is not demanded From 1891 95 the half yearly instalments became due on the 1st July and the 1st January in each year It is clear that the tax is made payable partly in arrears and partly in advance

**[639]** The defendants appealed from the judgment of the Subordinate Judge

*Macpherson* and *Manekshah J Jahangirkhan* for the Appellants (Defendants)

*Scott C H Setalvad Narayan V Gokhale* and *Narayan M Samarth*, for the Respondent (Plaintiff)

The following authorities were cited *Queen* v *Reynolds* L R (1893), 2 Q B 75 *Ashanullah* v *Trilochan Bagchi* I L R 13 Cal 197 *Hiralal* v *The Thana Municipality* P J 1891 p 84 *Joshi Kalidas* v *The Dakor Municipality* I L R 7 Bom 399 *The Eastern Counties Railway Company and Overseers of Moulton* 25 L J (N S) M C 49 *Vallabh* v *Hope* 8 Bom H C Rep (A C J) 213 at pp 216 217 *Reg* v *Venkaji* 8 Bom H C Rep (Cr Ca) p 39 at pp 47 61 *Chhabildas* v *The Municipal Commissioners of Bombay* 8 Bom H C Rep (O C J) p 85 at pp 91 92 *The Municipality of the City of Poona* v *Mohanlal* I L R 9 Bom 51

The **judgment** of the Court was delivered by

**Parsons J** The most satisfactory way to deal with this appeal is we think to consider the objections to the legality of the tax in question *seriatim*, setting out the facts so far as they relate to the particular objection under review This is the method that has been adopted by the Subordinate Judge against whose decree this appeal has been made and it was the course adopted at the hearing of the appeal We will consider therefore those objections in the order in which they have been dealt with by the Subordinate Judge and which was followed in this Court as far as was possible

The history of the case is given by the Subordinate Judge in paragraphs 1 to 22 of his judgment and need not be restated The objections dealt with by the Subordinate Judge in paragraphs 23 to 29 have not been pressed in appeal The necessary steps for imposing a tax are sufficiently accurately set out in paragraph 30 (see *ante* p 635) of his judgment and the first objection to be considered falls under the first of the steps there mentioned

**[640]** Section 21 clause (1) of the Bombay District Municipal Act of 1873 runs thus Every Municipality desirous from time to time to impose any tax toll or other impost for the purposes of this Act It was argued by Mr Scott that in the present case there was no Municipality desirous of imposing a tax for any of the purposes of the Act because though there was a resolution passed to impose a tax the Municipal Commissioners who passed the resolution did not themselves know for what purpose the tax was to be imposed and he cited in support of his argument Exhibits 59 24 (paragraph 15) 236 156 104 218 223 150 182 168 148 143 79 and 69 The objection is one that was not expressly taken in the lower Court and therefore has not been dealt with there It seems to us that it is an untenable one because every Municipal Commissioner knew that the whole scheme of taxation was to be revised with a view to reduce some of the existing taxes and impose others in order that the town might among other benefits, obtain a water supply The resolution of the meeting held on the 23rd November 1892, (Exhibit 29) is conclusive on the point of desire It is not alleged that the tax in question was sought to be imposed for any purpose contrary to or beyond those of the Act

It is next objected that the resolution above mentioned (Exhibit 29) was illegal, because the scheme was proposed to be adopted at a meeting without previous notice "The notice calling the meeting (Exhibit 28) does not specify the tax as the object of the meeting, but only the Government Resolution (Exhibit 55). Section 27 of the Act of 1884 requires notice Clause 7 does not apply to special meetings—*Hiralal v The Thana Municipality*, P J for 1891, p 84 If the resolution is void, the whole of the proceedings are void also—*Joshi Kalidas v The Dakor Town Municipality*, I L R 7 Bom, 399" This objection is dealt with by the Subordinate Judge in paragraphs 32 to 34 of his judgment We agree with him in the construction he puts on clause 7 of section 27 The words "except with the permission of the presiding authority" clearly govern the whole of the rest of the clause, and, therefore, even if there were no mention of this business in the notice convening the **[641]** meeting, the resolution would not be bad We think, however, that the mention in the notice, that "the Government Resolution No 3947 of the 31st October 1892, with the opinion of the Legal Remembrancer about the revised scheme of taxation,' was the business to be transacted was under the circumstances sufficiently explicit, and justified a detailed revised scheme of taxation being placed before the meeting (see Exhibit 55 and 56) and proposed for adoption It was then open to any Commissioner to raise any objection he chose to the adoption The resolution that was ultimately passed to adopt the scheme and to impose the tax (29) was, in our opinion, valid and binding.

The next objection is as to the notice required to be given under section 21 (it forms the second and third of the necessary steps set out by the Subordinate Judge in paragraph 30) Section 21 (1) continues thus "shall give notice of such intention and shall in such notice define the nature of the tax, toll or other impost the class of persons or property to be made liable thereto, and the amount to be imposed Exhibit 30 is the notice actually given It runs thus – His Lordship read the notice of the 3rd December 1892, set out *supra*, p 633 and continued

It is objected that this notice is bad because it does not state the purpose for which the tax was desired to be imposed The words 'such intention' include purpose The tax payers have a voice in the matter and ought to be able to object to the purpose *Re Eastern Counties Railway Company and Overseers of Moulton*, 25 L J, N S, Mag Cases p 19 Objections cannot properly be made unless the purpose of the tax is disclosed ' The Subordinate Judge has discussed this objection and allowed it for reasons set out in paragraphs 35 to 38 of his judgment We do not agree with him Assuming the desirability of stating the purpose, we cannot hold that the law has declared it necessary to state the purpose in the notice We think that the word 'intention" means what it actually does mean and no more—' intention to impose a certain tax' – and that it cannot be construed to mean ' intention and purpose " We should have expected the Legislature to have used these words had it considered it necessary to give notice of the purpose **[642]** We observe that the Act evidently does not contemplate each particular tax being imposed for a specific purpose and applied to that purpose. The tax is to be raised ' for the purposes of the Act " If the specific object of a particular tax were required by law to be stated in the notice, it could only be in order that the money to be raised by it should be applied to that purpose and no other. This is not, however, contemplated by the Act Rates in England are raised for specific purposes, highway rates for highways—poor rates for the support of the poor - school rates for educational objects, and so on Each rate must be applied to the purpose for which it is raised. Therefore it is that the purpose

of such rates must be mentioned in the notice This consideration distinguishes the case cited by Mr Scott and shows its inapplicability to the clause in question. What the objectors really desire to have stated in the notice is the reason for raising the tax and not the purpose to which it is to be applied—but that could not conveniently be stated in a formal notice It would be obviously impossible to do so fully The reason for the tax is to be learned from the debate which takes place when it is proposed In the present case the purpose of the tax was known to the inhabitants The objections made to the tax show this clearly.

Then it is objected that the nature and amount of the tax were not sufficiently stated in the notice 'The bare statement that the tax was to be a house and property tax is insufficient The principle on which it was to be assessed, on what rateable value it was to fall, the exemptions proposed to be allowed, the mode in which the value of the property taxed was to be arrived at, —all these things ought to have been stated in the notice' This objection is discussed by the Subordinate Judge in paragraphs 39 to 43 of his judgment He disallows the objection that the total amount which the taxes estimated to produce ought to have been stated in the notice, rightly holding that the word "amount" means that which the person or property will have to pay, but he allows the objection that the omission to state the principle on which the tax was to be assessed rendered the tax illegal, and that the subsequent addition defining the mode of assessment did not cure the illegality It seems to us that there is some confusion of ideas here The notice was that the tax was to be [643] so much according to a certain classification, which classification depended upon the value at which the property was assessed It was further provided that the classification lists were to be made by the Managing Committee, and a right of appeal was given from the decision of the Managing Committee In other words, it was notified that the tax to be imposed was one the amount of which depended on the valuation of the property made in the first instance by the Managing Committee That was the principle on which the tax was to be imposed and levied and the notice is clear on the point We fail to see any omission or illegality in the notice respecting such a tax as the one in the present case As soon as the value of the property was ascertained, the amount of the tax was at once known

It was further argued that the notice under section 21 ought to have contained rules defining the mode in which the Managing Committee were to arrive at their valuation, but section 21 (1) does not require this No doubt it is expedient that there should be some rules, so that the Managing Committee should not be left guideless in the matter, but the framing of these rules seems to be an after process, which is provided for by section 32 of the Act of 1884 As a matter of fact in the present case such was done At a general meeting held on the 23rd November 1893, additions and amendments in the rules for the levy of the tax were passed by the Municipality These additions and amendments were notified to the public under section 21 (1), the only objection made was considered and the sanction of Government was obtained to them on the 8th March 1891 (Exhibit 50) The Subordinate Judge says that on that date the whole scheme of the house and property tax consisting of sixteen rules became complete He has however, declared it illegal because the scheme and rules were not all proposed and sanctioned by one and the same process at one and the same time There is no authority for such a proposition Under the Act there is no prohibition of an amendment of the scheme of taxation, provided only the provisions of section 21 are complied with In the present case it cannot be said that the scheme was amended The tax was not altered either in its nature or incidence the powers only of the Managing Committee were

curtailed and [644] defined They had been given the power of valuing property according to any mode they chose This was now taken away, and certain rules were passed for their guidance and observance These rules, however, as we have before said, were not passed until after the provisions of section 21 had been observed, and there is no objection raised to them on the ground that these provisions were not fully complied with We think, therefore, that they are perfectly legal and valid

The next objection falls under the fifth step mentioned in paragraph 30 of the judgment Section 21 (2) provides as follows - "Any inhabitant of the municipal district objecting to such tax toll or impost may within a fortnight from the date of the said notice, send his objection in writing to the Municipality, and the Municipality shall take such objection into consideration " The Subordinate Judge deals with the objection in paragraphs 44 and 45 *ante*, pp 635 8, of his judgment and allows it He says the Municipality failed to consider the objections of the people in the way in which they ought to be considered A great deal of evidence has been cited to us on the point It appears that no less than 6,283 petitions bearing 10,458 signatures were sent in, in reply to the notice In accordance with a resolution passed by the Municipality on the 20th December 1892 they were left on the hall table for twenty one days for perusal by the Commissioners At the end of that time namely, on the 14th January 1893, a special general meeting was held to consider the objections At that meeting it was proposed and seconded that the Municipality, having considered the objections, and being of opinion that they are invalid, the rules passed on the 23rd November 1892, be forwarded for sanction by Government Three amendments were proposed successively to this proposition *viz*, (1) that the scheme should not be submitted to Government, as it was illegal (2) that the petitions be severally considered and disposed of (3) that the printed petitions only be read and considered separately Each was voted on and negatived, and the original proposition was ultimately put to the meeting and carried

It seems to us that this is a consideration within the meaning of the clause which requires consideration only and is silent as [645] to the amount as well as the quality of that consideration It is to be noted also that it is the objection only that has to be considered The petitions may be innumerable, the objections may be few In the present case it has been pointed out to us that they are very few for the most part the petitions contain only individual objections to pay a house tax and statements that a water supply was not necessary. During the twenty three days that the petitions lay on the table, most of the Commissioners went and read them three of them read the whole, one read fifty, another a thousand, another four or five thousand, and so on One witness only (113) says that he did not read any but he had been sick and had not attended the meetings for one year and a half before he was examined The members, therefore who attended at the special meeting were generally well acquainted with the nature of the objections and so able to discuss and consider them Apparently a full discussion took place about them No one was refused a hearing, and it is not suggested that the meeting was brought to an end by any application of the closure or other abrupt method. All that was refused was the reading and consideration of the petitions severally. That, in our opinion, was unnecessary in the present case it was almost impossible

The next objection raised before us is dealt with in paragraph 51, *ante*, p. 638, of the judgment, and we agree with the Subordinate Judge in the conclusion he has come to in respect to it.

The only other objection raised before us is dealt with by the Subordinate Judge in paragraph 52. The plaintiff complains that the assessment of the value of the property classified has been made upon an erroneous basis, and not according to the amended rules. We need not discuss this objection, as we are of opinion that even if the complaint were well founded it would not affect the validity of the tax. It would only give the plaintiff and other persons whose property has been similarly assessed a right of appeal to have the valuation set right.

As all the objections fail and the tax is proved to have been legally imposed, we reverse the decree of the lower Court and order the plaintiff's suit to be dismissed with costs throughout.

*Decree reversed.*

## [646] ORIGINAL CIVIL

*The 22nd and 29th January and 1st February, 1897.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Vundravandas Purshotamdas ........ (Original Defendant) Appellant

*versus*

Cursondas Govindji ........ (Original Plaintiff) Respondent.*

*Will*—Dharam—*Gift to dharam*—*Charity*—*Reversioner*—*Limitation applicable to reversioner*—*Limitation Act (XV of 1877), Art. 141.*

One Calliwanji Sewji died without issue on 6th January 1869, leaving two widows, Cooverbai and Nanivahoo [illegible] will [illegible] of his immoveable property as was not validly disposed of by him. By his will dated [illegible] January 1869 he appointed the defendant Vundravandas and two others his executors and trustees. The two latter were dead at the date of this suit. By his will he left two immoveable properties to his wife Cooverbai for her life [illegible] to his wife Nanivahoo [illegible] of his property he left to his trustees [illegible] them to apply the same in charity (*dharam*). The properties left to his widows were to revert on their death to the charity fund held by the said trustees. Cooverbai died in 1871. Nanivahoo survived till 1888 and died in November of that year, leaving a will.

The plaintiff was the nephew (brother's [illegible]) and heir of the testator and he sued to have his rights in and to his uncle's estate ascertained. He contended that the bequests for *dharam* were void and that the property bequeathed for that purpose was undisposed of. He claimed to be entitled to the whole of the testator's immoveable property including that which had been devised to the widows for life.

The defendant pleaded that he and his co-executor had held and dealt with the estate in accordance with the testator's will and contended (*inter alia*) that the plaintiff's claim was barred by limitation.

*Held* that the devise to *dharam* was too general and indefinite for the Court to enforce, and was therefore void.

*Held* also that under article 141 of the Limitation Act (XV of 1877) the plaintiff's claim to the immoveable properties left by the testator was not barred by limitation.

APPEAL from PARSONS, J.

The appellant was the sole surviving executor of one Callianji Sewji, who died on the 6th January 1869. The respondent (plaintiff) was the nephew

* Suit No. 554 of 1888. Appeal No. 931.

(brother's son) and heir of the said Callianji Sewji and he brought this suit to have his rights in and to the estate of Callianji Sewji ascertained and declared

The plaint set forth that Callianji Sewji died in January 1869, without issue He, however, left two widows viz Cooverbai and Nenabahoo, who became entitled to a widow's estate in the immoveable estate not validly disposed of by him

[647] The only male relations of Callianji Sewji living at his death were his father Govindji Sewji (the plaintiff's father), his half brother (Dossa Sewji) and a nephew (Cursondas Purshotumdas) All these however were dead at the date of this suit

At the time of his death Callianji Sewji was possessed of a large amount of property, both moveable and immoveable in Bombay and elsewhere The day before his death (5th January 1869) he made his will appointing three executors and trustees, viz Vundravundas Purshotum (the defendant) Deva Hurdas and Tulsidas Ichharam The two latter were dead at the date of this suit

By his will he left one of his immoveable properties to his heirs on payment of Rs 1 00 000 stated to be charged on it He then left two other immoveable properties to his wife Nenabahoo for her life and two to his wife Cooverbai for her life and the residue of his estate he left to his three trustees directing them to apply the same in charity The properties left to his wives were to revert on their death to the charity fund held by the said trustees The following are the material portions of the will

One oart (or garden) near the Gowalia Tank purchased from Sha Kalliandas Mohandas The said oart stands in my own name but Rs 1 00 000 are due to Messrs Cameron and Bynn against the said oart My heirs are only to take the same on paying the said money

Further whatever ornaments &c there are in my house in the possession of my two wives have been apportioned to them respectively Each is to take care of and retain her own

According to these particulars are the properties mentioned above The particulars of the properties which have been given by me to my two wives out of the said property (are as follows)

One oart at Mahim called the *Jafri Wadi* has been given to my old wife named Nenabahoo The income that may be derived therefrom is to be enjoyed (by her) during her natural life and she is to make charities out of the said income but it *cannot* be sold

Further there is the above mentioned house in Lohar chal (Iron smith Lane) in the rear of (the house of) Mr ... Whatever rent may be derived from the said house is all to be enjoyed by my wife named Nenabahoo and to be made *dharam* (religious or charitable gifts) No one (else shall) have any right thereto but the said house cannot be sold to any one

'Further, my two 'estates have been given to my new wife named Cooverbai for enjoying the rent (thereof) The particulars thereof are as follows —

[648] 'Whatever rent may be derived from one garden called the Sutoor Bag, and one house in Memonwada (known as that) of Jevat ... making together two 'estates is all freely to be enjoyed (by her) during her natural life as long as (she) remains faithful to my name and is to be made *dharam* (religious or charitable gifts) of No one is to raise any dispute or objection whatever thereto, but these 'estates cannot be sold

"According to these particulars, out of the abovementioned 'estates,' belonging to me, the abovementioned 'estates' four in number, have been given to my wives, for enjoying the rent (thereof) and for making '*dharam dhan*' (charitable or religious gifts, &c., of the same) and whatever other 'estates belonging to me, remain and whatever profit appertaining to my share may remain after deducting the debts, &c., in my books, belong wholly to me personally I have during my lifetime appointed three 'trustees' over the same The particulars of their names are mentioned below —Bhai Vundravandas Purshotamdas Bhai Deva Hurdas my mohta Tulsidas Ichharam

'According to these particulars I have appointed 'trustees' The said 'trustees' are to act in such manner as they think proper for preserving my name, so that my money might always be used for some good *dharam* (religious or charitable purposes) after my death and by which good might be done to me No one shall have any right (or) claim whatsoever thereto Further, the whole of the said property has been acquired by my own exertions No one (else) has any right (or) claim whatsoever thereto and the particulars of what is to be paid out of my *dharam* (religious or charitable) fund' to my step mother and step brother Dossa and my whole brother Govindji for (their) expenses as stated below, (are as follows —) To my whole brother Govindji, for each month Rs 30 namely thirty To my step mother Bai Maneck for each month, Rs 20 namely twenty To my step brother Dossa for each month, Rs 25 namely twenty five According to these particulars (and agreeably to what is written above) (the same) are to be paid every month

"Further it is as follows —As to the estates which have been given by me to my wives they are to enjoy the rents of the said estates during their natural lives and on the death of my wives the said estates are to revert to my *dharam* (religious or charitable fund) and whatever income may be (derivable) from the said estates is to be expended for my *dharam* (religious or charitable purposes) No one shall have any right (or) claim thereto My 'trustees shall have 'power over the whole of it in every respect They are to act after my death in such a manner as to give (me) a good name No one has any right (or) claim thereto In this manner, I have in my lifetime made the whole of (this) 'will in my sound understanding agreeably to which will' my 'trustees are to do all good works of a permanent nature No one is to question my trustees in any way respecting the same Samvat 1925, Poush Vad the 8th Tuesday (5th January 1869)

The testator's widow Cooverbai died in 1871 The other widow Nenavahoo survived till 1888 and died in November of that year, leaving a will

[649] The plaintiff stated that after the death of the testator the said three trustees took possession of the whole of the property, and he complained that they had wasted and misappropriated a large portion of it He contended that the bequests for *dharam* in the will were void and inoperative and that the property bequeathed for that purpose was undisposed of He claimed to be entitled to the whole of the testator's immoveable property including that which had been devised to the widows for life The following paragraphs of the plaint set forth his claim —

'8 The plaintiff submits that the said bequests in the said will contained for *dharam* are void and inoperative and that the whole of the testator's property save and except the said oart near Gowalia Tank, the said four immoveable properties devised to his said widows, and the said monthly allowances bequeathed by him to his whole brother, the plaintiff's father, to his step mother Bai Maneck and to his step brother Dossa Sewji, was undisposed of by the said will The plaintiff claims to be entitled to the whole of

the immoveable property of the testator, including the said four properties devised to his said widows, and also to such portions of the moveable property as may not have been disposed of by the said Nenavahoo in her lifetime "

" 12 The plaintiff says that the defendant Vundravandas Purshotamdas and his co executors and after their death the said defendant has continued misappropriating mismanaging and wasting the estate, moveable and immoveable, of the said Callianji Sewji, and alleges he is entitled to expend the said estate upon *dharam* as directed by the said will

" 13 The plaintiff says that Nenavahoo died intestate on or about the 19th day of November 1898, and since her death the defendant Vundravandas Purshotamdas has removed Rs 1 500 in cash and articles which now belong to the plaintiff out of the house in which she lived without making any inventory thereof, and he is wasting and expending the same "

He prayed that his rights to the estate should be declared that the bequests for *dharam* might be declared void that accounts might be taken of the estate which had come to the hands of the trustees, &c &c

The defendant Vundravandas filed a written statement in which he pleaded that the plaintiff's claim was barred by limitation He denied that the estate had been wasted He alleged that it had been always held and dealt with by him and his co executors in accordance with and under the provisions of the will of Callianji Sewji As to the allegation in paragraph 13 of the plaint he stated that he had taken possession of the property [650] therein mentioned as Nenavahoo's executor As to the bequests for *dharam* contained in Callianji Sewji's will the following paragraph of the written statement states his contention —

" 6 The defendant submits that the bequest to *dharam* in the said will contained is not void and inoperative as contended in the 8th paragraph of the plaint and that the claims set up by the plaintiff in the said paragraph are unsustainable The defendant further says that the various charities established by the defendant and his co executors in carrying out the said bequest were so established with the full knowledge and consent of the plaintiff and his deceased father Govindji Sewji and also of the testator's widow the said Nenavahoo (the other widow Cooverbai being then dead) The defendant submits that the plaintiff is now estopped from in any way disputing the right of the defendant to establish the said charities, under the provisions of the testator's will "

The Advocate General of Bombay was made a defendant to the suit

At the hearing the following issues were raised —

1 Whether the suit, or any and what part thereof is barred by limitation?

2 Whether the defendant No 1 is guilty of any and what of the charges of fraud and mismanagement set forth in paragraph 7 of the plaint ?

3 Whether the bequests to *dharam* in the will of the testator are void and inoperative ?

4 Whether the plaintiff by his conduct or otherwise is not now estopped from objecting to the application of the testator's estate as in the will directed ?

5. Whether the defendant has continued to misappropriate mismanage and waste the estate of the testator as in paragraph 12 of the plaint alleged ?

6 Whether Nenavahoo died intestate ?

7. Whether the plaintiff is entitled to any and what portion of the estate of the said Nenavahoo ?

Counsel for plaintiff in place of the issues 6 and 7 asked for the following issue:—

8. What portion of the moveable estate in the hands of Cooverbai and Nenavahoo has been validly disposed of by them or either of them?

It was agreed that the issues as to limitation and as to the validity of the bequests to *dharam* (issues 1 and 3) should be decided first, and after argument the Court (PARSONS, J.) held that the suit was not barred, and that the said bequests were void. The following was his judgment:—

PARSONS, J.:—This was a suit which was brought on the 21st December 1888, by the plaintiff, who claims to be entitled as the [651] heir of his uncle Callianji to the whole of his immoveable property and to such portions of his moveable property as may not have been disposed of by his widow Nenavahoo.

Callianji, a separated Hindu, died childless in 1869, leaving two widows Cooverbai and Nenavahoo. Cooverbai died in 1871. Nenavahoo died in 1888. On her death the plaintiff (who is the son of a brother of Callianji who died in 1884) became entitled to succeed as the heir of Callianji Callianji made a will in which after bequests of certain specific legacies he gives two properties to each of his widows for them to enjoy the income or rents thereof for their lives. The rest of his estate and these four properties after the death of the widows he makes "*dharam*" and he directs his executors to expend the income for "*dharam*," which he explains to be "doing all good works of a permanent nature" and "acting in such a manner as to give me a good name."

It is contended on behalf of the plaintiff that this bequest to "*dharam*" is void, and on behalf of the defendants (the executor as representing the estate and the Advocate-General the charity) (1) that the bequest is good and (2) that even if bad the suit is time barred.

Preliminary issues have been raised on these two points and have now to be decided.

On the authorities cited, and on the plain construction of the terms of the will, I have no hesitation in holding that the provisions constituting the "*dharam*" and directing the executors to expend the income of the estate for the *dharam* are void.

This being so there would be an intestacy as to the whole of the estate so attempted to be dealt with, and the effect of this would be that the widows of Callianji would take not the limited estate devised to them by the will, but what is in law defined to be a widow's estate in his property. I say the effect would be, for no compulsion could be exercised to force them to take it, and it is not necessary that they should actually claim and take their widows' estate. They might out of deference to the wishes of their husband, or of their own choice, have preferred that the executors should devote the income of the estate to some [652] charitable object whereby their husband's name would be kept in honour.

This, however, would not change the legal aspect of the effect of the void bequest, or alter the nature of the estate that on the death of Callianji would devolve on his widows. There would still be an intestacy, and no acquiescence or consent of the widows and no act of the executors could change that or validate the invalid bequest so as to affect persons not claiming through or under them.

Such, then, being my decision on the first point, it has next to be seen whether the plaintiff's suit is within time.

Numerous cases have been cited by the learned counsel for the defendants in support of their contention that the suit is time-barred. It appears, how-

ever, on an examination of them that the majority are in no way relevant to the present case They refer either to a different law or to a different state of facts. If a period of possession which would be adverse to and would bar the right of the widow, would be adverse to and would bar the right of the person entitled to possession on her death, then no doubt some of the cases are in point This, however is not the present law It is settled that no alienation by the widow can affect her husband's heir either by giving the alienee a better title than the widow herself has or by making his possession during the lifetime of the widow adverse to the heir

The precise article of the Limitation Act of 1877 applicable to the present case is, without doubt, No 141 as contended for by defendants counsel and not No 140 as the plaintiff's counsel has urged That article gives a Hindu entitled to the possession of immoveable property on the death of a Hindu female, a period of twelve years within which to bring his suit for possession of that immoveable property and provides that that period begins to run from the time when the female dies

In the present case that time is the death of Nenavaboo, which took place in 1888 less than a year before the suit was filed As long as either Cooverbai or Nenavaboo was alive the plaintiff [653] would have no right of action He could not sue for possession, and he would have no right whatever to interfere in the management or disposition of the income of the property Even if it be assumed that the executors of Cullianji expended that income on charity contrary to the wishes of the widows still the plaintiff could have taken no possible objection the eto Even if they had alienated some of the corpus of the estate, I know of no provision of law which would have compelled him to sue to set aside that alienation or otherwise hold it binding on him His title and his right to possession would not come into being until the death of the last surviving widow, and then and then only could he legally sue for the property Of course, if the testator had disposed of his property so that on the death of his widow there would be no estate left to his heir, then the case would be different but the right of the heir would in that case be taken away not by any adverse possession not by any act of the executor not by any conduct of the widow, for none of these things could affect him, but by the act of the owner of the paramount estate who alone could divest him of the estate which is conferred upon (him) by the law of inheritance In the present case had the bequest of the testator of his estate in *dharam* been a valid bequest there is no question but that the plaintiff's suit must have failed When, however, it is found that the bequest was not a valid bequest, but that there was an intestacy, the effect of which was to create an estate to which on the death of the last surviving widow the heir of the testator whoever he might be at that time, would be entitled, then during the lives of the widows there can be no such thing as possession adverse to that heir The law allows the heir twelve years from the death of the widow within which to bring his suit for possession, and it is not in the power either of the widow or of the executor or of any person claiming either through or against them to abbreviate that time or substitute another period I find, therefore that no part of the suit is barred by limitation, and that the bequests to *dharam* in the will of the testator contained are void and inoperative

**Subsequently the Court found issues 2 4 5 and 6 in the negative and on the issues 7 and 8 held that the plaintiff was entitled to the whole undisposed of [654] estate of Nenavaboo, and that Nenavaboo had validly disposed of her *stridhan* only**

**The Court passed a decree for the plaintiff for possession of the properties mentioned in the will and ordered an account of the moveable estate left by the testator from the**

19th November 1888 (*i.e.*, the death of Nenavahoo) up to the date of the decree, and also an account of the moveable property left by Cooverbai and Nenavahoo respectively at the time of their death, distinguishing between the *stridhan* of Nenavahoo and the other property.

The defendant Vundravandas appealed, contending (1) that the bequest for *dharam* was valid; (2) that the plaintiff's claim was barred by limitation; (3) that the lower Court should have held that the estate conferred on Callianji's widows was a life-estate in the usual meaning of that term with power to dispose by will of all savings of income; (4) that no account should be ordered of the moveable property left by Nenavahoo, and that such property was validly disposed of by her will, (5) that the plaintiff was not entitled to the moveable property of the testator which never came to the possession of his widows.

*Anderson* and *Vicaji* (with *Lang*, Advocate General) for the Appellants (Defendants): The gift to *dharam* should be upheld. The early cases on the point, *viz*, *Advocate-General* v. *Damothai*, 1 Perry's Or. Ca., 526, and *Gangbai* v. *Thavar Mulla*, 1 Bom H C Rep., 71, are wrong and should no longer be followed '*Dharam*' or '*dharamdan*' in a Hindu will has the same meaning as the word 'charity' in an English will. See Wilson's Glossary, p. 137. The Courts in India are now more competent to say what objects a Hindu testator contemplates when he leaves money to *dharam*. He contemplates, as shown by the cases, dharamshalas, sadavarats, wells, hospitals, &c, which are all legal. See West and Buhler (3rd Ed), p 23. Mandlik's Hindu Law, p 333; *Jamnabai* v. *Khimji*, I. L R., 14 Bom, 7. Purposes formerly held objectionable would now be held legal, *e g*, feasting Brahmins or a caste—*Dwarkanath Bysack* v *Burroda Persaud*, I. L. R, 4 Cal., 443; *Lakshmishankar* v. *Vaijnath*, I. L. R, 6 Bom., 24.

[655] In *Gangbai* v. *Thavar Mulla*, 1 Bom. H. C. Rep., 71, a devise to 'charity' in a will written in the English language was held good, although the word used by testator was evidently '*dharam*' The tendency of legal decisions in India as well as in England has been to widen the definition of 'charity' Any charity is now held good which is not purely private in its object and temporary in its application—Tudor on Charitable Trusts, Chapter I. What would formerly have been bad as superstitious uses are now good. If the public or any section of the public are intended to derive or do derive any advantage from the gift it is a good gift In this will the trustees are directed to do all "good works of a permanent nature" If the word '*dharam*' is still to be held vague, these words limit and define its meaning Permanency makes a merely benevolent gift a good charity—Tudor on Charitable Trusts, pp. 4 and 5.

But in any case we contend that the plaintiff's claim (except as to the two properties left to Nenavahoo for life and the dwelling-house in Barbhaya Street which was also in her possession until her death in 1888) is barred by limitation. All the other immoveable properties have been held by the executors under the will as trustees for the charities for more than twelve years before Nenavahoo's death. If the gift to charity is void, Nenavahoo was entitled to these properties and not the trustees. Their possession, therefore, was adverse to her—*Churcher* v. *Martin*, 42 Ch. D, 312. She as a Hindu widow fully represented the estate Therefore we contend if she was barred, all who claim after her are also barred.

The question depends on the construction of article 141 of the Limitation Act XV of 1877. Does that article refer to a suit for such rights of possession as the widow has at the time of her death, or does it give her successor

a right independent of her? We contend the former is the true construction. See *Saroda Soondury Dossee* v. *Doyamoyee*, I. L. R., 5 Cal., 938. It was the view at first taken by all the Courts in India—*Adi Dea Narain* v. *Dukharan*, I. L. R., 5 All., 532 at p. 537; *Sambasiva* v. *Ragava.*, I. L. R., 13 Mad., 512; *K. Subramaniam* v. *T. Subramaniam*, I. L. R., 4 Mad., 124; **[656]** *Chhaganram* v. *Bai Motigavri*, I. L. R, 14 Bom., 512. The Full Bench case of *Srinath Kur* v. *Prosunno Kumar*, I. L. R., 9 Cal., 934, has been regarded as a decision on article 141 giving a different construction of article 141, but from the judgment itself it appears doubtful whether it was so intended. But as such it has been followed. See *Kokilmoni* v. *Manick Chandra*, I. L. R., 11 Cal., 791; *Ram Kali* v. *Kedar Nath*, I. L. R., 14 All., 156; *Moro* v. *Balaji*, I. L. R, 19 Bom., 809. The decision in *Srinath* v. *Prosunno*, I. L R., 9 Cal., 934, proceeded on the assumption that the Limitation Act (IX of 1871) (in which the article in question appeared as article 142) was intended to completely alter the law on the point and to give the heir twelve full years in which to sue from the date at which the estate fell into his possession, without regard to any thing that might have occurred in the widow's lifetime depriving her of her right. This assumption the Privy Council has declared to be unfounded. See *Hari Nath* v. *Mothura Mohun*, I. L. R., 21 Cal., 8. This case has re-established the law as laid down in *Saroda Soondury* v. *Doyamoyee*, I. L. R., 5 Cal., 938, and the earlier cases. Although on the facts it is a decision not in point here, the reasoning of the judgment directly applies. Their Lordships say expressly that "no change in the then existing law" was intended to be made or was made when article 142 of Act IX of 1871 was passed in the direction of bestowing rights of suit not then existing or enlarging such as did exist. Consequently the old law as established under Act VIII of 1859 is on this point still the law. What that law was is clearly laid down in *Nobin Chunder* v *Guru Persad*, Beng. L. R Sup. Vol., 1008: 9 W. R., 505, considered and approved by the Privy Council in *Amritolal's case*, 15 Beng. L. R., 10, and in the judgment in *Hari Nath's case*, I. L. R., 21 Cal., 8; and these cases are approved as statements of the present law notwithstanding the different wording of the article in the Acts of 1871 and 1877 See also *Lachhan* v. *Manorath Ram*, I. L. R, 22 Cal., 445. It is true that in *Moro* v. *Balaji*, I. L. R, 19 Bom., 809, this Court took a different view of *Hari Nath's case*; but we submit **[657]** that on a re-examination of the judgment that view would be modified. The decision of PARSONS, J., in the present case was based on *Srinath Kur* v. *Prosunno*, I. L. R., 9 Cal., 934, which has been declared by the Privy Council to be wrong; and the decree in this case ought, therefore, to be reversed.

Where a widow has allowed herself to be barred by lapse of time, her title to possession 'has become extinguished' (section 28 of the Act). What, then, has become of it? To whom has it gone? It has passed away from her to the person who previously had only the possession and not the title, in this case the trustee of the charity, the defendant. See per Lord ST. LEONARDS in *Trustees of Dundee* v. *Dougall*, 1 Mac. H. L. Cas., 317 at p 321, and per Lord CAIRNS in *Dawkins* v. *Lord Penrhyn*, 4 Ap. Ca., 51 at p. 58. Section 28 operates as a parliamentary conveyance of the title, as said by PARKE, B., in *Doe dem Jukes* v. *Sumner*, 14 M. & W., 39. Down to that time he had the possession and the title, *i. e.*, the widow's title. The whole question, then, is what was the widow's title? The law was and is that a Hindu widow represents the whole estate; consequently if she is barred from recovering, either by a decree against her (*Shivganga case*, 9 Moo. I. A., 539), or by lapse of time (*Nobin Chunder's case*, Beng. L. R. Sup. Vol., 1008: 9 W.R., 505) all claimants to the same estate, whether claiming through or in succession to her, are

equally barred This is a matter of substantive law, not a mere question of procedure If it was intended to alter the law, there would be a provision in the body of the Act and not a mere article contained in the schedule to the Act

No presumption of an intention to alter the law is to be gathered from a mere change of phraseology in such acts—*Murray* v *East Indian Company*, 5 B and Ald, 204 at p 215

The heir is not without remedy He can bring a declaratory suit to have his rights declared if he sees he is being prejudiced by the neglect of the female entitled to the possession And if he were without remedy, his case would be no harder than that of others who are liable to be prejudiced by the laches of their [658] predecessors *e g* a son whose father has lost the estate by neglecting to sue in time, or issue in tail under the English statutes of limitation, where the tenant in tail has been guilty of similar neglect Unless a Hindu widow is no more than a tenant for life the Court must hold the heir bound see *Hari Nath's case*, I L R, 21 Cal, 8 *Nobin Chunder* v *Guru Nath* Beng L R Sup Vol 1008 and *Amritolal Bose* v *Rajoneekant Mitter*, Beng 15 L R, 10

The lower Court is wrong in ordering an account of the moveable property of either of the widows and also in declaring the plaintiff to be entitled to any moveable property of the testator undisposed of at the death of Nenavahoo the survivor Part of the moveable property of the testator was never reduced into possession by either widow and part of it was enjoyed by Cooverbai and on her death in 1871 taken possession of by the trustees for the charity, all claim to these parts of the moveable property is barred by limitation And as to any moveable property of Nenavahoo in her possession up to her death such property must have been either her own *stridhan* or her husband's ornaments which are given absolutely by the will or the savings of the rents derived by her from the two properties given her for her life by the will These last were, we contend her own absolutely They are given to her in words which impose no restriction whatever she was to freely enjoy' (consume is a closer translation) and make any charitable donations she thought proper out of the same without hindrance from any one This amounts to an absolute gift—Mayne's Hindu Law, section 584 *Thakurain* v *Chowdry Bhoranath*, L R, 21 A 256 No account should be ordered of the moveable property

*Inverarity* (with him *Branson* and *Russell*) *contra* —A bequest to *dharam* has been held to be valid in this Presidency for the last forty years, and it is too late now to open the question In this will, moreover the bequest is couched in a particularly objectionable form So far from the words in the will relied on [659] being qualifying words they are in reality enlarging words "All good works of a permanent nature" is as vague and general an expression as it is possible to use These words would include mere philanthropy as distinguished from charity See in *Kendall* v *Grange* 5 Beav 300, a bequest for objects of "general utility" was held bad as not necessarily 'charitable" So a bequest for charitable or philanthropic objects was held bad in *In re Macduff* (1896) 2 Ch, 451 since confirmed in appeal

Then as to limitation We say that the possession of the trustees for the charity was not adverse to the widows at all From the first the widows assented to all that they did Probate was taken out with their consent, the money that was laid out was so laid out, as the defendant says in his written statement 'with the consent and advice of Nenavahoo" (Cooverbai being then dead) A temple erected on Nagdevi site by the trustees bears a tablet and an inscription that this was done "by the order of Nenavahoo" The defendant seeks to account for this by saying that Nenavahoo contributed some of the money,

but it is clear, from the affidavits he himself made at an early stage in this case, that Nenavahoo was consulted in everything, and nothing was done without her consent She was absolute mistress then, and could do what she liked with the income, and nothing that we could have done could affect her conduct It would be very hard if, that being the case, the plaintiff were to lose his rights The heir could not even bring a suit for a declaration, as the widows assented—*Dhunlaij* c v *Nowroji Bomonjee*, Suit No 565 of 1889 not reported, and *Lyell* v *Kennedy* 8 Ap Ca 217 In *Churcher* v. *Martin* an assenting trustee was also a beneficiary but his assent was held to be in the former character only so that it is not an authority against us Further, under this will the trustees, as the first object the charity—failed became express trustees for the widows first, then for us and no time bars us (section 10, Limitation Act, XV of 1877) Once find an express trust created, and if necessary the Court will supply the beneficiary if it can see who was intended —*Patrick* v *Simpson*, 24 Q B D, 128

**[660]** If I am wrong in these two contentions still the plaintiff cannot be held to be barred Article 141 of Act XV of 1877 was intended to meet this very case and the hardship entailed on the reversioners by the previous law on the subject The Full Bench decision of *Srinath Kur* v *Prosunno* I L R, 9 Cal 934, has been accepted as correctly stating the law by most of the Courts of this country see *Ram Kali* v *Kedar Nath* I L R 14 All, 156 *Vukta* v *Dida* I L R, 18 Bom 216 *Azam Bhuyan* v *Faizuddin*, I L.R 12 Cal, 591 *Sambasiva* v *Ragava*, I L R 13 Mad, 512, *Shamlall* v *Amarendro*, I L R, 23 Cal 460 The latter case is a decision in point and is more recent than the Privy Council case of *Hari Nath* v *Mathura Mohun* I L R 21 Cal, 8, relied on by the other side The facts in *Lachhan Kunwar's case* I L R, 22 Cal, 445, show that it was probably decided under the Act of 1859 and not under the Act of 1871 at all In any case it cannot be treated as a decision on the point now in question the widow entitled was herself the *Hari Nath's case* I L R, 21 Cal, 8, does not touch the present point at all the cases above cited were not even referred to It would be absurd to hold that when the widow dies, possession adverse to her has been held for 11 years and 364 days, no time has run against the heir entitled on her death and yet if her death occurs a day or two later the heir is completely barred No argument is to be drawn from section 28 of the Limitation Act that section merely says the widow's right is extinguished it does not touch our rights They are specifically preserved by article 141

The plaintiff, therefore is entitled to all the immoveable properties of the testator in the defendant's hands There must be an account as to what these are, we never admitted, nor was it proved, that they were merely those that are enumerated in the schedule to the decree On the contrary it is clear that there were others And as to the rents and profits of the immoveable properties the account ordered is insufficient We admit that the widow had the power to spend them, if she thought fit but so far as they were not actually expended on the charities they belong to us. There should be an account to ascertain how these stand.

**[661]** *Anderson* in reply —The will does not leave the property to *dharam* and to good works of a permanent nature The two are not contrasted The will has to be read as a whole so read, it means " I leave it to be expended on such works of *dharam* as are good or approved and of a permanent nature " Consequently the reasoning of the two cases [*Kendall* v *Granger*, 5 Beav, 300, and *In re Macduff*, (1896), 2 Ch., 451], cited on the other side does not apply.

The trustees' possession was undoubtedly adverse to the widows throughout. Whether a possession is adverse or not, depends on the nature of the claim made by the person in possession, not upon the assent or dissent of the rightful owner. If the possession is held by a title independent of, and not derived from, the rightful owner it is adverse whether the rightful owner acquiesces or not. So much so that the possession of a grantee under a void grant is adverse to the grantor, though in that case there is much more than mere acquiescence —Angell on Limitations, section 404; *Magdalen Hospital* v. *Knotts*, 4 Ap. Ca., 324; *Churcher* v. *Martin*, 42 Ch. D., 312. The test is, can the real owner sue for immediate possession; if he can, he must, or time runs against him. In this case it is clear, and is admitted throughout, that the defendant claimed and took possession under and by virtue of the authority derived from the testator,—that is, as trustee for the charities. This was a title fatal to the claim of all persons claiming by inheritance to the testator. There was an express trust, it is true, contained in the most explicit terms in the will, but not in plaintiff's favour, but in favour of the charities. *Patrick* v. *Simpson*, therefore, is not applicable. This suit is brought to destroy that express trust and claim the properties covered by it in defendant's hands as the executor of the will. Under these circumstances, whatever the position of the defendant is towards the plaintiff, he is certainly not an express trustee for him. The position is exactly that of the parties in *Churcher* v. *Martin*, 42 Ch. D., 312, followed in *Cowasji N. Pochkhanawalla* v. *Rustomji D. Setna*, I. L. R., 20 Bom, 511. An executor is not an express trustee even for a legatee [*Evans* v. *Moore*, (1891) 3 Ch., 119]—much less for one whose claim is founded on the total **[662]** destruction of the will. If the facts in *Dhunbaijee's case* were as stated, that case was wrongly decided. The argument on the other side as to the meaning of article 141 of the Limitation Act might have been of force before the decision in *Hari Nath's case*, I. L. R., 21 Cal., 8; but it is of no avail now since that decision. The learned counsel for the plaintiff has failed to distinguish *Hari Nath's case*, I. L. R., 21 Cal., 8. There is nothing absurd in the reading of the Act we contend for. Time runs against the reversionary heir from the same date as under the previous Acts: the only change is that by the new provision the heir, if still entitled to possession at the widow's death, has given him an extension of the period in which he may sue to recover it. There is no breach of principle in this; and in many cases it would remove what might seem to be a hardship.

The Court below took the right view of the rents and profits of the immoveable properties accrued due antecedently to Nenavahoo's death. She allowed those to go to the trustee for the charities, as if they were hers to spend, that alone is equivalent to her having expended them. There was nothing of the nature of accumulation, whether for herself or her husband's estate.

**Farran, C. J.**:—This is an appeal by Vundravandas Purshotumdas, surviving executor of Callianji Sewji, against the decree of the Division Court, which has declared that the devise in *dharam* contained in the will of the testator of almost the whole of his property, is void, and that the plaintiff, as the nearest heir of the testator upon the death of his surviving widow Nenavahoo, is entitled to his estate. The suit was in form a suit for the administration of the estate of the testator.

The facts are, in effect, undisputed. Callianji Sewji died on the 6th January 1869, leaving a will bearing date the 5th of that month, whereby he appointed the appellant and one Deva Hurdas and one Tulsidas Ichharam (both of whom have since died) trustees of the whole of his property and executors

according to the tenor of his will The plaint states, and the fact is not disputed, that the executors, upon his death, took possession of the whole of the moveable and immoveable property of the testator, consisting of cash, outstandings, ornaments, houses lands, &c, at Bombay and elsewhere At this time the heirs of the testator [663] were his two widows Cooverba and Nenavahoo, while his nearest blood relation was his full brother Govindji Sewji, since deceased, the father of the present plaintiff The executors proved the will and, on the 2nd March 1869, with the consent of the two widows administration of the testator's estate was granted to them We agree with the argument of counsel for the appellant that notwithstanding such consent, and although, in giving effect to the directions of the testator as to *dharam*, the executors may have acted "with the consent and advice of the widow Nenavahoo, (Cooverbai died soon after the testator), and with the consent and active concurrence of Govindji (the plaintiff's father), and with the advice of Nenavahoo, and the knowledge of the plaintiff, the possession of the executors in so far as they were not by the terms of the will made trustees for the widows and reversionary heirs of the testator, was adverse to the widows and heirs The executors throughout and even in Exhibits D and F professed to be acting under their title as executors and in accordance with the terms of the will and never professed to deal with the property under a title derived from the widows or heirs They acted not as agents or trustees for the widows and heirs but as independent owners deriving their title from the will and from that alone They entered into possession under the will and there is nothing, we think in the evidence to show that the character of their possession was subsequently altered On the contrary the execution of the trust deeds shows that at their dates, at all events they were dealing with the assets of their testator as his executors, and in no other capacity The presumption that they continued to act in that character to the end, is not we think in any way displaced This possession under a written instrument, the will, coupled with the intention to carry out its terms by reason of the title which it conferred whether the persons entitled to take, in the absence of such an instrument consented or did not consent to that possession, constituted in our opinion, a possession adverse to the heirs

It will here be convenient to deal with the argument that the executors by reason of the devise in *dharam* being incapable of enforcement become express trustees of the whole estate, not validly disposed of by the will for the heirs of the testator [664] The argument is based on the decision in *Patrick* v. *Simpson*, 24 Q B D, 128. It must, we think, be conceded that where a Hindu will makes the executors trustees of the whole estate of the testator and the bequests in the will are not sufficient to exhaust that estate the executors become express trustees of the undisposed of residue for the next of kin of the testator. That has been so decided by this Court in *Lallubhai* v *Mancooverbai*, I L R, 2 Bom, 388, where the case of *Salter* v *Cavanagh* 1 Dr & W 668, was followed, as it was also followed by the Queen's Bench Division in England in *Patrick* v *Simpson*, 24 Q B D, 128 But here the will purports to deal with the whole estate and confers it upon the trustees for certain purposes Assuming that these purposes are too vague for the Court to enforce the bequest would still create a trust binding upon the conscience of the trustees That appears to us to be the express trust upon which the trustees hold the estate which excludes and is inconsistent with a trust inferred or implied from the terms of the instrument for the next of kin It is upon the basis of the trust in favour of the next of kin being inferred from the instrument itself that the decision in the case of *Salter* v. *Cavanagh*, 1 Dr & W, 668, appears to us to be founded. The principle ceases to apply when the instrument impliedly excludes the idea

of a trust in favour of the next of kin Though the exact position of the defendant in this case differs from the position of the defendants in *Churcher* v *Martin* 42 Ch D 312 yet the following passage from the judgment of KEKEWICH, J, in that case shows that his decision would have been the same had the position of the defendant there been identical with that of the defendant here The general proposition (that the possession of the trustees is the possession of their *cestui que trust*) is true enough and might be supported by other authorities But what is its application to the present case (I will assume that those in possession were trustees in the proper and full sense of the term)? How can the possession of trustees enure to the benefit of him whose title was intended to be defeated by the deed which created the trust? How can the grantor be then *cestui que trust*? Because it is urged there is an express trust in his favour—an express trust [665] necessarily resulting from the failure of the e declared It would suffice to reply that such a resulting trust is implied by law and that whatever else it may be it is not an express trust but as *Salter* v *Cavanagh* was referred to, I may point out that the trust there spoken of as express was one inferred from the deed and not as here a trust arising out the deed and due only to the fact that the deed is void This seems to have been appreciated by the learned author of the text book which was mentioned It is necessary for us therefore, to decide this question we think that we must hold that the trustees under the will in question were not express trustees for the heirs of the testator except in so far as the terms of the will constituted them such trustees We have considered the question whether the expression express trust had been used in our statute (Act XV of 1877 section 10) but for this purpose we think that the words in trust for a specific purpose may be treated as a more expanded mode of expressing the same idea Our decision on this point is supported by the case of *Anandmoyee* v *Doorjamoney* I L R 4 Cal, 155, which cannot we think be substantially distinguished from it

We pass on to consider the question the answer to which we have above assumed whether the gift in *Dharam* contained in the will of Gulhanji Sewji is capable of enforcement in this Court, and upon it we think that we are concluded by authority By a long series of decisions beginning with the *Advocate General* v *Ramkuar* Perry's Or Ca 526 followed by *Pranjivandas Tulsidas* v *Devkuvarbai* 1 Bom H C R p 76 (footnote), and a host of subsequent reported and unreported cases it has been laid down that a devise in *dharam* is void for vagueness and uncertainty and this we think, must be regarded as the established law of this Court until that law shall have been differently expounded by a superior tribunal It is doubtless the case that this interpretation of the law defeats in innumerable instances the cherished wishes of Hindu testators Few Hindu wills that we have met with, are without a devise of this nature though some testators define with precision the objects of *dharam* and it may well be that the Court would have acted with more regard to native feeling and ideas if in [666] stead of considering the broad signification that the word *dharam* indisputably bears, which appears to be as broad as the word philanthropy or piety, or charity, in its untechnical sense, it had considered the objects which the Hindu Shastris and Hindu texts would consider to be embraced within the term and construed it in reference to the Hindu sacred law relating to *dharam* These objects, we think might be exhaustively enumerated under a few heads which would even now with a widening idea not be wider than the objects which are deemed to be charitable by the Courts in England, and would not embrace such objects as are suggested in the argument in *Macduff* v *Macduff*, (1896) 2 Ch, 451.

In a native Court untrammelled by English precedent or decisions we can hardly doubt but that a devise in *dharam* would be upheld and applied The question is, however, we consider no open to us We have only made these remarks as indicative of what our judgment might have been, we do not say would have been, had the case not been concluded by authority

It is contended for the appellants that in the will now under consideration the expression *dharam* is qualified and cut down by the context and that the bequest ceases for this reason in this case to be too vague for the Court to enforce We do not think that the argument is well founded It would be impossible for us, we think to distinguish the devise in this case from those which have from time to time been held to be uncertain by our Courts The expression *dharmada* is [illegible] given to the widows and does not assist in ascertaining the meaning of the expression '*dharam*' to which the residue of the [illegible] property is to be devoted The passages in which the residue is dealt with [illegible] The said trustees are to act in such manner as [illegible] my name so that my memory [illegible] *dharam* after [illegible] by which [illegible] was translated) [illegible] This it appears to us only expresses [illegible] Hindu testators [illegible] supposed [illegible] [667] [illegible] the broad [illegible] to [illegible] *dharam* [illegible] Hindu [illegible] *dharam* should be [illegible] in the case of [illegible] *Mullick* v *Sumbhoo* [illegible] p 10 [illegible] guished from that which we have quoted [illegible]

The other passage [illegible] will [illegible] my lifetime made the whole of [illegible] will [illegible] to which my trustees are to [illegible] On this it is argued that the [illegible] *dharam* [illegible] shows that the word is used in a limited sense but [illegible] many benevolent and philanthropic works [illegible] charitable The character of the work and not [illegible] to be applied in order to ascertain whether it is charitable or not [illegible] mentioned in argument in *Macduff* v *Macduff* (*supra*) [illegible] are all of a more or less permanent character The judgment in *Kendal* v *Granger* 5 Beav 300 is a guide to us upon this [illegible] We [illegible] with the Division Court that the devise in *dharam* [illegible] and too indefinite for the Court to enforce and is therefore void

We have next to consider whether the claim of the plaintiff is to any and what extent barred by the law of limitation The testator as we have stated died in 1869 His widow Cooverbai [illegible] in 1871 leaving some moveable property With this or its proceeds, the trustees of the testator purporting to be acting as the trustees of Cooverbai under her will [illegible] duly attested purchased an immoveable property on the 21st December 1872 which they or the survivors have since held in that capacity Whether the moveable property left by Cooverbai included or did not include property which [illegible] from the testator we are clear that all claim of the plaintiff [illegible] is long since time barred She left no immoveable property to which the provision of article 141 of the schedule to the Limitation Act only applies The decree in so far as it directs an account to be taken [668] in respect of the moveable property left

by Cooverbai in distinguishing between such of it as was *stridhan* and such as was no *stridhan* must be amended by striking out the whole direction Cooverbai did not it appear enter into possession of the houses left to her for life We need not further refer to her existence or to the clauses of the will which affected her

The clauses in the will which were in favour of Nenavahoo were these "One oart at Mahim called the *Jaifal Waadi* h been given to my old wife Nenavahoo The income w ich may le derived therefrom is to be enjoyed (by her) during her natural life and she is to make charities out of the said income but it (the oart we think) cannot b sold Further there is the abovementioned house in ... in the rent of (the house of) Miya Nakhooda R ... whatever rent may be derived from the said house is all to be enjoyed by my ... *dharam* of No one else shall have any right ... but the said house not be sold to any one A later clause ... that ... houses after the ... of Nenavahoo are to revert to the general *dharam* fund The ... of the testator in Babhaya Street The properties mentioned ... were made over to Nenavahoo She died in 1885 and ... who ... took possession of the property ... which ... consisted of ... *stridhan* ... and the rents and profits of the two properties ... In ... account in the case of Nenavahoo the property ... direction in the case of the property of Cooverbai This ... we consider to be unnecessary It appears ... that the testator has given full power of disposition to Nenavahoo over the income of the properties given to her for life ... no else shall have any right ... expresses the wish of the testator that her power over the income shall be absolute There is no reason for construing the words otherwise *Lalla ... Chandu ... Lanath* I R 2 Ind Ap 256 By the same ... the gift in favour of the executors She is given full power of disposition over the income The addition to Nenavahoo's ... which ... operation ... then the devise in

[669] *dharam* ... we think ... of that power or to reduce the ... estate ... level ... Hindu widow's estate

We are of opinion ... that Nenavahoo ... power to make the will which she has made ... decree must be varied by omitting the portion which directs an account ... movable property left by Nenavahoo

It remains to consider whether the claim of the plaintiff is barred by limitation as to the general bulk of the property left by the testator It is ... the movable property left by him and the profits of the immovable properties which ... expended during the lifetime of Nenavahoo and with her acquiescence the plaintiff has no claim As Nenavahoo ... of ... class of property so she could authorise ... of her husband to deal with it The plaintiff's claim must ... immovable properties left by the testator and to such part of his movable property and of the rents and profits of the immovable property as was unexpended at the death of Nenavahoo in 1885

The article applicable to the immovable property is article 141 of the Limitation Act ... runs thus "Like suit (for possession of immoveable property) by a Hindu ... entitled to the possession of immoveable property on the death of a Hindu or Mahomedan female" That article appears to us to be intended for limitation purposes to do away with the anomalies which surrounded a Hindu widow's estate and other estates analogous thereto,

and to assimilate it for these purposes and for these purposes only to that of the estate of an ordinary tenant for life. The term "reversioner" being inapt to express the next heir of her husband succeeding upon a Hindu widow's demise the Legislature has, it appears to us, adopted the phrase "Hindu entitled to the possession of immoveable property upon the death of a Hindu female" to express the same idea. That it has designedly altered the law which formerly prevailed upon this subject as laid down in *Nobin Chunder* v. *Guru Persad*, Beng. L. R., (F. B. Rul.), p. 1008, and approved by the Privy Council in *Amritolal* v. *Rajoneekant*, L. R., 2 Ind. Ap., 113 at p. 121, **[670]** is obvious. It is clear that adverse possession against a Hindu widow for any period less than the full statutory period of twelve years is now valueless as against the person to succeed on her death. He has still the full statutory period of twelve years to sue after her death. No time has in that case run in favour of the adverse possession against the Hindu male heir. This was not so under the old law. Under it time was running in his favour during the widow's life time. Now it begins to run in his favour only on her death. A Hindu entitled to the possession of immoveable property on the death of a Hindu female appears to us to mean a Hindu whose title to the possession of immoveable property accrues upon the death of a Hindu female and does not except the case where during the life time of the widow the adverse possessor has been in possession for twelve years. This view of the law has been accepted by all the Indian High Courts with the exception perhaps of Madras, but there the question was not discussed. We refer to the decisions in *Srinath* v. *Prosunno*, I. L. R., 9 Cal., 934; *Kokilmoni* v. *Manik Chandra*, I. L. R., 11 Cal., 791; *Sham Lall* v. *Amarendro*, I. L. R., 23 Cal., 460; *Dwarka Nath* v. *Komolmoni*, 12 Cal. L. R., 548; *Ram Kali* v. *Kedar Nath*, I. L. R. 14 All., 156; *Mukta* v. *Dada*, I. L. R., 18 Bom., 216; *Mero* v. *Balaji*, I. L. R., 19 Bom., 809, without suggesting that the list is exhaustive. There are some decisions the other way, but those which we have mentioned are the decisions of the Courts at present binding. In the present case we have no concern with the old law prior to 1873, and we think that it may be fairly asked how and under what article of the present law the suit is barred. If the plaintiff is not barred under article 141, under what article is he barred? The only article that can be suggested is article 144, but under it the possession of the defendants never became adverse to the plaintiff even as that expression is interpreted by section 3 of the Act.

Admitting that the Indian authorities are against him, Mr. Anderson contends that the judgment of the Privy Council in *Hurrinath* v. *Mohunt Mothoor Mohun*, L. R., 20 Ind. Ap., 183, is conclusive in his favour. We do not agree with that view. The judgment expresses no **[671]** opinion upon the effect of article 141 save this, that it did not operate to prevent a decree which was binding upon Sampurna from being binding upon the plaintiff in that suit who became entitled to possession of the property on the death of Sampurna, even though the decree against Sampurna and in favour of the defendant was based upon the law of limitation. From the interlocutory *dicta* and remarks in the course of the argument for the appellant, it is clear that it was the extinguishment of the plaintiff's right by the decree against Sampurna, which appeared to their Lordships of the Privy Council to be the *crux* which prevented the plaintiff from recovering and that also is apparent in the judgment itself. If the Privy Council had intended to overrule the Calcutta Full Bench decision in *Srinath* v. *Prosunno*, I. L. R., 9 Cal., 934, the judgment would, we think, have made some allusion to that case. In our opinion their Lordships did not intend to deal with it. It is also by no means clear that Sampurna's title was not barred under the old law when the Act of 1871 came into force. The

date of the death of Pearimoni is not given in the report. If this is not so, there is an anomaly in the law as pointed out by the Calcutta High Court in the case under consideration (see I. L. R., 21 Cal., at p. 12). In *Lachhan Kunwar v. Anant Singh*, L. R., 22 Ind. Ap., 25, also referred to by Mr. Anderson the present question did not arise. We think, therefore, that we ought to follow the current of authorities to which we have referred, and to hold that the plaintiff's claim to the immoveable properties of the testator Calliangi in the possession of the defendant is not barred by limitation.

As to the moveable property (if any) in the hands of the defendant at the death of Nenavahoo and the rent and profits (if any) of the immoveable properties in the defendant's hands at the same period there has been but little argument. It appears to us that Nensvahoo's claim to both was barred at her death, and that there is no provision of the Limitation Act which gives the plaintiff a fresh starting point from that period.

This will considerably simplify the accounts which have to be taken and the form of the decree. As to the Nigreh fields, the defendant says that the executors gave them away in charity at [672] the time of the testator's death, but it is alleged by the respondent that there was no change of possession. The matter was not pressed in the Division Court. Our decree will leave it open to the plaintiff to show, if he can, that those fields are still in the defendant's possession.

The decree of the Division Bench will be varied by the substitution of the following decree after the recitals, and the declaration as to the bequest to *dharam* being void. And this Court doth further declare that the plaintiff is entitled to recover from the defendant the several immoveable properties of Calliangi Sewji which were in the defendant's possession at the death of Nenavahoo and to the proceeds of such of them as have been since sold by the defendant, and to an account of the rents and profits of the said properties received by the defendant since the death of Nenavahoo, and doth refer it to the Commissioner to ascertain and report what properties (if any), in addition to those specified in the schedule to the decree, were so in the possession of the defendant, and to take an account of the net rents and profits received in respect of the immoveable properties of Calliangi Sewji by the defendant since the death of Nenavahoo, and doth order and decree that the defendant do forthwith deliver to the plaintiff possession of the said several immoveable properties specified in the schedule and pay to the plaintiff the sum of Rs. 18,719-14-9 which stands to the credit of the first defendant in the Bank of Bombay in his account No. [illegible]. The defendants one and two to have their costs taxed as between attorney and client paid out of the property, the subject of this decree. Further directions and further costs reserved. Liberty to apply.

Attorneys for the Plaintiff: Messrs. *Crawford & Co.*

Attorneys for the Defendant: Messrs. *Vulji and Raghowji*

NOTES

* [1. This was affirmed by the Privy Council in (1899) 23 Bom., 725. See also (1902) 4 Bom. L. R., 8[illegible]3.

2. As regards limitation see also (1906) 3[illegible] Bom., 222 (sec. 10), (1908) 32 Bom., 394 (*ibid*), (1910) 12 Bom. L. R., [illegible] (*ibid*), (1911) 13 Bom. L. R., 717 (sec. 10), (1898) P. R., 79, (1903) P. R., 4[illegible] (Art. 143).]

## [673] ORIGINAL CIVIL

*The 29th March 1897*

PRESENT

SIR C FARRAN KT, CHIEF JUSTICE

### In the goods of Sir Albert A D Sassoon deceased

*Probate duty Locality of asset*

S died in England in October 1896 ... England on 1st December 1896 He left a large ... in ... Bombay ... was a partner in the firm of David Sassoon and Company which had its head office in London and had branches in Bombay and Calcutta

*Held* that no probate duty was payable on the value of the share of the deceased as a partner in the firm of David Sassoon and Company on the property of the firm situated in British India at his death

REFERENCE by the Taxing Officer of the Court under section 5 of the Court Fees Act (VII of 1870) for the opinion of the Chief Justice

The question arose on an application for letters of administration to the property and credits of Sir Albert A D Sassoon

The application was made to the High Court of Bombay by Miss Flora Sassoon the constituted attorney of the executor of the will of the deceased

Her petition stated that Sir Albert A D Sassoon died in England on the 24th October 1896 leaving property and credits within the town and island of Bombay He left a will and codicils probate whereof was obtained in England on the 1st December 1896 His executor (Sir Edward Sassoon) by a power of attorney executed by him on the 22nd December 1896 appointed the petitioner his attorney to obtain administration of the deceased's estate in India

The following clauses in the petition set forth the petitioner's case with reference to the payment of duty

9 That the said deceased was at the time of his death ... partner in the firm of Messrs David Sassoon and Company of Bombay Calcutta and London in which firm he held at the time of his death ... 100 ... petitioner submits that no court fee stamp ... payable ... ... ... ... of the assets or credits of the said firm ... ... ... ... ...

10 That the business of the said firm was first ... by the late David Sassoon ... which ... ... afterwards ... with him ... [674] the style of David Sassoon and Company his son the said Sir A A D Sassoon deceased and other of the said testator's son

11 That subsequently branches of the said firm were opened at Calcutta and London respectively and the said firm had also a branch ... at ... ... and Shanghai in China which was carried on in the name of David Sassoon ... Company in which latter firm there were partners who were not partners in the head firm of David Sassoon and Company

12 That from the institution of the said firm of David Sassoon and Company at Bombay and until some time in the year 1891 Bombay was the head quarters of the said firm where its principal books of account were kept ... ... accounts were ... up annually and the share of its partners in the firm's profits and loss ... ... ... were ascertained and debited or credited to their accounts as the case might require

13 That for some time previous to the year 1891 all the partners in the said firm of David Sassoon and Company other than the late Mr Solomon David Sassoon had ceased to reside in India and resided in England and on the death of the said Mr Solomon David

Sassoon which took place at Bombay on the 15th day of March 1894, the head quarters of the said firm of David Sassoon and Company became removed from Bombay to London, where they have ever since been and now are and where in consequence the principal books of accounts of the said firm have since been and are now kept, and the said accounts have been and now are made up annually the profit and loss of the business carried on at Bombay, Calcutta and in China and elsewhere being brought into the London books, and where the share of the partner in the total transactions of the said firm have since been and are now ascertained and credited ... as the ... may require

14. That on the 1st day of January 1895 your petitioner was admitted into and has since been a partner in the said firm of David Sassoon and Company but all the other partners in the said firm ... in England which was at the date of the death of the said Sir A. A. D. Sassoon ... the head quarters of the said firm

15. That at the date of the death of the said Sir A. A. D. Sassoon deceased the said firm of David Sassoon and Company was possessed of moneys, property and credits situated within British India and that the said testator was a partner in the said firm interested in the said moneys, property and credits but was not entitled to any right therein other than a right to share in the net surplus ... ascertained after providing for its liabilities ... and it would not be possible to ascertain the value of the said testator's interest in the said moneys, properties and credits ... the value of his share and interest in the net surplus of the said firm when ascertained after providing for its total liabilities

16. That the ... of the said Sir A. A. D. Sassoon ... in the said firm of David Sassoon and Company (including ... at Bombay and Calcutta and ... firm of David Sassoon and Company of China) ... the estate of the said Sir A. A. D. [678] Sassoon deceased situated within England ... duty has been paid in England on that footing

17. That the said Sir A. A. D. Sassoon deceased was at the time of his death domiciled in England and has been held to have been domiciled by the Inland Revenue authorities in England and legacy duty has been charged on his estate accordingly

The Registrar of the Court was of opinion that duty was chargeable on the deceased's share of the firm's property situated in India leaving the executor to obtain a refund on any debts appertaining to that share

The Taxing Officer therefore under section 5 of Act VII of 1870 referred the following question for the decision of the Chief Justice

Whether any probate duty is payable on the value of the share of the deceased as a partner in the firm of Messrs. David Sassoon and Company in the properties of the firm situate in British India at his death

*Farran*, for the Petitioner

... Advocate General ... for the Crown

**Farran C J** In this case the Taxing Officer has referred for my decision the following question "Whether any probate duty is payable on the value of the share of the deceased as a partner in the firm of David Sassoon and Company in the properties of the firm situate in British India at his death" as being a question of general importance. In connection with this and with reference to the valuation of the estate generally of the testator in British India, counsel for the petitioner has called in question the practice of the Registrar not to rest content with the statements of the petitioners for probate or letters of administration as to the value of the property of which administration is sought, but to require other evidence as to the value of the assets specified in the inventory of which the estate is made up. This practice was initiated by our Registrar with the approval of our late Chief Justice Sir MICHAEL WESTROPP about the time when the Court Fees Act, 1870, came into operation, and may,

therefore, be now considered to be an established practice, but no rule directly bearing upon the subject has been made by the Court

**[676]** Mr Inverarity first contends that the practice is inconsistent with the provisions of sections 244 246 and 243 of the Indian Succession Act, and that the only inquiry which the Court can hold is the inquiry authorized by section 250 of that Act He especially relies on the provisions of section 243, which make the application for probate or letters of administration when made and verified in the manner required by the Act conclusive

A consideration of these sections however satisfies me that they are enacted for the purpose of authorizing the grant of administration and rendering it conclusive even though there might be incorrect statements or omissions in the application upon which the grant is issued and have no reference to the valuation of the estate for the purpose of levying a court fee upon it They were enacted for jurisdictional and not for fiscal purposes The examination and inquiry which may be instituted under section 250 needs I think to be held for a similar purpose though they are not in words confined to that object.

The ascertainment of the value of the estate for the purpose of fixing the stamp prescribed by section 329 and in the schedule to Act X of 1865 does not appear to have been provided for by the Legislature in the Act itself Section 329 and the Schedule of Act X of 1865 were however repealed by section 2 of the Court Fees Act 1870 and it is to the latter Act that we must have recourse when considering upon what materials the Court or its officers must rely when it is called on to adjudicate as to the court fee payable on a grant of probate or letters of administration Such express powers as are conferred on the Commissioner of Inland Revenue by Statute 44 Vic c 12 section 37 for the purpose of ascertaining the value of an estate for fiscal purposes do not find a place in the Court Fees Act 1870 but the duty to see that the proper court fee is paid before issuing administration to an executor or administrator is clearly imposed on the High Court issuing the same

Section 3 enacts that the fees chargeable in each of such Courts under No 11 of the first schedule to the Act shall be collected in manner hereinafter appearing Section 5 provides as follows (His Lordship read the section and continued) **[677]** — This section without expressly casting upon any one the duty of collecting and assessing the stamp duty assumes that it rests with some officer of the Court (who in this case is the Testamentary Registrar) and provides for the case of difference arising between him and the suitor or his attorney as to the necessity of paying a fee *or the amount thereof* It thus inferentially imposes upon him the ascertainment of the amount of the fee payable in each case Except in probate and testament any matters an *ad valorem* fee is not usually paid in the High Court but such a fee is payable in some other cases What that amount should in such cases be, is left to the proper Court officer to determine How in the case of an *ad valorem* fee is he to ascertain its amount The Act provides no machinery for doing so It may well be that under these circumstances the Court should consider that its officer ought to base his opinion solely upon the sworn application of the petitioner I cannot say that that would be an unreasonable conclusion In this High Court however a contrary practice has prevailed and it is impossible, I think, to say that that is an erroneous view to take of the statute Under such circumstances I consider that the established practice should continue

It is contended that such a practice is inconsistent with the provisions of Chapter III A of the Act I do not think that this is necessarily so The provisions of that chapter are founded upon similar provisions found in

English statutes 48 Geo III, c 149, sections 35 and 55, Geo III, c 184, sections 40 41 42, 43 and 51, and those provisions exist side by side with those contained in the later English Act to which I have referred A *primâ facie* examination of the value of the declared assets of an estate seems to me to be quite consistent with a power to correct their valuation subsequently The revenue authority—the Court officer—has and can have no means of ascertaining whether any items of property have been omitted from the inventory He can only check the valuation of those items which are shown in it

As to the practice of requiring the valuation to be made by certain named valuators, it is a good working practice, but I cannot see that it can be insisted on in a case where the petitioner can prove by other means the true value of the property If [678] after giving such proof as he is disposed to give, a difference still exists between the petitioner and the Registrar recourse must be had to the Taxing Officer Beyond saying this I do not think that I have materials before me to enable me to give any special direction in the present case

Upon the main question which has been referred to and argued before me the first point to consider is what is the nature of the asset which the Crown contends should be assessed for the probate duty The question states it as the share of the testator in the properties of the firm but that is not I think, an accurate description A deceased partner has (in the absence of special agreement) no share in the properties of the firm as such It is his interest in the firm which is the asset which is assessible to probate duty The cases of *Laidlay* v *The Lord Advocate* 15 Ap Ca 468 and *Lord Sudeley* v *Attorney General* (1897) Ap Ca 11, put that beyond doubt It is not material to enquire what is the exact nature of the property of the firm I read the passages from Lindley on Partnership quoted by the Solicitor General for Scotland at page 481 of the report and the passage from the judgment of Lord Chancellor HERSCHELL bearing upon this point — In Lindley on Partnership (5th Ed, p 339) it is said 'what is meant by the share of a partner, is his proportion of the partnership assets after they have been all realized and converted into money and all the debts and liabilities have been paid and discharged' And at page 343 from the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity a share in a partnership whether its property consist of land or not must as between the real and personal representatives of a deceased partner be deemed to be personal and not real estate unless indeed such conversion is inconsistent with the agreement between the parties (p 481)

One of the partners in this firm, Mr Laidlay, has died, and the question has arisen whether his interest whatever it may have been derived from the deed of partnership to which I have called attention is an asset situate in England and therefore, made the subject of probate duty in respect of which probate [679] must be taken out in this country There can be no doubt that the question to be determined is what is the local situation of the asset with which we have to deal because that the testator's interest in the partnership, however it is to be described, was one of his assets is beyond dispute (p 483)

That being the nature of the asset the next question is where is it situated The mode of solving that question is pointed out in the same case (*Laidlay* v *The Lord Advocate*) in the judgment of the Lord Chancellor thus (p 489, paragraph — —

Now my Lords, I think that when that provision is considered, it renders it clear that this asset which, by the hypothesis, was a share in a partnership business situate in India, did not by the exercise by the representatives of the deceased partner of this option, however they exercised it, convert

that which otherwise would have been an Indian asset into an English asset. It is said that the representatives of the deceased partner sold to persons in this country; but that transaction of sale was a transaction altogether subsequent to the death, and the character of the asset and its local situation cannot be affected by circumstance arising out of a transaction subsequent to the death. The question is, where was the asset situate at the time of the death? That it was sold to a person residing in this country and that, therefore, the payment in respect of it became a debt from a person residing in this country, and that in the case of a debt the locality of the debtor is to be regarded as the locality of the asset, can matter nothing, because this was not a debt existing at the time of the death of the testator, but arose subsequently to his death by a sale of a part of his assets, and of course the local situation of his assets cannot be in the slightest degree affected by what arises out of a sale of those assets."

Where, then, is the business of David Sassoon and Company carried on—in India or in London, for this cannot be said to be carried on at both places? Where is the government of the firm situated? I have come to the conclusion that London is the locality in which the business which is the property of the partnership is situate. Upon the statements in the petition and the evidence of Mrs. Sassoon, there cannot be, I think, any doubt **[680]** upon that point, if there is only one business. The Advocate General, however, contends relying upon the case of *Beaver* v. *The Master in Equity of the Supreme Court of Victoria*, (1895) Ap. Ca., 251, and seeks to bring the circumstances of the present case within that ruling but the circumstances of the two cases are very different, and I think that in this case there is but one business. The facts which existed in that case do not exist in this.

I should have been better satisfied if Mrs Sassoon had searched for and produced the old deed of partnership, for though, as she says, it may be no longer in force it does not appear that other than the change to London there has been any alteration in the mode of managing the business, and the former deed might have thrown light on the present practice. Taking, however, the evidence as it stands it appears that the same partners are partners both in London and India (the China firm stands on a different basis), and carry on business under the same name in both places. There is no capital account in Bombay at all. The real head of the firm to whom its good-will belongs resides in London, and new and important matters are only entered into by the Bombay firm after reference to London, though the ordinary every day work of the firm is automatically conducted here. The results of the transactions of the firm in its different classes of business, though not the details of each transaction, are sent home to London to be entered in the books there. The profit and loss account of the working of the whole firm is made up in London, and the proportion of each partner in the year's profits of the firm is entered to his credit there in a book kept for that purpose, a book of the firm, though kept private from its employees and servants. In short, I feel unable to point out a single circumstance which enables me to say that the Bombay business is a distinct business from the London business which would not apply to the foreign branch of any English firm.

I am, therefore, of opinion that the question referred must be answered in the negative.

Solicitors for the Petitioner.—Messrs. *Brown and Moir.*
Solicitor for Government:—Mr. *A. Little.*

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**NOTES.**

[See also *Beaver* v. *The Master, etc.*, (1895) A. C., 251.]

## [681] APPELLATE CIVIL

*The 30th January 1896*

PRESENT

SIR C FARRAN KT, CHIEF JUSTICE, AND MR JUSTICE PARSONS.

Ishvar Lakhmidat (Original Opponent) Applicant

*versus*

Harjivan Kumji (Original Applicant) Opponent.*

*Decree — Execution Order for sale of mortgaged property in execution Application by judgment debtor to be declared insolvent — Sale in execution pending application Subsequent declaration of insolvency does not affect sale Civil Procedure Code (Act XIV of 1882), Secs 344, 351*

An order for the sale of mortgaged property was made on the application of the mortgagee who had got a decree ... the mortgagor (judgment debtor) applied to be declared an insolvent under section 344 of the Civil Procedure Code (Act XIV of 1882) ... was duly declared an insolvent under section 351

*Held* that the subsequent declaration of the mortgagor's insolvency did not affect the sale or render it illegal ... the judgment creditor ... from the application ... section 344 of the Civil Procedure Code (Act XIV of 1882) ... only when a receiver is appointed under section 351 that the property of the insolvent vests in the receiver under section 354 and the rights of the creditor ... interfered with. It ... provided that such an order shall have any retrospective effect

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code Act XIV of 1882) against the decision of Gilmour McCorkell District Judge of Ahmedabad confirming the order of Khan Saheb Navroji Byramji Subordinate Judge of Umreth

On the 25th April 1893, opponent Harjivan Rumji mortgaged his house and other property to one Ishvar Vrajlal for Rs 300 Ishvar obtained a decree on the mortgage for the recovery of the debt by the sale of the mortgaged property in default of payment On the 26th February 1894 Ishvar applied for the sale of the mortgaged property in execution of the decree While this application was pending, Harjivan on the 2nd April 1894 applied to be declared an insolvent under section 344 of the Civil Procedure Code (Act XIV of 1882) On the 17th July 1894 the mortgaged property was sold in execution and was purchased by the applicant Ishvar Lakhmidat Subsequently the inquiry as to Harjivan's insolvency was proceeded [682] with, and he was declared to be an insolvent on the 22nd December 1894 The Nazir of the Court was appointed receiver of his property and the sale of the house to the applicant was set aside on the ground that the pendency of the insolvent's application rendered the sale illegal

On appeal by the applicant the Judge confirmed the order

The applicant then obtained a rule *nisi* to set aside the order

*Gokuldas K Parekh* appeared for the Applicant in support of the rule:— We contend that the Subordinate Judge had no authority to quash the execu-

* Application, No 195 of 1895 under the extraordinary jurisdiction.

tion proceedings in a summary manner A court-sale can be set aside only on the grounds mentioned in section 311 of the Civil Procedure Code. Further, the order under section 351 of the Civil Procedure Code is not retrospective The mere application under section 344 has no effect There is no vesting order made until the applicant is declared an insolvent The Subordinate Judge has relied on the decision in *Viraraghava* v *Parasurama*, I L R, 15 Mad., 372, which has nothing to do with attachments which came into existence before a vesting order is made

There was no appearance for the Opponent.

**Farran, C J** —The sequence of the proceedings which gave rise to this application was as follows Ishvar Vrajlal early in 1894 obtained a decree upon a mortgage of the 25th April 1893 against his mortgagor Harjivan The decree directed the sale of the mortgaged premises—a house in default of payment On the 26th February 1894 Ishvar applied to have the house sold in execution of his decree and the usual orders for sale were made Prior to the sale taking place, Harjivan on the 2nd April 1894, presented an application to be declared an insolvent under section 344 of the Code of Civil Procedure While this application was pending, the house in question was sold in execution on the 17th July 1894, and the present applicant Ishvar Lakhmidas, became the purchaser

Certain objections had been made as to the right of Harjivan to make the application to be declared an insolvent These were **[683]** disposed of by the Subordinate Judge on the 1st August 1894 when he decided to entertain the application and to proceed under section 347 of the Code The usual notices were served Harjivan was examined and on the 22nd December 1894 was declared an insolvent The Nazir of the Court was at the same time appointed receiver of his property

At the same hearing the Subordinate Judge set aside the sale of the house to the auction purchaser on the ground that the pendency of the insolvent's application rendered the sale of the house illegal The District Judge on appeal confirmed the order The present application under section 622 of the Code is made to set aside the order of the Subordinate Judge

We are unable to find any ground for the action of the Subordinate Judge. The Code of Civil Procedure does not provide that any consequences in derogation of the ordinary rights of judgment creditors shall follow from an application by the judgment debtor under section 344 It is only when a receiver is appointed under section 351 that the property of the insolvent vests in the receiver under the provisions of section 354, and the rights of the creditors are interfered with It is not provided that such an order shall have any retrospective effect

There was nothing illegal, therefore, in the sale of the house to the present applicant, and the order of the Subordinate Judge setting it aside must be cancelled The difficulty has arisen from the great delay which occurred in dealing with the insolvent's application Such matters should be at once disposed of

*Rule made absolute*

## [684] APPELLATE CIVIL

*The 5th February 1896*

PRESENT

SIR C. FARRAN KT CHIEF JUSTICE, AND MR JUSTICE PARSONS

Trimbak Gopal Rahalkar .(Original Plaintiff) Appellant

*versus*

The Secretary of State for India in Council and another . (Original Defendants) Respondents

*Revenue Jurisdiction Act (Bombay Act X of 1876) Secs 4 Cl (f) 5† Survey and Settlement Act (Bombay Act I of 1865) Sec 32‡—Land Revenue Code (Bombay Act V of 1879) Secs 38 and 39§—Free pasturage Land set apart by Government for grazing Subsequent sale by Government of part of such land —Right of pasturage by the inhabitants of a village over Government waste lands Right of Government over such land Jurisdiction of Civil Courts*

The land comprised in three survey numbers situate in the village of Mahim were set apart by Government as free grazing land for the cattle of village. Out of this [685] land about 2 600 acres was sold by Government to one Mancharsha (defendant No 2) in 1891 The extent of the area over which village cattle grazed before the sale being thus curtailed the plaintiff for himself and on behalf of the other villagers brought this suit against the Secretary of State and Mancharsha alleging that the land left for grazing after the sale of 2 600 acres was insufficient for the pasturage of the village cattle and praying (in the alternative) that Government should set apart so much of land as might be necessary for free grazing &c and that until such land as was necessary had been set apart the plaintiff

* Appeal, No 7 of 1895

† Section 4 clause (f) and section 5 of the Revenue Jurisdiction Act (Bombay Act X of 1876) -

4 Subject to the exceptions hereinafter appearing no Civil Court shall exercise jurisdiction as to any of the following matters —

(f) Claims against Government to hold land wholly or partially free from payment of land revenue or to receive payments charged on or payable out of the land revenue or to set aside any cess or rate authorized by Government under the provisions of any law for the time being in force or respecting the occupation of waste or vacant land belonging to Government

5 Nothing in section 4 shall be held to prevent the Civil Courts from entertaining the following suits —

(a) Suits against Government to contest the amount claimed, or paid under protest, or recovered as land revenue on the ground that such amount is in excess of the amount authorized in that behalf by Government or that such amount had, previous to such claim, payment or recovery been satisfied in whole or in part or that the plaintiff or the person whom he represents is not the person liable for such amount

(b) suits between private parties for the purpose of establishing any private right, although it may be affected by any entry in any record of a revenue survey or settlement or in any village papers

(c) suits between superior holders or occupants and inferior holders or tenants regarding the dues claimed or recovered from the latter ,

and nothing in section 4 clause (g) shall be held to prevent the Civil Courts from entertaining suits other than suits against Government, for possession of any land being a whole survey number or a recognised share of a survey number ,

and nothing in section 4 shall be held to prevent the Civil Courts in the districts mentioned in the second schedule hereto annexed from exercising such jurisdiction as, according

might be declared to have the right of using the land comprised in the three survey numbers as heretofore and that an injunction might be granted accordingly

Government alleged that the land that was left after the sale to Manchersha was sufficient for the *bona fide* needs of the villagers and contended (*inter alia*) that the suit was barred under section 4, clause (*f*), of the Revenue Jurisdiction Act (Bombay Act X of 1876)

*Held* confirming the decree of the lower Court dismissing the suit that while the Courts consistently with the course of legislation may have jurisdiction to declare that the villagers of a specified village are entitled to rights of free pasturage over Government waste lands within the limits of their village still they can go no further and enjoin the Collector to pursue any particular course in connection with them while he is acting *bona fide* in pursuance of the power which the provisions of the statute confer upon him

The claim being against Government respecting the occupation of waste land belonging to Government, the Civil Courts are precluded from entertaining it under section 4 of the Revenue Jurisdiction Act (Bombay Act X of 1876) A question relating to the discontinuous occupation of the village waste by the village cattle is as much a question of land revenue as one relating to the permanent occupation of them or a portion of them by an individual

APPEAL against the decision of J J Heaton District Judge of Thana

[686] Certain lands in the village of Mahim (*viz* Survey Nos 835, 836 and 837) had been set apart by Government as free grazing land for the cattle of the village

In 1891 Government sold about 2600 (acres?) of this land to one Manchersha (defendant No 2)

Thereupon the plaintiff on behalf of himself and his co villagers brought this suit (No 1 of 1892) against the Secretary of State for India and Mancbersha, alleging that the land left for the village cattle was insufficient for pasturage and praying that Government might be ordered to set apart so much land as was necessary for pasturage and that until that was done the plaintiff and his co villagers should be declared to have the right of using the lands comprised in the three survey numbers as heretofore &c

to the terms of any law in force on the twenty eighth day of March 1876 they could have exercised over claims against Government—

(*a*) relating to any property appertaining to the office of any hereditary officer appointed or recognised under Bombay Act No III of 1874 or any other law for the time being in force or of any other village officer or servant

(*b*) to hold land wholly or partially free from payment of land revenue

(*c*) to receive payments charged on or payable out of the land revenue

† Section 32 of the Survey and Settlement Act (Bombay Act No I of 1865)

A Survey or Settlement Officer may set apart unoccupied land in unalienated villages for free pasturage of village cattle * * * and land assigned specially for any such purpose shall not be otherwise appropriated or assigned without the sanction of the Revenue Commissioner

§ Sections 38 and 39 of the Land Revenue Code (Bombay Act V of 1879) —

38 Subject to the general orders of Government it shall be lawful for Survey officers whilst survey operations are proceeding under Chapter VIII and at any other time for the Commissioner to set apart land the property of Government and not in the lawful occupation of any person or aggregate of persons in unalienated villages or unalienated portions of villages for free pasturage for the village cattle for forest reserves or for any other public or municipal purpose and lands assigned specially for any such purpose shall not be otherwise appropriated or assigned without the sanction of the Commissioner and in the disposal of land under section 37 due regard shall be had to all such special assignments

39 The right of grazing on free pasturage lands shall extend only to the cattle of the village or villages to which such lands belong or have been assigned and shall be regulated by rules to be from time to time, either generally or in any particular instance prescribed by the Collector with the sanction of the Commissioner

The Collector's decision in any case of dispute as to the said right of grazing shall be conclusive

The Government pleaded, in defence, that the land left after the sale to Mancherisha was sufficient for the needs of the villages, and further contended that the suit was barred under the provisions of section 4, clause (*f*) of the Revenue Jurisdiction Act (Bombay Act X of 1876).

The Judge found that the suit was barred by the provisions of the Revenue Jurisdiction Act (Bombay Act X of 1876); that the plaintiff and other permanent residents of Mahim had not acquired any rights over the lands in question such as to prevent the Government from dealing with it at its pleasure, that the suit was not maintainable for the perpetual reservation of the lands for grazing and other purposes mentioned in the plaint, that the claim was not time-barred, and that the Court could not make a decree directing a perpetual reservation of any land whatever He, therefore, dismissed the suit.

The plaintiff appealed.

*Scott* (with *Daji A. Khare* and *Ganesh K. Deshmukh*) appeared for the Appellant (Plaintiff) — We represent the rayats of the village of Mahim. The villagers have a right of grazing their cattle over the land in dispute and of taking leaves and branches of trees therefrom Our complaint is that Government has sold part of this land to defendant No. 2 There are three questions there is one question of fact and the other two are points of law. [687] The question of fact is whether the rayats have got land for grazing purposes. The points of law are whether the suit is barred under section 39 of the Land Revenue Code (Bombay Act V of 1879) and whether the suit is maintainable under section 4, clause (*f*), of the Revenue Jurisdiction Act (Bombay Act X of 1876)

The evidence establishes our prescriptive right, and it further shows that there is not now as much land available for grazing purposes as there was when Government made the grant There are about 3,000 cattle in Mahim. This fact is admitted by the Collector in his written statement Each animal requires about one acre and six gunthas of land for grazing purposes The land is now quite insufficient

The lower Court held that we cannot maintain the suit owing to section 4, clause (*f*), of the Revenue Jurisdiction Act and has relied on *Shridhar* v. *The Secretary of State for India in Council*, P J., 1893, p 248. That ruling is not applicable. That was a case for declaration of ownership, while in this suit we ask a declaration that we have certain rights. We do not claim the right of occupation, which means the right to possession to the exclusion of others.

[PARSONS, J. —Is not the right of grazing a right of occupation ?]

We submit not Government set apart land for grazing cattle and so long as the right of grazing cattle is not interfered with, we have got nothing to do with the occupation of the land The term occupant is defined in the Land Revenue Code, and we submit that a person having only a right to land for grazing purposes cannot be called a holder of land under that definition. *The Secretary of State* v *Mathurabhai*, I. L. R., 14 Bom., 213, shows that the present suit is maintainable.

Rao Saheb *Vasudeo J Kirtikar*, Government Pleader, appeared for Respondent No. 1 (Defendant No. 1).—The Judge held that the suit was one for occupation of land, and was, therefore, not maintainable. Grazing means occupation by cattle · therefore the claim is governed by clause (*f*), section 4, of the Revenue Jurisdiction Act. Civil Courts cannot take cognizance of such claims. [688] Under the Land Revenue Code such matters are left entirely to the Collector. Before the Survey and Settlement Act was passed, Government

had framed certain rules for the guidance of their officers, and under those rules they were permitted to set apart reasonable areas of land for free pasturage See Survey and Settlement Manual 1882 pp 36, 37 The mere setting apart of certain lands for the convenience of the villagers does not give them any rights against Government

If it be held that the present suit is maintainable then the case will have to go back to the Judge for inquiry as to whether the land which is now left for grazing purposes is sufficient for the present requirements of the villagers

*Lang* (Advocate General with *Van kshah J Taiyabji*) appeared for Respondent No 2 (Defendant No 2) —Section 4 clause (*f*) of the Revenue Jurisdiction Act governs the present case Villages may increase or decrease, and therefore constant supervision of revenue officers is necessary

*Scott*, in reply as to the meaning of occupancy or *occupatio* cited Mayne's Ancient Law p 246 Pollock and Wright on Possession p 12

**Farran, C J** This is an appeal from the decree of the District Court of Thana dismissing a suit brought by the plaintiff on behalf of himself and the other villagers of Mahim in the Thana Collectorate against the Secretary of State and the defendant Mancharsha Motibhai The object of the suit was to preserve three Survey Nos 835 836 and 837 as free grazing land for the cattle of the villagers In 1891 the Collector with the sanction of the Commissioner, Northern Division sold about 2600 acres out of the three numbers to the defendant Mancharsha and thus curtailed the extent of the area over which the village cattle had been before the alienation in the habit of grazing

The plaintiff originally framed his suit alleging a customary or prescriptive right and prayed for a declaration that the plaintiff and the other villagers of Mahim had from time immemorial a right of grazing their cattle upon and taking leaves, sticks &c from the survey numbers in question and for an injunction restraining the defendants from obstructing them in the enjoyment of such right [689] The amended plaint alleged that the land left for grazing after the sale of the 2600 acres to the defendant Mancharsha was insufficient for the pasturage of the village cattle and that until sufficient land had been set apart for that purpose Government was not entitled to dispose of the residue and prayed (in the alternative) that it might be declared that the plaintiff had the right to compel Government to set apart so much land as might be necessary for free grazing &c and that until such land as was necessary had been set apart the plaintiff might be declared to have the right of using the three survey numbers as heretofore and that an injunction might be granted accordingly

The three Survey Nos 835 836 and 837 are admittedly unassessed Government waste land within the limits of Mahim and contain about 1 185 acres There is not much other Government waste land within the limits of the village, but it is the case of Government that the Government waste land which is left (about 2,928 grazing acres) after the sale to the defendant Mancharsha is sufficient for the *bonâ fide* needs of the villagers in the matter of free pasturage

The legal contentions raised by the written statement of the Secretary of State are —(1) That the claim of the plaintiff is barred by the last paragraph of clause (*f*) of section 4 of the Bombay Revenue Jurisdiction Act 1876 (2) That the proprietary rights of Government over the land are not affected by reason of its having been reserved for grazing under section 38 of Bombay Act V of 1879 or section 32 of Bombay Act I of 1865 (3) That under the above sections the right of disposing of the land vests in the Revenue Commissioner (4) That the reservation of the land was permissive and temporary and not permanent (5) That the enjoyment by the villagers was permissive

and not as of right. (6) That if the villagers have acquired any rights, they are not rights over any particular land, but rights only to so much land for grazing as may be necessary for their cattle. (7) That the Revenue Commissioner is alone empowered to determine how much land is necessary, and the Court cannot interfere.

The issues raised were :

(1) Is the suit barred by anything in the Bombay Revenue Jurisdiction Act (X of 1876)?

[690] (2) Have the plaintiff and the other permanent residents of Mahim acquired any right over the land in suit such as to prevent Government from dealing with it at their pleasure ?

(3) Is a suit maintainable for the perpetual reservation of the land in suit for grazing and the other purposes mentioned in the plaint ?

(4) Is plaintiff entitled to a perpetual reservation of so much land as may be necessary for the grazing of the village cattle ?

There was also an issue as to limitation, but no argument has been addressed to us upon that subject, and it may be treated as abandoned.

The District Judge decided all the above issues in accordance with the defendant's contentions.

Though the evidence taken on commission which has been read to us (Exhibit 108) shows that the villagers of Mahim for the last fifty or sixty years have grazed their cattle over the survey numbers in question, as well as over other Government waste land in the village, there is nothing in that evidence to indicate the nature of the right or supposed right under which they did so, nor is there anything in it to establish a distinction between the practice of the villagers of Mahim in respect of the grazing of their cattle over Government waste land and that of other villages where a similar practice prevails. Our decision must, therefore, rest upon the law generally applicable to Government waste land similarly circumstanced and not upon any special or peculiar custom prevailing in the village of Mahim

Now it is found by the District Judge, and his finding has not been controverted in the arguments addressed to us, that prior to the survey settlement in 1862-63 the villagers of Mahim had free grazing land, forming part of the Government waste, attached to the village; but that the evidence did not show whether it consisted of the identical land comprised in the three survey numbers in suit or not. These numbers are partly salt marsh and partly grass land. At the survey in 1862-63 they were set apart for free grazing, being described in the survey register (Exhibit 16) as "unassessed Government *warkas* lands allowed for free grazing." Until the sale to Manchershah in 1891 the villagers [691] continued to graze their cattle over them. These are the facts with which we have to deal in determining the questions of law raised by the defendant's contentions.

The judgment in the case of *The Secretary of State* v. *Mathurabhai*, I. L. R., 14 Bom., 213, lays down three propositions :

(1) That a right such as that of pasturage by the inhabitants of a village over Government waste lands could have been acquired by prescription against the East India Company and can be so acquired against the Secretary of State as representing the Crown.

(2) That a right of free pasturage over Government waste lands has been recognized by Government as a right belonging to some villages, and where it exists must have been acquired by custom or prescription.

(3) That in the absence of special circumstances the recognized custom of the country under which that right is enjoyed did not confer the right of pasturage on any particular piece of land

The judgment further indicates that the extent of this right was to be measured by a consideration of how much grazing land was sufficient for the purposes of the village This customary right it is contended before us is of too indefinite and varying a character to be in accordance with the rule laid down in the English authorities that customary easements must like all other customs be reasonable and certain "That easements claimed by custom may be sustainable in point of law, they must be possessed of the same characteristics as those which are essential for the validity of customs generally They must be reasonable and certain" — Goddard on Easements p 241 (edition 1884) On this ground it is argued that the alleged right varying from time to time with the extent of the village and the number of the cattle which it possesses cannot be a right which Courts of law can recognize and enforce Whether this argument be correct or not it appears to us to afford a reason why the Legislature should leave in the hands of the revenue authorities rather than with the civil Courts the power to determine and regulate the extent of the right for the time being Assuming, however the right to [692] have existed in this form in the present case before the introduction of the survey settlement in the village we have to consider whether it has been to any and what extent controlled or regulated by legislation The judgment in *The Secretary of State v Mathurabhai* does not deal with this subject

Previous to the recent revenue legislation the Bombay Government had assumed that it possessed the inherent right to make rules for the regulation of the pasturage of its waste land and to control the user of it by the villagers Rule 16 of the Rules made in 1848 49 by Government for the guidance of the revenue officers directs the grazing of unassessed Government land to be sold by auction annually a reasonable proportion being set aside for the free pasturage of such villages as have hitherto enjoyed the right Government Resolution No 1036 of 1853 directs that land assigned at the settlement as free common is not to be resumed without the sanction of the Revenue Commissioner Survey and Settlement Manual 1882 p 36

Bombay Act I of 1865 which gave legislative sanction to the introduction of the survey settlement, by section 32 enacted as follows — "A Survey or Settlement Officer may set apart unoccupied lands in unalienated villages for free pasturage of village cattle * and lands assigned specially for any such purpose shall not be otherwise appropriated or assigned without the sanction of the Revenue Commissioner" The Act thus recognizing the claims of certain villages to free pasturage over Government waste substituted for the undefined rights previously existing a right to have a certain portion of such land set apart to meet it leaving the amount of the land to be set apart to be determined by the Survey Officer, but liable to be subsequently varied by the Collector with the sanction of the Commissioner

The Bombay Land Revenue Code 1879 repeats the same provisions section 38 providing that it shall be lawful for the Survey Officer while survey operations are proceeding to set apart lands, the property of Government, for free pasturage for the village cattle and that lands specially assigned for such purpose shall not be otherwise appropriated or assigned without [693] the sanction of the Commissioner, while section 39 enacts that "the right of grazing on free pasturage lands shall extend only to the cattle of the village or villages to which such lands belong or have been assigned and shall be regulated by rules to be from time to time either generally or in any

particular instance prescribed by the Collector with the sanction of the Commissioner The Collector's decision in any case of dispute as to the said rights of grazing shall be conclusive Although we see nothing in this course of legislation which excludes the jurisdiction of the civil Courts to declare the existence on the part of villagers of a right of free pasturage yet sections 38 and 39 give legislative sanction to the rules, which the Collector, with the sanction of the Commissioner, may frame for the regulation of such rights and with the like sanction to the alienation of lands subject to the same

While therefore the Courts consistently with this course of legislation may have jurisdiction to declare that the villagers of a specified village are entitled to rights of free pasturage over Government waste lands within the limits of their village it is difficult to see how they can go further and enjoin the Collector to pursue any particular course in connection with them, while at all events he is acting *bona fide* in pursuance of the power which the provisions of the statute confer upon him We have referred to this legislation in order to determine the present position of the villagers with reference to free pasturage

It remains to consider whether Act X of 1876 deprives the civil Courts of their jurisdiction to deal with their claims against Government in respect of it The only claim which it appears to us the plaintiff on behalf of the villagers of Mahim can now advance against Government is to have the Government waste land set apart at the survey settlement for free pasturage reserved for that purpose any former indefinite rights which they may have been entitled to being now merged in the provisions which the statute has made to meet them or having been lost by lapse of time The question is whether that is a claim against Government respecting the occupation of waste land belonging to Government If it is section 4 of the Act precludes the civil Courts from entertaining it We are of opinion that it is [694] It is contended for the appellant that occupation in that clause means exclusive occupation such as would if continued give a right to the land itself Mr Scott has pressed upon us the meaning of the word as it was used in the Roman Law where *occupatio* is recognized as one of the means by which property is acquired *in rebus nullius* and which Mr Maine has treated of in his work on Ancient Law, Chapter VIII That certainly is a legal and technical meaning of the word but we think that in the Act which we are construing we ought not to give such a restricted meaning to it In popular language it has a more extended sense Webster gives use as one of its meanings The Act treats questions respecting the occupation of Government waste land as questions relating to the "land revenue" and the object of the Act is to exclude such questions from the jurisdiction of the civil Courts and to leave them to be dealt with by the revenue authorities except when they are of the definite nature described in the proviso to section 4 and in section 5 A question relating to the discontinuous occupation of the village wastes by the village cattle is as much a question relating to the land revenue as one relating to the permanent occupation of them or a portion of them by an individual Claims to establish either right against Government appear to us to be claims respecting the occupation of waste lands A claim to have lands set apart for free pasturage for the villagers appears to us to fall within the meaning of the clause It can hardly be contended that the person to whom the grazing of the waste land is sold annually is not entitled to an occupation of it within the meaning of the clause The land reserved for the villagers' pasture is in a position very clearly analogous to land so left for grazing No outside cattle are allowed to pasture upon it See *The Collector of Thana v Bal Patel*, I L R, 2 Bom, 110 This case,

we think, is governed by the ruling in *Shridhar v The Secretary of State for India in Council*, P J, 1893, p 248 The appeal will be dismissed, and the decree of the District Court confirmed with costs

*Decree confirmed*

NOTES
[See also (1903) 31 Mad 58]

## [695] APPELLATE CIVIL

*The 6th February 1896*

PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE AND MR JUSTICE PARSONS

* Madhavrao Appaji Sathe (Original Plaintiff) Appellant

*versus*

Deonak and others (Original Defendants) Respondents

*Khoti Settlement Act (Bombay Act I of 1880) Secs 20 and 21† Evidence Act (I of 1872) Sec 35—Decision of a Survey Officer as to tenure—Binding effect of the decision Burden of proof*

Section 20 of the Khoti Settlement Act (Bombay Act I of 1880) throws upon the Survey Officer the duty of investigating and determining disputes as to any matter which he is bound to record The tenure upon which a particular survey number is held is one of such matters which he has to determine and to record His decision is, under section 21 of the Act, binding upon the parties until it is reversed or modified by a final decree of a competent Court The burden of proof in such case lies upon the party seeking to vary the decision

Statements of facts made by a Settlement Officer in his statement of reasons for his decision are not his own statements of facts, but are statements of conclusions which it was his duty to arrive at; they are admissible in evidence as being entries in a public record stating facts and made by a public servant in the discharge of his official duty within the meaning of section 35 of the Evidence Act (I of 1872)

SECOND APPEAL from the decision of C L G Crawford District Judge of Ratnagiri reversing the decree of Rao Saheb K N Patankar Subordinate Judge of Dapoli

The plaintiff alleged that the lands in dispute were khoti lands and brought this suit to set aside the decision of the Survey Officer that they were dhara and not khoti He also asked for *thal* rent (customary rent in kind)

The Subordinate Judge set aside the Survey Officer's decision and declared that the lands were plaintiff's khoti He rejected the claim for rent

[696] On appeal by the defendants the Judge reversed the decree and rejected the claim, holding that the lands were dhara The plaintiff preferred a second appeal

* Second Appeal No 115 of 18

† Sections 20 and 21 of the Khoti Settlement Act (Bombay Act I of 1880)

20 If it shall appear to the survey officer who frames the said register or other record, that there exists any dispute as to any matter which he is bound to record he may either on the application of any of the disputant parties or of his own motion investigate and determine such dispute and frame the said register or other record accordingly

21 In any such matter the decision of the said survey officer, when not final, shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court

*Robertson* with *Mahadeo V Bhat*, for the Appellant (Plaintiff) —The question is whether the lands are the plaintiff's khoti or defendants' dhara We contend that they are our khoti lands and the defendants are occupancy tenants The Survey Officer wrongly decided in the year 1889 that the lands were defendants' dhara The lands are situate in the village of Susheri which is a khoti village, and, therefore, *prima facie* the presumption is that these lands are khoti The burden of proof lay upon the defendants that they are not so The Judge has wrongly placed upon us the burden of proving that the lands are khoti and not dhara *Muhammad Yakub* v *Muhammad Ismail*, 9 Bom H C Rep, 278 A finding arrived at by a Settlement Officer under section 21 of the Khoti Act (I of 1880) can be interfered with by a civil Court when there is a dispute as to the correctness of that finding Where in a khoti village a tenant claims to hold lands as his dhara the burden of proof is on him

Assuming, however, that the burden of proof lay upon us we submit that we have sufficiently discharged it by the production of the original sanad which was granted to our predecessor by the Peshwa in 1775 It shows that the whole village was khoti and there was no dhara land in it at the time of the grant The defendants ought therefore to show how they acquired dhara lands in the village

He cited *Kripal Narain Tewari* v *Sukurmoni* I L R, 19 Cal, 91, at p 100

*Ganesh K Deshamukh* for the Respondents (Defendants) The case of *Muhammad Yakub* v *Muhammad Ismail* 9 Bom H C Rep 278 cited as to the burden of proof was decided long before the Survey Act was passed The burden of proof lies on the plaintiff The Khoti Act clearly lays down that a person claiming land as khoti must prove that it is not dhara The decision of the Settlement Officer being in our favour the burden of proving that the lands are khoti lies on the plaintiff

**[697]** *Robertson* in reply The ruling in *Muhammad Yakub* v *Muhammad Ismail* 9 Bom H C Rep 278 shows that the question of tenure was considered in that case because specific issues on that point were raised

The entry of 1863 is admissible in evidence under section 35 of the Evidence Act

**Farran, C J** :- Upon the first point which has been argued before us in this second appeal we do not entertain any doubt The Khoti Settlement Act by section 20 throws upon the Survey Officer the duty of investigating and determining disputes as to any matter which he is bound to record The tenure upon which any particular number is held is one of such matters That he has to determine between the khot and its holder When he has done so, his decision is under section 21 of the Act binding upon the parties affected thereby until reversed or modified by a final decree of a competent Court It is treated as decisive as to the matter recorded until the contrary is proved in a competent civil Court The District Judge has rightly thrown the burden of proof upon the plaintiff who sought before him to vary the decision of the Settlement Officer

The determination of this case rests almost altogether upon the inference to be drawn from the numerous documents which have been put in evidence and to the degree of weight which is to be attached to each Upon a full, careful and exhaustive consideration of them the District Judge has come to the conclusion that the plaintiff has not succeeded in showing that the decision of the Survey Officer was erroneous We are asked to review that conclusion

and to hold that the plaintiff has established his case. It is not, we consider, competent for us sitting in second appeal to adopt that course. The Lower Appellate Court has decided a question of fact within its competence from which no appeal lies, and it is not the less binding upon us because the evidence adduced is chiefly of a documentary character.

It has, however, been argued that the Lower Appellate Court has committed an error of law in treating as irrelevant the reasons which the Assistant or Acting Superintendent, Revenue Settlement, has given in the column of remarks in the dharepatrak of [698] 1862 for his statement that "the tenant paid the assessment through the khot." Their admissibility depends upon whether they are entries in a public record stating facts and made by a public servant in the discharge of his official duty within the meaning of section 35 of the Evidence Act. The fact that the tenant paid the assessment through the khot has been treated by the District Court as admissible in evidence, but not the reasons which led him to say so. This view is in accordance with the *dictum* of WEST, J., in *Govindrav* v. *Ragho*, I. L. R., 8 Bom., 513. It is, in our opinion, correct. The Settlement Officer had to fix the assessment upon the land and to ascertain the name of the then "vahivatdar" and who paid the assessment. Statements made by him as to these are statements of fact and relevant. The reasons which he assigns for making them are not, even though they consist of statements of collateral facts, but which it was no part of his duty to inquire into.

As to the opinion of the Survey Officer as evidenced by the effect of the dharepatrak and the place assigned to the defendants' ancestor in it, the Survey Officer at that time was not invested with authority to decide questions of tenure between the khot and his tenants, and his opinion upon such a subject, even if regularly recorded, would not have been admissible as evidence between the parties. This is the view taken by the District Judge. He has, however, contemplated the possibility (as in these cases of the doubtful relevancy of evidence it is safest to do) of the Survey Officer's opinion being regarded as evidence, and has expressed his view as to its weight, and has come to the conclusion that, even if he were to take it into consideration, its effect is overborne by the other evidence in the case. We confirm the decree with costs.

*Decree confirmed.*

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**NOTES.**

[See also (1909) 2 I. C., 623 (*Roobkari* not admitted as not prepared in discharge of official duties), (1912) 35 Mad., 21 (report by one officer to another of a statement of fact made by a third officer held inadmissible to prove that fact).]

## [699] APPELLATE CIVIL

*The 13th February, 1896*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE

Gangava (Original Plaintiff) Appellant

*versus*

Savava and others (Original Defendants) Respondents *

*Registration — Suit for registration Registration Act III of 1877, Secs. 24 and 77*

No suit lies under section 77† of the Registration Act (III of 1877) against an order made under section 24 of that Act refusing to direct a document to be accepted for registration.

SECOND APPEAL from the decree of M H W Hayward, Assistant Judge of Belgaum

Rayappa, the husband of the first defendant executed a certain document to the plaintiff on 16th November 1890 He died on the 20th November On the 11th April 1891, plaintiff presented the document to the Sub Registrar of Athni for registration (see section 23 of the Registration Act III of 1877) The Sub Registrar refused to accept it on the ground that it was not presented within four months from the date of execution but he forwarded it to the District Registrar of Belgaum for his directions under section 24 The District Registrar under section 24 refused to direct the document to be accepted for registration

The plaintiff then filed this suit under section 77 of the Act, praying for a decree directing the document to be registered

The Subordinate Judge of Athni and Gokak dismissed the suit on the ground that no suit lay on an order passed under section 24 of the Registration Act

In appeal the Assistant Judge of Belgaum confirmed the decree of the Subordinate Judge

Plaintiff preferred a second appeal to the High Court

*Ghanasham Nilkanth* for the Appellant (Plaintiff) — The Registrar's refusal to direct the document to be accepted for registration is equivalent to a refusal to register within the meaning of sections 76‡ and 77, and this suit can

* Second Appeal No 506 of 1895

† [Sec 77 —Where the Registrar refuses to order the document to be registered, under Section 72 or Section 76 any person claiming under such document or his representative assign or agent, may, within thirty days after the making of the order of refusal institute in the Civil Court within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree and the provisions contained in the second and third paragraphs of section 75 shall *mutatis mutandis*, apply to all documents so presented, and notwithstanding anything contained in this Act, the document shall be receivable in evidence in such suit ]

Suit in case of refusal

‡ [Sec 76 —Every Registrar refusing—

(a) to register a document except on the ground that the property to which it relates is not situate within his district or that the document ought to be registered in the office of a sub registrar, or

Refusal by Registrar

(b) to direct the registration of a document under Section 72 or Section 75,

shall make an order of refusal and record the reasons for such order in his Book No. 2, and on application made by any person executing or claiming under the document, shall, without unnecessary delay, give him a copy of the reasons so recorded.

No appeal lies from any order under this section or Section 72.]

be maintained—*Durga Singh* v *Mathura Das*, I L R, 6 All, 460, *Raya* v. *Anapurnabai*, 10 Bom H C Rep, 98, *Abdullah Khan* v *Janki*, I L R., 16 All, 303

**[700]** *Hormusji C Coyaji* for the Respondent (Defendant) — The order passed by the District Registrar under section 24 was an order refusing to direct the document to be accepted for registration Such an order is entirely different from an order refusing to register An order under section 24 excuses or refuses to excuse delay in presenting the document for registration and the Registrar has an absolute discretion to pass such an order Civil Courts do not interfere with such discretion See *Oojul Mundul* v *Herasutoollah* 7 Cal W R, 150

**Jardine J** The applicant brought the document to the Sub Registrar after the period of four months from the date of execution Section 23 of Act III of 1877 declares that in such circumstances it shall not be accepted for registration Under section 24 the Sub Registrar forwarded the application to the Registrar who under the words of that section has a discretion to remedy the effect of delay caused by urgent necessity or unavoidable accident The Registrar may direct that the document shall be accepted for registration This accepting for registration is not the same as admitting to registration The Registrar refused to make the above direction Mr Ghanasham argues that such refusal is a refusal to register within the meaning of sections 76 and 77

But the Act evidently means different things by the two phrases *refuse to register* found in sections 19 and 35 and *refuse to accept for registration* found in sections 20 and 21 We are of opinion that the first thing to be done by the registering officer is to decide whether to accept or not accept It is only after the acceptance for registration that he can consider the wider question which arises on admissions and denials and evidence whether he should refuse to register

We must hold therefore that what the Registrar did under section 24 was not a refusal to register So section 76 (*a*) does not apply Neither does section 76 (*b*) as the direction was not concerned with the matters to which section 72 or 75 apply

We are of opinion then that the right to bring the present suit is not given by section 77 as the condition with which that **[701]** section begins *viz* where the Registrar refuses to order the document to be registered is not one which attaches to a refusal to give the direction for which section 24 makes provision at his discretion

The Court confirms the decree with costs

*Decree confirmed*

NOTES

[ See however (1899) 10 M L J 101 and (1906) 30 Bom 204 ]

[21 Bom. 701]

## APPELLATE CIVIL

*The 17th February, 1896.*

PRESENT

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Wamanrao Damodar ........ (Original Plaintiff) Appellant

*v*ersus

Rustomji Edalji and others ........ (Original Defendants) Respondents.*

*Specific Relief Act (I of 1877), Sec. 42—Declaratory decree—Right to sue for declaration—Mortgage—Code of Civil Procedure (Act XIV of 1882), Sec. 287.*

Dinsha Edalji mortgaged certain property to plaintiff. After Dinsha's death plaintiff obtained a decree for recovery of his debt by sale of the mortgaged property. Before the property was advertised for sale the defendants who were Dinsha's brothers objected under section 287 of the Code of Civil Procedure (Act XIV of 1882) alleging that Dinsha was not the sole owner of the property, that it was joint with them, that they had set aside the property for religious purposes, and that Dinsha had no right to mortgage it.

The Court executing the decree thereupon ordered that the applicants' (defendants') claim should be notified in the proclamation of sale. Plaintiff then filed a suit against the defendants praying for a declaration that the property belonged to Dinsha exclusively, and that the defendants had no right or interest in it.

*Held*, that under section 42 of the Specific Relief Act (I of 1877) the plaintiff was entitled to the declaration prayed for.

Plaintiff having himself purchased the property after his claim for declaration had been allowed by the Subordinate Judge, it was contended that he was not entitled any longer to a declaratory decree.

*Held*, that the change of circumstances brought about by the plaintiff himself purchasing the property did not take away the right to sue which had already accrued to him.

*Govinda v. Perumdevi*, I.L.R. 12 Mad. 136 referred to.

SECOND APPEAL from the decision of F. Hamilton, District Judge of Surat.

[702] One Dinsha Edalji mortgaged his property to the plaintiff. After Dinsha's death the plaintiff obtained a decree for the sale of the property.

The defendants who were Dinsha Edalji's brothers, filed a claim under section 287 of the Civil Procedure Code, alleging that the property belonged jointly to them and to Dinsha, that its income was dedicated to charity, and that Dinsha had no right to mortgage it. On the 9th September 1891, the executing Court passed an order that the claim set up by the applicants (*i.e.*, the defendants) should be notified in the sale proclamation.

Plaintiff then filed this suit to obtain a declaration that the property belonged to his judgment-debtor Dinsha exclusively, and that the defendants had no right to it.

The Subordinate Judge found that Dinsha was the sole owner of the property, and granted the declaration sought for.

After this decree the plaintiff on the 17th June 1894, put up the property to sale and himself purchased it.

The defendants appealed to the District Judge, who set aside the order of the 9th September 1891, reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim for a declaration.

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* Second Appeal, No. 300 of 1895.

In his judgment he said —

"The cause of action is clearly the aforesaid order (i e , of 9th September 1891), as the suit was instituted on the 8th September 1892 just within the period of limitation for a suit under article 13

"The original decree was for the sale of certain mortgaged property As there was no attachment, the proceedings taken under section 287 of the Civil Procedure Code must be held to have been *ultra vires* as described in *Himatram* v *Khushal* I L R 18 Bom , 98, where the ruling in *Deefholts* v *Peters* I L R 14 Cal 631 has been followed

"The property should have been sold without the notification of the claim of defendants This has since been done in pursuance of the decree now under appeal The sale was of the right, title and interest of the d ... Dinshaw Edalji and the decree holder, the plaintiff himself, purchased the same for Rs 1,500 on the 17th June 1894

"No cause of action for a declaration on that defendants have no interest in the property has yet arisen to plaintiff That may hereafter arise as it is alleged that defendants are in actual possession "

[703] Against this decision the plaintiff preferred a second appeal to the High Court

*Ganpatrao Sadashiv Rao* for the Appellant Plaintiff

*Govardhanram M Tripatni* for the Respondents Defendants

**Farran C J** — The decree of the District Judge setting aside the order of the 9th September 1891 in Suit No 73 of 1891 is in our opinion of extremely doubtful legality but as there is no appeal against that part of the decree we abstain from doing more than expressing our present opinion

As to the declaration it appears that when the plaintiff sought to sell the property mortgaged to him by Dinshaw, the defendants set up a claim to it which struck at the root of his mortgage and if sustained would have rendered it practically valueless It is to meet such cases as these that the Legislature inserted section 42 in the Specific Relief Act and the Subordinate Judge deeming the claim made by the defendants untenable rightly exercised his discretion and gave the plaintiff a declaratory decree

We think that the District Judge wrongly reversed that decree without entering upon the merits of the case The change of circumstances brought about by the plaintiff himself purchasing the property did not take away the right to sue which had already accrued to him *Govinda* v *Perumdevi*, I L R , 12 Mad , 136

We reverse the decree and remand the appeal for disposal on the merits Costs to be costs in the appeal

*Appeal remanded*

NOTES

[Facts subsequent to suit are not generally taken notice of —(1907) 11 C W N , 732 6 C. L J , 74 (1909) 36 Cal 726 ]

## [704] APPELLATE CIVIL

*The 17th February, 1896*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE

Patel Ranchod Morar (Original Defendant) Appellant

*versus*

Bhikabhai Devidas (Original Plaintiff) Respondent *

*Mortgage — Change of name in Government records Mortgage or sale — Subsequent agreement to retransfer land in Government records on payment of debt Document creating a right in land Registration — Registration Act III of 1877, Sec 17*

In 1877 the plaintiff being indebted to the defendant transferred certain land to the defendant's name in the Government record In July 1879 the defendant executed the following document to the plaintiff reciting the previous transfer and agreeing to re transfer the land to the plaintiff's name in the ... 1880 if the debt which would then be due should be paid off

In the village of B... your (plaintiff's) field Survey No 116 measuring 5 acres 3 gunthas bearing assessment Rs 16 You (plaintiff) have got it transferred to our name That field therefore stands in our (defendant's) name in the Government records. You were indebted to us On account of that debt you have transferred it to our name The field shall be transferred to your name when you repay the said debt to me You have cultivated the field for the produce of Samvat 1936 and a lease in respect thereof you have this day passed to me An ... stamp paper was purchased at the time of the transfer for the execution of this agreement but no agreement was then passed This agreement is therefore this day passed to you when ... You owe me (a) debt bearing no interest I will put out of my pocket the expenses to be incurred at present in cultivating the field The debt due to me will in all amount to Rs 100 If you repay all these rupees during the time till the Vaishakh Shudh 6th Samvat 1937 I will take them and retransfer the field to your name And if you fail to pay (them) till Vaishakh Shudh 4th you will have no claim whatever to the said field I shall not take the rupees after the 4th (chauth) nor shall I give (or transfer) the field to you I shall be at liberty to give the field to any one I like without keeping any claim of yours as regard cultivation manure and hedge You have no claim or right whatever

This document was not registered The plaintiff brought this suit to redeem the land alleging that it had been mortgaged to the defendant and that the debt had been paid off The defendant contended that the transaction in 1877 was not a mortgage but a sale of the land to him and that the document of July 1879 was an agreement to resell it to the plaintiff, which was not admissible in evidence as it was not registered

*Held* upon the evidence that the transaction in 1877 was a mortgage to the defendant and not a sale

*Held*, also that the document of the 11th July 1879, did not require registration It created no rights in land but only amounted to a personal covenant to effect a mutation of names in the Government books when the debt due by the plaintiff was satisfied

[705] SECOND APPEAL from the decision of M P Khareghat, Joint Judge of Ahmedabad

Suit for redemption and possession

* Second Appeal, No. 318 of 1895.

The plaintiff alleged that being indebted to the defendant, he mortgaged his field to the defendant and transferred it to his name in the Government records in July 1877

On the 11th July 1879, the debt being then still due by the plaintiff the defendant executed a document agreeing to retransfer the land to the plaintiff's name in Vaishakh Shudh 6th Samvat 1936 (12th July 1880) if the debt should be then paid off The document was in the following terms and was not registered

In the village of Behrampur is your (plaintiff's) field Survey No 146 measuring 5 acres 3 gunthas bearing assessment Rs 16 You (plaintiff) have got it transferred to our name That field therefore stands in our (defendant's) name in the Government records You owe a debt to us On account of that debt you have transferred it to our name * * * * * * Th field shall be retransferred to your name when you repay the said debt to me You have cultivated the field for the produce of Samvat 1936 and a lease in respect thereof you have this day passed to me And a stamp paper was purchased at the time of the transfer for the execution of this agreement but no agreement was then passed This agreement is therefore this day passed to you when the lease is executed And you owe me (a) debt bearing interest I will pay out of my own pocket the expenses to be incurred at present in cultivating the field The debt due to me would in all amount to Rs 100 If you repay all these rupees to me till the Vaishakh Shudh 6th Samvat 1936 I will take them and retransfer the field to your name And if you fail to pay (them) till Vaishakh Shudh 4th you will have no claim whatever to the said field I shall not take the rupees after the 4th (chauth) nor shall I give (or transfer) the field to you I shall lease the field to any one I like without keeping any claim for arrears cultivation manure and hedge You have no claim or right whatever

The plaintiff complained that the debt had been paid but that the defendant had not retransferred the land

The defendant contended that the transaction in July 1877 was not a mortgage but a sale and he denied the execution of the above document of 11th July 1879 and objected to its admission in evidence as it was not registered

The Subordinate Judge of Ahmedabad dismissed the plaintiff's suit

In appeal the Joint Judge of Ahmedabad reversed the decree and ordered that plaintiff should recover the land on paying Rs 100 within six months to the defendant He held that the [706] above document was a personal covenant to retransfer the land to the plaintiff's name and did not require registration

The defendant appealed to the High Court

*Ghanashyam Malhariram* for the Appellant (Defendant) We contend that in 1877 the land in question was not mortgaged but sold by the plaintiff to the defendant and that the document (Exhibit 11) of the 11th July 1879 is an agreement to sell it back again to the plaintiff There is no document showing a mortgage in 1877 and this document does not recite any The fact of the sale in 1877 is corroborated by the change of names in the Government records By that sale the original debt due to the defendant was extinguished A suit on the document of 1879 is now in any case barred by limitation and, moreover, this document is not registered and is not admissible in evidence

He cited the following cases — *Ramu* v *Ramabai* 6 Bom H C Rep, 265 A C J *Pillakchand* v *Jitamai* 10 Bom H C Rep 206 *Tarachand* v *Lakshman*, I L R, 1 Bom 91, *Subhanhat* v *Vasudevbhat* I L R, 2 Bom, 113, *Bapuji* v *Senavaraji*, I L R 2 Bom 231, *Ayyavayyar* v *Rahimansa*, I L R, 14 Mad 170, *Bhagwan Sahai* v *Bhagwan Din*, I L R, 12 All, 387, *Vani* v *Bani*, I L R, 20 Bom, 553 *Baksu* v *Govinda*, I L R, 4 Bom, 594,

*Gopal* v. *Ganpatrav*, P. J., 1893, p. 95; *Lakshmamma* v. *Kameswara*, I. L. R., 13 Mad., 281

*M. K. Mehta* for the Respondent.—It is clear that there was a mortgage in 1877. The document of 1879 does not need registration. It does not create or modify any right in the property.

He cited *Burjorji* v *Muncherji*, I. L. R., 5 Bom 143; *Rama* v. *Laburao*, P.J., 1874, p. 18

**Ranade, J.** —There are only two points raised in this appeal. one of these relates to the construction to be placed on Exhibit 44, and the other relates to the necessity or otherwise of its registration Taking the latter point first, we find that the Court of First Instance was of opinion that Exhibit 44 was an agreement to reconvey property valued at more than Rs. 100, and as such was compulsorily registrable under sections 17 and **[707]** 49 of Act III of 1877 The Joint Judge in appeal held that it created no rights in land, but only amounted to a personal covenant to effect a mutation of names in the Government books when the debt was satisfied, and as such did not require registration We are inclined to accept this latter view as correct.

The object of the instrument was evidently not to create or extinguish or modify rights in immoveable property As will be seen from the translation of the document in the judgments of the lower Courts, the transfer of the khata in appellant's name had been effected two years before. It was at that time arranged between the parties that the appellant should pass an agreement recognizing the true nature of this transfer of khata, namely, that it was not intended to be an absolute transfer. As no such agreement was then executed, the appellant agreed on certain conditions to effect the change of the khata into the plaintiff's name after the debt was satisfied. The instrument was intended to serve as evidence, in the respondent's hand, of this agreement of the appellant The debt itself was not Rs 100 at the time It was expected with interest and further advances to amount to Rs 100. By itself Exhibit 44 created no rights in land, it only recited the original understanding, and it was not produced in this case to prove any such right. The lower Court of appeal has, therefore, very properly held that Exhibit 44 was admissible in evidence without registration - *Raju* v *Krishnarav*, I. L R, 2 Bom, 273; *Vani* v. *Bani*, I. L R, 20 Bom, 553, *Burjorji* v *Muncherji*, I.L R., 5 Bom., 143, *Sakharam* v. *Madan*, *ibid*, 232. *Chunilal* v *Bomanji*, I. L R., 7 Bom., 310.

The next point for consideration is what was the true character of the transaction which was recited in this agreement. Both the lower Courts have held that when the khata of the land was transferred, the parties intended not to effect a sale of the property, but only a mortgage for the security of debts due by the transferor to the transferee. The fact that a debt was due by the one to the other is admitted by the appellant It was contended, however, that this debt was the consideration for **[708]** a sale out and out of the transferor's interest. There seems, however, in that case to have been no occasion for the subsequent personal covenant to reconvey on satisfaction of the debt at a given time. The translation furnished in the judgment of the first Court clearly sets forth the most important recital in the agreement, namely, that the debt was to carry interest till the time fixed for repayment. This condition clearly shows that the transfer of khata was not intended to be in satisfaction of the pre-existing debt, which still continued to be a debt, and to carry interest also. The sum of Rs 100 was fixed as the expected total of principal and interest and further advances. If the transfer of khata in the first instance did not thus operate to extinguish the debt, it is clear that the subsequent default of the

transferor in making payment at the time fixed could not have that effect—*Saksu* v *Govinda*, I L R, 4 Bom, 594 All the indications which have been recognized as distinguishing a mortgage from a sale transaction are present here The existence of the debt, the agreement to pay interest on it, the continuance of the former owner in possession as tenant, the agreement to repay the debt with interest at a given time, and the agreement to reconvey, all go to show that both the lower Courts have properly construed the instrument and the transaction recited therein—*Abdulbhai* v *Kashi*, I L R, 11 Bom, 462 The cases of *Subhabhat* v *Vasudevbhat* I L R, 2 Bom 113 *Bapuji* v *Senavaraji*, I L R, 2 Bom, 231, *Bhagwan Sahai* v *Bhagwan Din*, I L R 12 All 387 *Ayyavayyar* v *Rahimansa*, I L R, 14 Mad, 170, are clearly distinguishable because there were sale deeds of absolute conveyance in all these cases coupled with a covenant for re-purchase There was no reservation of any liability for debt, no agreement to pay interest, and to repay the debt as in this case We accordingly, dismiss the appeal and confirm the decree Costs on appellant

*Decree confirmed*

**NOTES**

[See also (1900) 2 Bom L R 1058 (1906) A W N 180 (1915) 17 B m L R 929]

## [709] PRIVY COUNCIL

*The 7th February and 20th March 1897*

PRESENT

LORDS WATSON HOBHOUSE AND DAVEY AND SIR R COUCH

Bai Motivahu Appellant

*and*

Bai Mamubai and another Respondents

[On appeal from the High Court at Bombay

*Will construction—Hindu law Gift and wills Executory bequests Power to direct who should take executory bequest Restriction to donee living at testator's death—Limitation of the exercise of the power*

Even if Hindu wills are not to be regarded in all respects as gifts to take effect upon the death of the testator they are generally to be regarded as to the property which they can transfer and as to the persons to whom transfer can be made as regulated by the Hindu law of gift The *Tagore case* (1869) 9 Beng L R 377 L R Ind Ap Cal Sup Vol 47 referred to and followed

A Hindu testator devised his immoveable property upon trust for the income to be appropriated to the maintenance of his widow and of his daughter and of the children that might be born of her the property to be divided among the heirs of such children If there should not be any children born of his daughter the property under the will should devolve upon those to whom she might direct it to be delivered by making her will

The daughter having had no children and questions having arisen between the daughter and the widow as to the administration of the estate according to the will

*Held* that there was not an absolute gift to the daughter and that the persons to whom the property was given though to be designated by her did not take the gift from her but from the testator The judgment in *Dixon* v *Oliver* 1806 13 Ves 108 not applicable

According to the already settled law if the testator himself had designated the persons to take, in the event of his daughter having no child the gift would have been valid as an executory bequest, supported by preceding life interests but valid only under the following restriction, *viz*, that to render the gift valid the taker so designated must have been either actually or in contemplation of law in existence at the death of the testator

In this case, no principle of Hindu law stood in the way to prevent the testator from substituting his daughter for himself as the person empowered to designate ; but the same limitation held good as to the existence being requisite of the donee at the end of the donor's life, in order that the power might be validly exercised.

There was no application of the English law of "powers" which was not fit to be applied generally to Hindu wills. Subject to the above restriction, the power in question was valid.

It was not decided upon whom the property would devolve, if the power should not be exercised.

**[710]** APPEAL from a decree (15th March 1895) of the Appellate High Court affirming, with a verbal amendment, a decree (19th December 1891) of the High Court in its original jurisdiction (*Bai Mamubai v. Dossa Morarji*, (1899) I.L.R., 15 Bom., 443.)

The questions which were raised on this appeal between the widow and the daughter, by a former marriage, of the testator, Jetha Ladhani, lately a Hindu merchant in Bombay, as to the construction of the will and the validity of a clause in it, were entirely of law. The testator, who died in November 1869, having made his will on the 18th October preceding, appointed his widow Motivahu to be executrix and Khimji Lakmidas, his former partner in business, to be executor of his will, with a third, Dossa Morarji since deceased. Probate was obtained on the 1st November 1870. Questions having arisen in carrying out the will, this suit was brought on February 1878, by the daughter Mamubai against the executor and the executrix. On this appeal preferred by Motivahu from the decree of the High Court, the respondents were the daughter Mamubai, and the executor Khimji Lakmidas. Trust estates for life having been given by the will out of the income of the testator's immoveable property to his widow and daughter, and then to the children that might be born of his daughter, with ultimate division of it among the heirs of those children, and a provision that, if there should be no children, his daughter should have power by her will to direct in whose favour an executory devise of the property should take effect ; --the question was raised, on this appeal, whether the Courts below were right in holding it to be a valid provision that, in the event, which had happened, of no children having been born of the testator's daughter, the property should go to the persons to whom that daughter should by her will direct it to be delivered.

After some bequests of money for charitable purposes and for legacies, the will directed that all the testator's landed property should be held under a trust-deed to be executed by his executors and executrix and his friend Seth Thakar Khatav Makanji, who were out of the net income of the property to pay the personal expenses of his widow and daughter, and those of his daughter's children, as the trustees might think proper. Afterwards the **[711]** property to be apportioned among the heirs of the daughter's children, with the conclusion, as follows :—" Should there be no children, then after deaths of the widow and the daughter the trust to become void, and this property to be delivered to such persons as my daughter may direct it to be delivered to, by making her will."

Another clause after providing that any remaining cash should be divided among his daughter's children, on their mother's death, and that of his widow, made a further trust, if there should be no children, for *dharam*, or religious and charitable purposes. The will repeated, in case this should fail, the above power to be exercised by the daughter ; and, as the trust for *dharam* was too vague to be carried out, and was so treated on all hands, this clause was practically a repetition of the power to the daughter.

The written statement to the plaint in this suit contained nothing as to the validity of the power, but related to the accounts of the estate

No issues were raised On the 26th August 1878, the accounts were referred to the Commissioner, whose report was by consent confirmed on the 25th November 1890 The Judge in the Court of original jurisdiction (FARRAN, J ) construing the 8th clause of the will, considered that the income was given to Bai Motivahu and to Bai Mamubai during their joint lives, and then to the survivor of them As to the disposal of the property after the death of the daughter Mamubai, the Judge held that as she had no children born of her, or in legal existence at the date of the death of the testator the gift to such children was invalid under the rule laid down in the *Tagore case* (1869) 9 Beng L R, 377 L R, Ind Ap Ca Sup Vol 47 but that the bequest that, failing any children born of her, the property should devolve upon those to whom she might by her will direct that it should be delivered was valid This constituted, on failure of any children born of her, in effect an absolute gift to the daughter Mamubai who, in that state of things, subject to the life interest of Bai Motivahu, was at liberty to will the whole property to whomsoever she might choose It was also the Judge's opinion that [712] any who might take the property under such a direction made by Mamubai would take it from her and by her gift, not the testator's, so that the will and the direction did not offend against the rules laid down in the *Tagore case* 9 Beng L R 377 L R, Ind. App Ca Sup Vol, 47

As to the gift to religious and charitable purposes made in the event of there being no children born of Mamubai, the Judge held it too vague to be upheld, so that under this clause also she could exercise a power of appointment, as given in a preceding part of the will

Part of the judgment was as follows The plaintiff has no children, and she is said to be about thirty It is admitted that the provision for the future children of Mamu, if any, must fail under the ruling in the *Tagore case*, 9 Beng L R, 377, L R, Ind App Ca Sup Vol 47 If any should be born, this admission would not be binding on them I cannot now decide what would become of the property in that event In the event of no children being born of Mamu, the testator has directed that the property is to be delivered to such persons as his daughter Mamu may direct it to be delivered to by making her will The question arises whether that is a valid direction having regard to the ruling in the *Tagore case*, 9 Beng L R, 377 L R, Ind App Ca Sup Vol, 47

I endeavour to put myself in the position of the testator, a Hindu, to ascertain what he meant He manifestly desired to make adequate provision for his wife Motivahu for her life while keeping a watchful control over her see clauses 13 14, 17 and 7 He manifestly desired that she should not be his heiress Mamu, subject to the provision for Motivahu and Mamu's children, he wished to inherit after him He contemplates Mamu surviving Motivahu and the trust being kept up for her and her children failing children of Mamu he wished that Mamu should do what she pleased with the property and it is to emphasize that intention I think that he says she is to direct to whom it is to be given by making her will Subject to Motivahu's interest she is to enjoy it in her lifetime and after her death she is to will it away This is to all intents and purposes an absolute gift to her The intention of the testator is, I think, sufficiently plain though it may fail if Mamu should not give [713] the requisite directions by her will He has not contemplated her doing so If I am correct in this view the gift does not offend against the rule in the *Tagore case* The persons to whom the property is given take it from Mamu and not from the testator Mamu became the

owner Courts in England have viewed similar wills in this light The cases are collecte i in Theobald on Wills p 352 *Robinson* v *Dusgate* 2 Vern, 180 *Hixon* v *Oliver* 13 Ves 108, are cases very like the present If I am in error in ascertaining the wishes of the testator from the words which he has used, I am in good company When there is as here, no gift over on failure to exercise the power it is difficult to interpret the will in any other sense than this that the testator when penning his intention expressed the incidents of an absolute gift instead of making an absolute gift in the more simple form, and omitted to specify some of them

'The next clause to be considered is the 13th The meaning of this clause is that Motivahu is to receive Rs 750 per month to keep the house and to defray the worship of the Thakur Mamu no doubt the testator expected would live with her but if she withdraws herself the testator has made no provision for that I should be making a new will for the testator and altering his expressed intention if I were to allocate any part of this sum to Mamu If Mamu returns to the house and Motivahu does not properly expend the money on the household expenses the executors have the power themselves to expend them with their own hands

As to clause 15 it is sufficient to say that only Rs 50 per mensem are payable out of the income of the trust created by clauses 7 and 8 The other expenditure there directed is to be made out of the general fund This general fund is that specified in clause 16 The capital is not to be trenched upon Out of the balance of the income the executors can make payments for religious charities The bequest is allowable as the translation runs and even if the word *dharam* only is used in the original the parties will hardly dispute it as it is only the surplus income out of which the expenditure can be made For the reason [714] already given I cannot positively decide on the invalidity of the provisions in clause 18 If children should be born my decision would not bind them The 18th clause contains an alternative gift of the property there described to *dharam* on failing that to such person as Mamu may direct by making her will The whole gift however would fail on both branches if Mamu should have a child If she has such child the alternative gift comes into play The alternative gift to *dharam* fails for vagueness but effect will be given to the valid one See case collected in Theobald p 406 (3rd Ed) My decision on clause 8 governs the gift to Mamu expressed in the same words in clause 18

The decree declared that Bai Motivahu and Mamubai were during their joint lives entitled in equal shares to the net rents of the property and that the survivor of them was entitled during her life to the entirety of the rents That the gift contained in paragraphs 8 and 18 of the will to such person as Bai Mamubai might by her will direct was valid

A Division Bench of the High Court Sir C SARGENT, C J and BAYLEY J heard and decided an appeal from the above judgment and decree raising the question of the validity of the power to appoint conferred upon Mamubai The High Court gave no reasons for their judgment a similar question having been disposed of in *Javerbai* v *Kablibai* (1891) I L R 16 Bom 492, and the reasons given in their judgment in that case appearing to afford the statement of their opinion herein The High Court affirmed the decree of the Court of First Instance with a restriction upon Mamubai's power of selection, to persons in existence at the death of the testator

Mr *J D Mayn* and Mr *H Cowell*, for the Appellant relied on the following principal points The amendment made by the High Court in the decree of the original Court showed that the High Court did not alto-

gether concur in the view taken by Mr Justice FARRAN to the effect that the provisions of the will created an absolute estate in Mamubai The High Court must have been of opinion that effect could only be given to the testamentary appointments to be made by Mamubai by treating them [715] as estates conferred by the testator under the will of 1869 It was submitted that so much of that will as provided for the devolution of the estate after the death of Mamubai was invalid being contrary to the principles of the Hindu law relating to wills as laid down in the *Tagore case* (1869) 9 Beng L R 377 L R Ind Ap Ca Sup Vol 47

A disposition in favour of such person as Mamubai might appoint by will was invalid A disposition or power to direct a disposition to take effect on failure of a previous invalid bequest would be inoperative as being itself invalid Again the Hindu law required that on a gift (and the law of gift governed such a bequest) an ascertained person in existence and accepting the gift, must do so at the instant when the gift should take effect and that would be at the time of the death of the donor To allow such a disposition by will as the power in question if exercised would effect would be to allow a bequest to operate in favour of a person who might or might not be in existence at the death of the donor In view of this the High Court had attempted to give validity to the power in question by restricting in the decree the exercise of that power to a class of persons who must have been in existence at the death of the testator It was submitted that the High Court by its decree could not have thus given validity to what was invalid from the beginning and moreover could not impose a limitation altogether beyond the contemplation of the testator himself He had given in unrestricted power of selection of the taker of an executory devise The Court had so far made a will for him as to confine that selection to a diminished and diminishing class But as the provision was actually made it on the face of it would have made the addition of another younger life than his own within which period the power might be exercised after his death That was a provision in conflict with the Hindu law of wills and it was therefore invalid That law as explained in the *Tagore case* 1869) 9 Beng L R 377 L R Ind Ap Ca Sup Vol 47 required that a person must be specified as donee that he must be capable of accepting and accept at the time when the gift would be capable of taking effect These restrictions on gift forbade virtually powers of appointment such as the one in question They prevented a testator from delegating [716] his choice in this manner No such powers were recognized in the Hindu system of wills in which bequests were founded on the law of gift a bequest being in its view a gift to take effect upon death The following cases were cited *Ramtonoo Mullick* v *Ramgopaul Mullick* (1829 1 Knapp 245 *Nagalutchmee Ummal* v *Gopoo Nadaraja Chetty* (1856) 6 Moore Ind Ap Ca 309 *Vallinayagam Pillai* v *Pachche* (1863) 1 Mad H C Rep 326 *Soorjeemoney Dossee* v *Denobundoo Mullick* (1862) 9 Moore Ind Ap Ca 123 *Bhoobunmoyi Debia* v *Ramkishore Acharj Chowdhry*, (1865) 10 Moore Ind Ap Ca 20 *Ganendra Mohan Tagore* v *Upendra Mohan Tagore* (1869) 4 Beng L R (O C) 103 9 Beng L R 377 L R Ind Ap Ca Sup Vol 47 *S M Krishnaramani Dasi* v *Ananda Krishna Bose* (1869) 4 Beng L R (O C) 231 *Sonatun Bysakh* v *S M Juggutsoonderi*, (1859) 8 Moore Ind Ap Ca 66

It was now too late to import a new principle into this part of the Hindu law and the testamentary right should be taken to have been established in a way that could not admit it

By the recognition of this power as given in the will there would be an intermediate time during which the estate might be in abeyance, contrary to

the well observed theory of the Hindu law which tended to the vesting of gift in the donee when the gift was effected The exercise of the power might be contrary to the theory of the law of the Mitakshara, whereby the undivided owner could not devise his share by will without the consent of his co sharers, and whereby the will of the undivided member of the family would be defeated by the right of survivorship among co parceners The undivided owner might obtain a partition and could then devise But on his death, his right to get partition ceases A power such as that now in question, would not accord with this Reference was made to *Laksman Dada Naik* v *Ramchandra Dada Naik* (1880) I L R 5 Bom 48 L R 7 Ind Ap Ca 181 (1876), I L R 1 Bom, 561

Mr *J Jardine* Q C and Mr *J H A Branson* for the Respondents argued that there was no reason for holding invalid the power in question It had long been settled law that a gift for life with a gift over on a contingency was good Reference **[717]** was made to *Tarokessur Roy* v *Shoshi Shikhureswar* (1883) L R 10 Ind Ap Ca 51 I L R 9 Cal, 952 The decree of the High Court was right in giving effect to the intention of the testator construing the will according to its legal construction and maintaining the power given by him with a precaution against the power being wrongly exercised The will was sufficiently right to enable the disposition to operate consistently with the rule laid down in the *Tagore case* (1869) 9 Beng L R 377 L R Ind Ap Ca Sup Vol 47 as to giving effect to a testator's intention No principle of Hindu law had been shown to have been infringed Reference was made to Theobald on Wills 352 *Robinson* v *Dusgate* (1690) 2 Vernon 180 *Hixon* v *Oliver* (1806) 13 Vesey 108 The judgment of the Chief Justice in *Javerbhai* v *Kablibai* (1891) I L R, 16 Bom 492 had answered all the arguments brought against the validity of the power It was not a fatal objection to the power that it could have been exercised as it originally was given in an invalid way The power given to the daughter by this testator was capable of being validly exercised and far from being contrary to any principle of Hindu law harmonized with it inasmuch as that law as was pointed out in the judgment referred to recognized the exercise in several instances of powers over definite objects As regarded the exercise of powers reference was made to *In re Maxwell's will* (1857) 24 Beav 246 *In re Capon's trusts* (1879 10 Ch D 484 Other cases cited will be found in the report of *Javerbhai* v *Kablibai* (1891) I L R 16 Bom, 492

Mr *J D Mayne* replied citing *Simpson* v *Forester* (1829) 1 Knapp P C Ca 231 *In re Stringer's estate*, (1877) 6 Ch D 1

Afterwards their Lordships' **judgment** was delivered on 20th March 1897, by

**Sir R Couch** The question in this appeal arises in a suit brought by the respondent Mamubai against the appellant and Dossa Morarji and Khimji Lakmidas the other respondent for the administration of the estate of Jetha Ladha a Hindu merchant of Bombay and for the construction of his will He died in November 1869 the will is dated the 18th of October 1869 and by it the **[718]** defendants are appointed his executors and executrix Having in the previous clause directed Rs 35 000 to be expended on his funeral ceremonies, and given various legacies the testator in the seventh and eighth clauses says —

7 Agreeably to what is written above the whole of the money which I have resolved to be paid or expended on account of the legacies and for the expenses of my funeral ceremonies for 12 months and on account of the *sadavart* (a religious institution) and for other *dharam* (religious or charitable) purposes according to the above particulars is to be paid out of my funds in ready cash but whatever my (landed) estate ' that is immoveable property there is is not to be touched by my vakils (executor or representative) or vakilatan (executrix

or representative) for these purposes, but after my death shall have taken place a 'trust deed' is to be made as soon as practicable of my garden dwelling house rope walk, warehouses (or godowns) houses stables lands and whatever other immoveable property that is (landed) 'estate' there is belonging to me in the island of Bombay, and the whole is to be invested in a 'trust' As to the trustees' thereof, my two vakils and vakilatan and in conjunction with them my friend Seth Thakur Khatav Makanji four persons jointly are duly to become 'trustees,' and these 'trustees' four in number are to collect the income of the whole property and after deducting therefrom the expenses connected therewith, money is to be paid out of the net income whatever it may amount to for the personal expenses of my wife Motivahu and my daughter Mamu and for the children of my daughter Mamu after her death, agreeably to the fourteenth and fifteenth clauses of this will and after paying the same whatever income may remain is to be used for the purposes of my wife Motivahu and my daughter Mamu and her children in such manner as my trustees think proper

'8 In the seventh clause mentioned above, it is resolved to invest the whole of my immoveable property in trust and to collect the income thereof but the trustees are not to demand any rent for the place out of my property which may be used as a residence for my family and should any of the trustees depart this life the surviving trustees are to appoint another trustee and after the death of my daughter Mamu should there be any children born of the womb of my daughter the trust' is to stand valid during the lifetime of such children Afterwards the heirs of the said children are duly to apportion and receive this property But should there be no children born of the womb of my daughter Mamu, then after the death of Mamu and of my wife Motivahu this trust is to become void and this property is to be delivered to such persons as my daughter Mamu may direct it to be delivered by making her will'

The eighteenth clause relates to the moveable property After providing for the birth of a son or daughter of Mamu it says

"According to these particular (and) agreeably to what is written above my property is to be apportioned and distributed and should no child be born of the womb of my daughter Mamu (which may God forbid) in that event on the death of my wife Motivahu and of my daughter Bai Mamu taking place my moveable property is to be expended in such good *dharam* (religious or charitable works) in as many 719] as may continue as long as the moon lasts and should it appear that any one would prevent this property from being given away for *dharam* (religious or charitable purposes) by reason of the rules of the Sirkar the same is to be given to such persons as my daughter Mamu may direct it to be given by making her will"

The nineteenth clause relates to the jewels of the testator and his wife, and is similar to the eighteenth

After a reference to the Commissioner of the Court to take accounts and make inquiries, and his making his certificate and report the suit was heard on the original side of the High Court by Mr Justice FARRAN who on the 19th December 1891, made a decree declaring among other matters that the gift contained in paragraph eight of the said will to such persons as the plaintiff Mamubai may direct by her will is valid but this Court cannot and doth not determine upon whom the property referred to in the said eighth clause will devolve in case the plaintiff Mamubai shall die without making or leaving a will" In his judgment the learned Judge says that to all intents and purposes there was an absolute gift to Mamubai, that the persons to whom the property was given took it from her and not from the testator that Mamu became the owner. He refers to Theobald on Wills, p 352 and says that *Robinson* v *Dusgate*, 2 Vernon, 180, and *Bixon* v *Oliver*, 12 Ves, 108, were cases very like the present. Their Lordships are unable to agree with the learned Judge in holding that there was an absolute gift The case in Vernon has been questioned by a great authority (Sugden on Powers, 109, 8th Ed referring in a note to *Buckland* v *Barton*, 2 H. Bl, 136, and *In re Mortlock's trust*, 3 K and J, 456) And in *Bixon* v.

*Oliver* the gift was to the testator's wife "to be disposed of as she thinks proper to be paid after her death" It was not a power, but a disposition vesting the whole interest in the legatee, but deferring the payment, and is distinguishable from the present case Further, it is to be observed that the declaration in the decree is not consistent with the judgment, which seems to require a declaration that Mamu was absolutely entitled Motivahu appealed against the decree and the appeal was heard before Sir CHARLES SARGENT, C J, and BAYLEY, J who on the 15th March 1895, ordered the [720] decree to be amended by inserting the words 'in existence at the date of the death of the said testator' in two clauses of the decree after the words 'in paragraph eight of the said will to such person and confirmed the decree so amended Their Lordships have not before them the reasons of the learned Judges for making this amendment It is obviously made for the purpose of limiting the exercise of the power, but it is open to the objection that it inserts in the power words which are not in the will Their Lordships propose to make a verbal variation in this part of the decree

The question in the present appeal is whether such a power in the will of a Hindu is valid

In *Sreemutty Soorjeemoney Dossee* v *Denobundoo Mullick* 9 Moo I A, 123, Lord Justice KNIGHT BRUCE, in delivering the judgment of this Board said "Whatever may have formerly been considered the state of that (the Hindu) law as to the testamentary power of Hindus over their property, that power has now long been recognized and must be considered as completely established This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law in allowing a testator to give property whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen if at all, immediately on the close of a life in being Their Lordships think that there is not, that there would be great general inconvenience and public mischief in denying such a power and that it is their duty to advise Her Majesty that such a power does exist It appears from the report cited (p 129) that this had also been held by the Supreme Court at Calcutta In the previous part of the judgment of the Board, the gift over had been held to be on a failure of male issue of any of the testator's five sons at the time of the death of that son The property was first given to the sons as a joint Hindu family absolutely and the question whether the first estate could be only an estate for life did not arise Before this judgment it had been held by this Board 8 Moo I A 85 that the extent of the power of [721] testamentary disposition by Hindus must be regulated by the Hindu law, and subsequently, in the judgment in *Beer Pertab Sahee* v *Rajender Pertab Sahee* 12 Moo I A, 1, it is said (p 37) It is too late to contend that because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*'

The leading case on Hindu wills is the *Tagore case*, 9 Beng L R, 377, and L R Ind App, Sup Vol, 47 It is unnecessary to refer to the particulars of the will in that case Two rules applicable to the will now under consideration are laid down in the judgment of the Committee one is "that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and, therefore, must either in fact or in contemplation of law be in existence at the death of the testator" (p 70). The other is that the first taker under the will may take for his lifetime (pp 66, 80). And it is said

(p 69) "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred" These appear to their Lordships to be the limits of the analogy between wills and gifts *inter vivos* which have been recognized They are not aware of any authority in support of Mr Mayne's contention as they understood it that in the present case there would not be such a transfer of possession to the person who would take by virtue of the power as is necessary to enable it to be validly exercised It appears to them to follow from the first taker being allowed to have only a life interest that his possession is sufficient to complete the executory bequest which follows the gift for life The result of the decisions is that, according to settled law, if the testator here had himself designated the person who was to take the property in the event of Mamu dying childless, the bequest would be good

[722] The remaining question is whether his substituting Mamu and giving her power to designate the person by her will is contrary to any principle of Hindu law There is an analogy to it in the law of adoption A man may by will authorize his widow to adopt a son to him to do what he had power to do himself and although there is here a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu law Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu law are applicable to this power and that it is their duty to hold it to be valid But whilst saying this they think they ought also to say that in their opinion, the English law of powers is not fit to be applied generally to Hindu wills

Their Lordships will humbly advise Her Majesty to affirm the decree of the Appellate Court with a merely verbal variation for the purpose of more clearly expressing the evident intention of the High Court That variation is as follows Instead of the declaration contained in the decree relating to paragraph 8 of the will and of the declaration relating to the testamentary power given to the plaintiff Mamubai by paragraph 18 of the will insert a declaration that the gifts contained in these paragraphs respectively to such persons as Mamubai may direct by making her will are valid gifts so far as the same may be directed to be delivered to persons who were in existence, either actually or in contemplation of law at the death of the testator Jetha Ladhaji and not further or otherwise but that this Court cannot and doth not determine upon whom the property subject to such powers respectively will devolve if and so far as such powers are not validly exercised The Courts below have ordered that the costs of all parties as between solicitor and client should be paid out of the estate of the testator, and their Lordships make a like order as to the costs of this appeal.

*Decree affirmed*

Solicitors for the Appellant —Messrs *Payn and Lattey*
Solicitors for the Respondents —Messrs *Lattey and Hart*

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**NOTES**

[1 A gift in favour of a person who is to come into existence under the exercise of a power etc may be valid if that person was in existence to compete it to take under the gift For example, a gift (or bequest) to a person in existence at the date of the gift (or death) is valid though he might acquire only long time after that qualification which entitles him thereto —(1905) 25 Mad , 363 (*son* by subsequent adoption) (1910) 15 C W N , 66 13 C L J 85 (gift to *wife* of a son, a bachelor at the time) (1906) 8 Bom L R , 921 See also (1906) 30 Bom , 477

2. The Hindu Law of Powers is not the same as or co-extensive with, the English Law; accordingly, where a power of alienation was conferred on a limited heir, the English Law of Powers was not applied, and alienations made by her under it were held to enure beyond her life time, in (1914) 42 Cal., 561

3 In (1909) 37 Cal., 128 F B, overruling (1897) 25 Cal., 405; (1901) 29 Cal., 260, and dicta in (1908) 12 C W N 808, it was held that a power to be exercised in favour of an idol to come into existence was valid

4 The Unborn Person rule in The Tagore Case was modified, by legislation, in the Hindu Disposition of Property Act, 1916

5 As regards alteration of decree see also (1904) 29 Bom., 306.]

## [723] PRIVY COUNCIL

*The 7th April, 1897*

PRESENT

LORDS WATSON, HOBHOUSE, AND DAVEY AND SIR R. COUCH

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Rabiabai and others .... Petitioners

*and*

Mahomed Ismail Khan and others . . Objectors

In the matter of an Appeal from the High Court at Bombay.

*Privy Council—Practice—Petition to restore an appeal—Terms under which it was restored*

Under Rule 5 of the Orders in Council of 13th June 1853, an appeal was dismissed for want of prosecution on the 8th October 1896 The record had been received of the 15th January 1896, and since then no steps had been taken The delay having been explained, and the cause of it considered sufficient, the appeal was restored to the file, on conditions as to costs, and on security to be given in England.

THIS was a petition preferred by Rabiabai, widow of Amir Saheb Mahomed Ali, in which his sons joined, relating to an appeal between the petitioners and Mahomed Ismail and others This appeal had been dismissed for want of prosecution

The petition set forth that on the 7th March 1893, the suit brought against the petitioners was dismissed by the decree of the High Court in its original jurisdiction, but on appeal decreed by the Appellate High Court on the 13th October 1893 An appeal to Her Majesty in Council was admitted on the 13th April 1894 The record was received by the Registrar of the Judicial Committee on the 15th January 1896 No steps having, after that, been taken, this appeal was, on the 8th October 1896, dismissed for want of prosecution under the terms of Rule 5 of the Order in Council of the 13th June 1853 The explanation of the petitioners was that the delay had taken place owing to the illness of Mahomed Ali Amir Saheb Kewai, the manager of the affairs of the family of which the appellants were members.

Mr *J D Mayne* for the Petitioners relied on this manager's affidavit, and referred to *Rajah Deedar Hossein* v *Ranee Zahooroon Nissa*, (1841) 2 Moore's Ind Ap Ca 441, *Ranee Brijobuttee* v. *Pertaub Sing*, (1860) 8 Moore's Ind Ap Ca, 160, and to the practice of the Judicial Committee by W. Macpherson, Esquire, p 100

Mr *T Ribton* was heard for Mahomed Ismael Khan, the first respondent on the appeal, on the objection to the petition.

[724] Their Lordships held that the appeal ought to the (*sic*) restored upon condition, (1) that the petitioners do deposit in the Registry of the Privy Council, within four months from the date of Her Majesty's order, £300 as security for

costs, (2) that the petitioners pay the respondent his costs of opposing the petition incurred in India, his costs of the dismissal of the appeal, and his costs of opposing the petition in England

An order in Council to the above effect was made on the 18th May 1897.

Solicitors for the Petitioners —Messrs *Nichol, Manisty and Co*

Solicitors for the First Respondent —Messrs *Hughes and Sons*

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[21 Bom 724]

## ORIGINAL CIVIL

*The 9th July 1897*

PRESENT

SIR C FARRAN KT CHIEF JUSTICE AND MR JUSTICE STRACHEY

Tullockchand Harnath and another (Original Defendants) Appellants

*versus*

Gokulbhoy Mulchand (Original Plaintiff) Respondent

*Registration — Suit to compel registration — Document referring to another document— Two documents when registrable as one Duties of Registrar — Further period for presentation allowed by section 34 of Registration Act —Registration Act (III of 1877) Secs 24 34 77*

The defendants executed and delivered two documents A and B to the plaintiff —A being an agreement of equitable mortgage and B an agreement that they (the defendants) would register A and do all things necessary therefor and in the event of their failing to do so to pay whatever the plaintiff could claim under A if it had been registered The plaintiff obtained an order for the registration of A but failed to present it for registration within thirty days after such order as required by section 75 of the Registration Act (III of 1877) and when he did present it registration was consequently refused He subsequently lodged B for registration, with A as an annexure to it and it was accepted on payment of a penalty under section 24 of the Registration Act The Registrar, however, refused to register B on the grounds (1) that without A there would be nothing to show what property B referred to and (2) that to register A as an annexure to B would be contrary to the provision of section 75 which limited the time for registration to thirty days The plaintiff then brought this suit under section 77 praying for an order for the registration of B with its accompanying document A within thirty days from the decree The Division Court made the order as prayed for On appeal by the defendants

[725] *Held* that the decree ordering the registration of B was correct That document was a mere personal covenant to do a certain act with reference to a particular document There was nothing on the face of it to show that the accompanying document referred to in it related to immoveable property The registering officer would travel out of his functions if he were to institute an enquiry as to what was the nature of the document referred to

When a Registrar has directed under section 24 that the document shall be accepted for registration the Court cannot inquire under sections 77 and 74 into the propriety of that direction

*Durga Singh v Mathura Das* I L R 6 All 460 approved of and followed

The proviso to section 34 allows a further period of four months (in addition to the four months allowed by section 24) within which to appear subject to the conditions set out in the proviso

*Held*, also, (varying the decree of the lower Court) that document A should not be copied as an annexure to document B If document A were in the nature of a schedule or

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* Suit No 251 of 1896 Appeal No 933

appendix to document B, then the two documents could be registered as one; but as they appeared to be two distinct documents separately stamped and executed for different objects, they could not be so registered. The Registrar had no power to inquire what document was referred to in the document he was asked to register. If he could not register the two documents as one, neither could the Court do so under section 77.

APPEAL from FULTON, J. see I. L. R., 21 Bom., 69.

Suit under section 77 of the Registration Act (III of 1877) to compel registration. The plaintiff prayed for a direction that a certain document (Exhibit B) with its accompaniment (Exhibit A), both of which were annexed to the plaint, should be registered in the office of the Sub-Registrar within thirty days of the passing of the decree.

Exhibit A was dated the 11th January 1895 and was an agreement of equitable mortgage of certain lands for Rs. 50,000 to the plaintiff signed by the first defendant for himself and as attorney for his father (defendant No. 2), and by one Motichand Harnath.

Exhibit B, which was also signed by the first defendant for himself and as attorney for his father (defendant No. 2) and by the said Motichand Harnathji, was in the following form:

"We, Harnathji Rupaji of Marwar and Tullockchand Harnathji and Motichand Harnathji, of Bombay agree with you Gokuldas Mulchand of Bombay that we will register the accompanying document as required by the Indian Registration Act 1877, [726] and shall do all acts and things necessary or expedient therefor and, in case we fail to do so, we shall pay whatever you recover under the accompanying document if the same had been registered.—Dated 11th January 1895."

Subsequently to the execution of these documents the plaintiff lodged Exhibit A alone for registration and after some difficulty in obtaining the necessary admission of execution from the defendants and Motichand he obtained an order from the Registrar for its registration. He, however, failed to present it again to the Sub-Registrar for registration within thirty days after that order (see section 75 of the Registration Act), and the Sub-Registrar accordingly refused to register it when it was presented.

On the 9th September 1895, plaintiff lodged document B, with A as an annexure to it, in the office of the Sub-Registrar to be registered and the Sub-Registrar, being authorized to exercise the powers of the Registrar in that behalf (*Government Gazette* 1887 Part I p. 980) accepted B for registration on payment of a penalty under section 24 of the Registration Act III of 1877. After several attempts to procure the attendance of the executing parties before the Sub-Registrar the plaintiff finally got Motichand Harnath to admit execution of document B before the Sub-Registrar, and it was registered as against him on 6th January 1896. The first defendant Tullockchand appeared on the 7th January 1896, before the Sub-Registrar but declined to admit execution and registration of B was therefore refused as against him on the 8th January 1896.

The plaintiff appealed on 25th January 1896, to the Registrar under section 73 of the Registration Act III of 1877 against this refusal. The first defendant in answer to a summons issued by the Registrar appeared with his solicitor before the Registrar on 25th February 1896, and admitted execution of document B, but raised objections to its registration, and on the 9th April 1896, the Registrar refused to register it.

The following were the reasons entered by the Registrar for his refusal to register document B:—

"The agreement is of the same date and refers to the same property as the mortgage. Under these circumstances is the agreement sufficiently distinct from the mortgage to

constitute a separate document? I find the following objections to consider the agreement a separate document —

[727] "1 If the mortgage is treated as a separate document there is in the agreement no evidence to show to what property the agreement refers

"2 If the mortgage is recorded in the registration book as an annexure to the agreement such record will constitute a r gi trati n cf the m r g g

"3 If by this means the mortgage is register d i w ll nake f u force the stipulation contained in section 75 of the Registration Act that the period of presentation for registration shall be limited to 30 days'

The suit was heard as a short cause by FULTON J who held that B being a registrable document, and having been duly presented and accepted ought to be registered, document A being copied as an annexure see I L R 21 Bom 69.

The defendants appealed

*Robertson* (with *Kirkpatrick*) for Appellant Defendants —The following authorities were referred to *Alexander Mitchell v Mathura Das* I L R, 8 All, 6 *Durga* *singh* v *Mathura Das* I L R 6 All 460 *In the matter of the petition of Ish h Nath* I L R I All 318 p 323 Maxwell on Statutes, pp 171 175 Registration Act III of 1877 sections 23 24 34 *Mohan Nusya v* *hon Mahomed* I L R, 5 Cal, 820

*Macpherson* (with *Lang* Advocate General) for the Respondent (Plaintiff) He cited *Shama Charan Das v Jitendra l h* I L R 11 Cal 750, Williams on Executors V I p 86 Brown on Probate p 108

**Farran C J** —This is an appeal from the decree of Mr Justice FULTON passed under section 77 of the Registration Act III of 1877) directing the document marked Exhibit B in the suit to be registered with the document marked Exhibit A in the suit as annexure thereto

The first question which we have to decide is whether the decree directing Exhibit B to be registered directing that Exhibit A shall be registered as an annexure to it stands upon different grounds

Exhibit B which is written on a stamp paper is in the following terms We Hunnathji Ruttanji f Marwar and Tullockchand Hurr and Mulchand Hunnathji f B mbay agree with you Gokulbhoy Mulchand of Bombay that we will [728] register the accompanying document as required by the Indian Registration Act 1877 and shall attend at the office necessary for execution thereof and in case we fail to do so we shall pay you the amount claimed under the accompanying document as if the same had been registered This instrument bears date the 11th January 1895 It is not disputed that the accompanying document referred to in Exhibit B is the document Exhibit A The latter is an equitable mortgage by way of deposit of title deeds of a piece of Foras land in Bombay The boundaries and description of the land appear on its face.

Now with regard to the agreement (Exhibit B) it appears to us to be a personal agreement on the part of the signatories to register a certain specified document, and in default of doing so to pay a specified sum It cannot in our opinion, be considered to be a document relating to immoveable property" within the meaning of section 21 of the Registration Act It is a mere personal covenant to do a particular act in reference to a particular document It does not either itself create declare assign limit or extinguish any right title or interest in immoveable property or purport to do so nor does it create a right to obtain another document which will when executed have that effect It would we think, be going too far to hold that because the document which the signatories have covenanted to execute relates to immoveable property, therefore

the agreement which contains a covenant to register it relates to immoveable property. If the covenant had been to copy or print the document, it could not have been argued that it related to land. A covenant to register it appears to us to stand upon the same footing. Therefore we come to the conclusion that the decree directing the registration of Exhibit B is not erroneous because Exhibit B does not contain the particulars prescribed by section 21. There is nothing on the face of the document (Exhibit B) which shows that the accompanying document referred to in it relates to immoveable property. The registering officer would, we think, travel out of his functions if he were to institute an inquiry as to what the nature of Exhibit A was.

It is, however, objected that the Sub-Registrar directed that on payment of a fine it (Exhibit B) should be accepted for registra-[729]tion after the lapse of four months from its execution without inquiring whether the non-presentation of it for registration within the four months was owing to urgent necessity (whatever that may mean in this connection) or unavoidable accident. The defendant did not prove that the document was accepted without inquiry, but he tendered evidence which he alleged would have shown it, and such evidence was not allowed to be given. We agree, however, with the ruling in *Durga Singh* v. *Mathura Das*, I. L. R., 6 All., 460, that when a Registrar has made a direction under section 24 that a document shall be accepted for registration, the Court cannot inquire, under sections 77 and 74, into the propriety of that direction. If it finds that a direction has been given by the Registrar, it will assume that the Registrar gave the direction on grounds which seemed to him to be sufficient. When that direction has been given, and the fine has been paid, it appears to us that " the requirements of the law on the part of the applicant " have been complied with. No obligation is upon the applicant that the Registrar shall properly perform the duties of his office. If the Registrar is willing to direct the acceptance of the document without inquiry made of the applicant, it is not incumbent on the latter to assign the reasons for his delay. In this case, however, the written statement of the defendants alleges that the plaintiff did explain to the Registrar the reasons for the delay, though it goes on to allege that the reasons so assigned were false.

As to the objection that the plaintiff did not, as required by section 34, appear before the registering officer within the extended time allowed by section 24, we think that the proviso to that section (34) allows the applicant a further period of four months within which to appear, subject to the conditions set out in the proviso. The section is not a lucid one, but that is the meaning which we gather from it. The imposition of a second fine appears to provide for a further delay over and above the delay condoned under section 24. We think, therefore, that there is no ground of objection established to the decree so far as it directs the registration of Exhibit.

[730] Whether the further direction that Exhibit A is to be copied into the register as an annexure to Exhibit B, gives rise to different considerations. The plaintiff owing to delay failed in getting Exhibit A, when presented alone for registration, registered. That circumstance alone would not, we think, stand in the way of the plaintiff getting the combined document made up of Exhibits A and B registered if the registration of it as a combined document is not open to objection upon other grounds. The question appears to us to be purely academical, as we do not think that it will make the slightest difference to the plaintiff's rights, or the defendant's obligation under Exhibit B, whether Exhibit A is made an annexure to it or not. Whatever rights the plaintiff can enforce under Exhibit B he can enforce whether Exhibit A is or is not copied out in the Registrar's book. If Exhibit A were in the nature of a schedule or

Appendix to Exhibit B, then we think that the two documents could be registered as one, but to us they appear to be two essentially distinct documents separately stamped and executed to effect different objects. If the Registrar could not register them as one document, neither can, we think the Court do so under section 77 Could the Registrar do so? We think not. Before the Registrar can register two documents as one we think that they must be connected together by reference and thus incorporated into each other. We think the Registrar has no power to inquire into what is the separate document to which the document which he is asked to register refers Thus for example if the agreement were to reprint the book or copy the picture now on the table, the Registrar could not register the book or the picture as part of the agreement but if the agreement were to reprint the book annexed to the agreement, or to copy the picture of which a photo was annexed to the agreement, he could do so If oral evidence has to be adduced under section 92 of the Evidence Act to show what the agreement relates to, we think that the Registrar is not authorized to take it Where the book to be reprinted is not sufficiently described, a dispute might arise as to what the book to be reprinted was Surely the Registrar could not be called on to settle the dispute His duty should be confined to ascertaining whether the agreement was executed or not, and should not [731] be extended to ascertaining what the subject matter of the agreement consisted in If he can make the inquiry when there is no dispute we cannot see why he should not be at liberty to make it when there is a dispute Neither duty is imposed upon him by the Act Sections 34 and 35 define and limit the extent of his duties It does not seem to us that it makes any difference that the subject matter of the agreement is another document, and that the agreement is to register it The only connection between them is that the one is the subject matter of the other They are in no sense one document We think therefore that the decree ought not to have directed that Exhibit A should be registered as an annexure to Exhibit B, and that to that extent it should be varied

*Decree varied*

Attorneys for the Appellant —Messrs *Brown and Mw*
Attorneys for Respondents— Messrs *Bhaishankar and Kanga*

**NOTES**

[ See also (1905) 30 Bom 01 (1900) I L R 21 ]

**[ 21 Bom 731 ]**

## APPELLATE CIVIL

*The 18th February 1896*

PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE, AND MR JUSTICE PARSONS

Kashinath Sakharam Kulkarni (Original Plaintiff) Applicant

*versus*

Nana and another .. .. .. ..(Original Defendants) Opponents *

***Civil Procedure Code (Act XIV of 1882) sec 622—High Court, interference by—Mamlatdar Jurisdiction***

**The plaintiff sued in a Mamlatdar's Court for possession of certain land, alleging that the defendants held them under a lease, the time of which had expired. The Mamlatdar**

* Application No. 209 of 1895, under the Extraordinary Jurisdiction.

found the execution of the lease proved, but held it to be colourable, and that the defendants did not hold under it. He, therefore, rejected the plaintiff's claim. The plaintiff applied to the High Court in its extraordinary jurisdiction and obtained a rule to set aside the order, contending that the Mamlatdar had no jurisdiction to decide that the lease was colourable, and that he ought not to have admitted evidence upon that point.

*Held* (discharging the rule) that the matter was not one for the extraordinary jurisdiction of the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882). The Mamlatdar had not declined jurisdiction. He had considered the materials laid before him and had come to a conclusion. That conclusion if erroneous ought to be corrected in a regular suit and not by an application to the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882).

[732] APPLICATION under the High Court's extraordinary jurisdiction (section 622 of the Civil Procedure Code Act XIV of 1882) against the decision of Rao Saheb Amrapi Ganesh Tilak Mamlatdar of Niphad.

The plaintiff sued the defendants in the Mamlatdar's Court to recover possession of certain land which (he alleged) the defendants held under a *lavni* kabulayat (lease), the term of which had expired.

The Mamlatdar found the execution of the kabulayat proved, but rejected the claim holding that the kabulayat was merely colourable, and that the defendants did not hold under it.

The plaintiff applied to the High Court under its extraordinary jurisdiction and obtained a *rule nisi* to set aside the order of the Mamlatdar on the grounds (*inter alia*) that the execution of the kabulayat being admitted by the defendants, the Mamlatdar had no jurisdiction to try the question of its being colourable or otherwise; that he ought to have held that the defendants could not dispute the plaintiff's title; and that he should not have admitted any oral evidence to contradict or vary the terms of the kabulayat.

*Mahadeo B Chaubal* appeared for the Applicant (Plaintiff) in support of the rule.—The kabulayat sued on being admitted and held proved by the Mamlatdar, it was not open to him to go into other questions—*Patel Kalabhai* v *Bhagwan* I L R, 19 Bom, 134, nor could the defendants impugn the kabulayat as colourable. The Mamlatdar has considered points which can be determined only in a regular civil suit.

There was no appearance for the Opponents (Defendants).

**Farran, C J** In this case the Mamlatdar has come to the conclusion that the defendant is not in possession of the land under the *lavni* kabulayat upon which the plaintiff relies as proving the defendants' tenancy and its termination within six months of suit. Upon this finding of the Mamlatdar, his decision that he cannot dispossess the defendant is correct.

It has been argued before us that the Mamlatdar has wrongly admitted evidence and that upon the evidence and admissions [733] made before him he was bound to come to a different conclusion and to hold that the defendants did hold the land under the *lavni* kabulayat or at all events that the defendant was estopped from saying that he did not. That is an argument which could properly be addressed to us, a Court of appeal, if an appeal lay to this Court but we think that we ought not, when our extraordinary powers under section 622 are invoked, to exercise them in such a case. The Mamlatdar has not declined jurisdiction. He has considered the materials laid before him and has come to a conclusion adverse to the plaintiff's case. That conclusion, if erroneous, ought we think, to be corrected in a regular suit and not by an application under section 622 and especially so when no substantial injustice appears to result from the Mamlatdar's decision. We discharge the rule.

*Rule discharged*

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NOTES

[See also (1909) 8 I C 613 (1903) P R, 13, (1901) P L R, 80]

21 Bom 733]

## APPELLATE CIVIL

*The 18th February 1896*

PRESENT

SIR C FARRAN, KT CHIEF JUSTICE AND MR JUSTICE STRACHEY

Yesu kom Krishna Sutar and another (Original Defendants) Appellants

*versus*

Sitaram, son and heir of the deceased Govinda Sutar . (Original Plaintiff) Respondent

*Bombay Hereditary Offices Act (Bom Act III of 1874) Sec 4† —Amending Act (Bom Act V of 1886)‡ 'Hereditary office' —Village sutar Hindu law—Bombay Government Resolution No 512 of 1882*

The duties with which section 4 of the Bombay Hereditary Offices Act (Bom Act III of 1874) deals are confined to duties in which Government is [illegible] responsible for the administration of the country is directly interested

[734] The definition of hereditary office does not extend to duties of a carpenter, which though useful to the village community are not matters with which Government has any direct concern

*Held* therefore that the village sutar carpenter did not hold an "hereditary office" within the meaning of that section

SECOND APPEAL from the decision of [illegible] Tuore District Judge of Satara confirming the decree of Rao Saheb S S W[illegible] Subordinate Judge of Karad

* Second Appeal No 128 of 1895

† Section 4 of the Bombay Hereditary Offices Act (Bom Act III of 1874) —

(IV) In this Act unless there is something repugnant in the subject or context

Watan property means the moveable or immoveable property held [illegible] assigned for providing remuneration for the performance of the duty appertaining to an hereditary office

It includes a right to levy customary fees or perquisites in money or in kind whether at fixed times or otherwise

It includes cash payments in addition to the original watan property made voluntarily by Government and subject periodically to [illegible]

Hereditary office means every office held hereditarily for the performance of duties connected with the administration or collection of the public revenue or with the village police or with the settlement of boundaries or [illegible]

the expression includes such office even where the services originally appertaining to it have ceased to be demanded

* * * * * * *

‡ Amending Act (Bom Act V of 1886) Section 2

Every female member of a watan family other than a female owner, and every person claiming through a female shall be [illegible] to any watan or part thereof or interest therein [illegible] after the date when this Act comes into force to every male member of the family [illegible] such watan or part thereof or interest therein

The interest of a widow in any watan or part thereof shall be for the term of her life or until her marriage only

§ Bombay Government Resolution No 512 of 1882 —

Bombay Act III of 1874 does not appear to apply to all village servants useful to the community All the sanads granted to village servants useful to the village community prohibit alienation of the property to which they relate [illegible] the terms of the settlement land which ceases to be held as remuneration for service to the village community may be resumed (Venkatrao's Commentary to the Hereditary Offices Act p 106)

The plaintiff sued for possession of certain service inam land, alleging himself to be the nearest male heir of the last holder of the said land The service for the performance of which the land was held was that of village carpenter

The plaintiff alleged that the land in question had belonged to his cousin Yamaji bin Bapuji Sutar, who died in 1887 leaving only a daughter (defendant No 1) who was in possession He claimed as the nearest male member of the watan family to be entitled to the land

The Subordinate Judge held that the plaintiff was entitled to the land and passed a decree in his favour

On appeal by the defendants the Judge confirmed the decree The following is an extract from his judgment —

With regard t issue No 3 (Is th plaintiff entitled t inherit in preference to defendant No 1?) I find that under section 2 of A t V of 1886 which amends Bombay Act III of 1874 f males other than the wi l w of the last male owner are to be postponed to m il s in r gard to succ i n to watan prop rty Plaintiff is admittedly the nearest m le relative of the l c s l Yamaji and is th r f r entitl d to inherit the property in preference t def n lant the d ught r f the d se l On these grounds [735] the Coll ct r h r fu e t regi t r the n am f d fen lant N 1 in the watan register, and the pl intiff s name his l n t r d i p f th l ex c l wa und r (Exh bits 28, 29) It is c nten l th th d ath f Yamaj hav g oc urr l b f r the Amending Act came into force the defendant right f inh r tan wa t ff t l t it this c nte ti n is untenable A t V f 1886 am n t f r n January 1887 wher the date as igi l in the plaint of Yamaj d th March 18 7 This tatem nt n t trav r d by the defendants and the objecti n n w t k n was n t rai d n th C urt b w nor is any such obj ction taken in the gr unds f app al It cann t theref re b n w entert ined

The defendant preferred a second app al

*Sadashiv R Bakhle* (for *Balaji A Bhagavat*) appeared for the Appellants (Defendants) We say that the land in question here which was granted for rendering service as village carpenter is not watan property and the Watan Act is not applicable Section 4 of the Act defines watan property A carpenter s duty has no connection with the administration or collection of public revenue, &c — Nairne s Hand book p 52 Service inamdars are divided into three classes patels kulkarnis and Mhars Patels and kulkarnis are directly concerned with the administration or collection of public revenue The Mhars are classed as watandars because they have to fix boundaries of villages

Sutars are called watandars because they are useful to the village community and not to Government Government Resolution No 512 of 1882 (see *sup* a p 731) has laid d wn that the Watan Act is not applicable to persons who are useful to the community *Bala Kakaji Shet Shimpi* v *Nassaruddin*, I L R 18 Bom, 103 *Patu valad Walibai* v *Dhondi valad Babaji* P J, 1884 p 182

*Vishnu K Bhatavdekar* appeared for the Respondent (Plaintiff) – The Watandars Act makes no distinction between classes of watandars All classes of watandars are governed by the Act The watan in dispute would be included in Part X (Inferior village hereditary offices) of the Act Section 64 of the Act invests the Collector with the power to register the names of the watandars and to determine their rights and duties and in the present case the Collector has exercised this power as is shown by Exhibits 28 and 29

[736] FARRAN, C J You must bring the land in dispute within the terms of the Watan Act I

Under the old system every village had *balutedars*, and a carpenter was one of them According to that system a carpenter was connected with a part of the civil administration, and, therefore, his service inam would fall under

the definition given in the Act Civil administration means civil administration in contrast with ecclesiastical administration—Grant Duff's History of the Marathas, Vol I, p 23

*Sadashiv K Bakhle*, in reply —A carpenter has got nothing to do with civil administration Part X of the Watan Act applies only to inferior classes of watandars such as Ramoshis who are village watchmen The Collector's order Exhibit 29, would have no binding effect if it be found that the Watan Act is not applicable to the watan in dispute

**Farran, C J** —The decision of this appeal turns upon the clause in section 4 of the Bombay Hereditary Offices Act which interprets for the purposes of the Act the expression hereditary office

The defendant is the daughter of the deceased Yamaji Sutar who was the last holder of the service inam land claimed in the plaint The service for the performance of which the land is held is that of village carpenter The plaintiff who is the cousin of the deceased Yamaji claims to recover the land from the defendant on the ground that he and not the defendant is the heir of the deceased in respect of this service inam property No special custom is set up

The ordinary Hindu law must govern the case unless the provisions of Bombay Act III of 1874, as amended by Act V of 1886 by which females other than the widow of the last male holder are to be postponed to males in regard to succession to watan property, are applicable to it Watan property is defined to mean property held for providing remuneration for the performance of the duty appertaining to a hereditary office The question therefore is not as put by the lower [737] Courts whether a sutar is a village officer but whether he holds an hereditary office as defined by the Act

Now hereditary office means every office held hereditarily for the performance of duties connected (a) with the administration or collection of the public revenue or (b) with the village police or (c) with the settlement of boundaries or (d) other matters of civil administration It is clear that a carpenter does not perform duties connected with (a) or (b) or (c) Does he then perform duties connected with other matters of civil administration? Are the duties of a carpenter those of civil administration? Is he a civil administrator? We think not The duties with which the section deals appear to be confined to duties in which Government is responsible for the administration of the country is directly interested The definition does not appear to us to extend to these duties which though useful to the village community are not matters with which Government has any direct concern This is the view which Government took of the question in 1882 (see Bombay Government Resolution No 512 of 1882) and is in our opinion the correct one As long as the duties of the village carpenter are performed it is immaterial whether they are performed personally or by a deputy Land held for the performance of the duties of a Kazi have been held not to fall within the meaning of this Act but for another reason—*Baba Kakaji* v *Nasarudin* I L R 18 Bom 103 The precedent is, therefore only valuable as showing that the scope of the Act is not to be extended beyond its apparent application The orders passed by the Collector (Exhibits 28 and 29) are not binding upon the civil Courts He has, we think, unduly extended the meaning of the Act We must for these reasons, reverse the decrees of the lower Courts, and dismiss the suit with costs

*Decree reversed*

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**NOTES**

[ As regards Madras, see the Madras Hereditary Village Officers Act, 1895 ]

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# [738] APPELLATE CIVIL.

*The 18th February, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Amarchand Hindumal and another ........(Original Plaintiffs) Applicants

*versus*

Savalya and others...........(Original Defendants) Opponents.*

*Mamlatdar—Jurisdiction—Lease—Death of lessee during the term—Possessory suit against lessee's heirs after the determination of the term.*

If heirs succeed to their fathers' rights under a lease, the jurisdiction of the Mamlatdar in a suit for possession arises on the determination of that lease against such heirs as though the original tenant were then alive.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb G. L. Killedar, Mamlatdar of Parner, in the Ahmednagar District.

The plaintiffs sued in the Mamlatdar's Court to recover possession of land which they alleged they had let to one Bhagu (father of defendants Nos. 1 and 2) and his brother Khandu (defendant No. 3) in lease for five years. Bhagu had died during the term, which expired on the 27th June 1895. The defendants refused to vacate, and the plaintiff filed this suit on the 5th September 1895.

The Mamlatdar ordered the plaint to be returned to the plaintiffs on the ground that the lease was not passed in the names of defendants Nos. 1 and 2, but in the name of their father and that of defendant No. 3, and that under the Mamlatdar's Act (Bombay Act III of 1876) he could not receive a suit against heirs.

The plaintiffs applied to the High Court, and a *rule nisi* was issued, calling upon the defendants to show cause why the order of the Mamlatdar should not be set aside.

*Ghanasham N. Nadkarni* appeared for the Applicants (Plaintiffs) in support of the rule.—The Mamlatdar refused to entertain the plaint on the ground that a suit will not lie in his Court against the heirs of a deceased tenant. The Mamlatdar wrongly refused to exercise jurisdiction. Defendants Nos. 1 and 2 stood in the place of their father and were liable to be evicted after the expiration of the term mentioned in the kabulayat.

[739] *Mahadev B. Chaubal* for *Dhondu M. Sanzgiri*, appeared for the Opponents (Defendants) to show cause.—Section 15, clause (*b*), of the Mamlatdars' Act is applicable to the present case. It shows that the plaintiff can succeed only if the defendant is in possession or enjoyment by a right derived from the plaintiff. Defendants Nos. 1 and 2 derived their right from their father. Therefore the plaintiff cannot succeed against them in the present suit. The suit is wrongly framed. The plaintiffs ought to have proceeded against defendant No. 3 alone. Bhagu's heirs, that is, defendants Nos. 1 and 2, are not plaintiffs' tenants.

**Farran, C. J.**—The Mamlatdar is in error in supposing that he has no jurisdiction against heirs. If heirs succeed to their father's rights under a lease, the jurisdiction of the Mamlatdar arises on the determination of that

* Application No. 210 of 1895 under Extraordinary Jurisdiction.

lease against such heirs just as though the original tenant were then alive. The rule must be made absolute. Costs to be costs in the cause

*Rule made absolute.*

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[ 21 Bom 739 ]

## APPELLATE CIVIL

*The 20th February 1896*

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE RANADE

Madhavram Mugatram (Original Plaintiff) Appellant

*versus*

Dave Trambaklal Bhawanishankar and others (Original Defendants) Respondents *

*Hindu law—Inheritance—Succession—Widow—Widow's estate—Heirs after widow's death—Female heirs—Widow of gotraja sapinda—Stridhan*

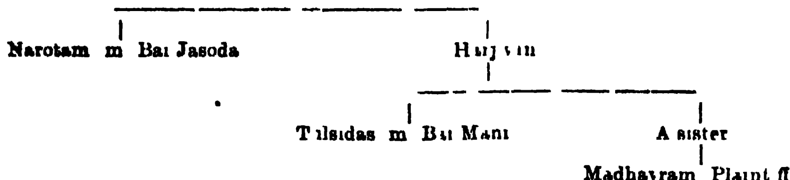
Narotam and Harjivan were divided brothers Harjivan died first leaving a son named Tulsidas Narotam afterwards died childless leaving his widow Jasoda who took possession of Narotam's property Tulsidas died childless leaving only his widow Bai Mani who succeeded to the property on Jasoda's death After the death of Bai Mani the plaintiff who was the son of Tulsidas's sister sued to recover the property from the defendants who were distant *samanodaka* relations of Narotam It was contended on the plaintiff's behalf that on Jasoda's death Bai Mani took the property as her *stridhan* acquired by inheritance and that the plaintiff as *bandhu* of her husband Tulsidas was heir to Bai Mani who died without issue.

*Held* (confirming the decree dismissing the suit) that on Jasoda's death (Narotam and Harjivan being divided), Bai Mani succeeded to the property as a *gotraja sapinda* being the widow of Tulsidas, the nephew of Narotam As such she took only a life interest in the property, and had no absolute interest in it as in her *stridhan* proper

[740] In the Presidency of Bombay female heirs who by marriage enter into the *gotra* of the male whom they succeed (including widow, mother, grandmother, the widow of a *gotraja sapinda, &c*), take only a widow's estate in property which they inherit from the last male owner Whether the estate inherited by these female heirs is called their *stridhan* or not, their restricted rights over it are admitted by all.

SECOND APPEAL from the decision of R S Tipnis Assistant Judge, F P, of Surat, at Broach, in Appeal No 73 of 1891

The following table shows the relationship of the parties –




Narotam and Harjivan were divided brothers Narotam was the owner of the immoveable property in dispute

Narotam, who survived Harjivan, died childless, leaving him surviving a widow named Jasoda, who succeeded to his property and a nephew Tulsidas, the son of Harjivan Tulsidas died, leaving him surviving his widow Bai Mani To this Bai Mani Jasoda devised the property in suit Bai Mani in turn by

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* Second Appeal, No. 76 of 1895.

will bequeathed the property to defendants Nos. 5 and 6, who were the *gotraja samanodaks*, being descendants of an ancestor of Narotam several degrees removed

The plaintiff was the son of Harjivan's daughter, Tulsidas' sister, and thus a *bandhu* of Narotam.

He brought this suit to recover possession of the property from defendants, alleging that it had belonged to Tulsidas Harjivandas, that on his death it came into the possession of his heiress and widow Bai Mani, that Bai Mani died on 3rd September 1889 that he (plaintiff) being the son of Tulsidas' sister was the next heir according to the custom of the Bhargava Brahmin caste, that Bai Mani had only a life interest in the property, that if Bai Mani had executed any will it was invalid and illegal and that he (plaintiff) was entitled to the property as heir

Defendants replied that Tulsidas was never the owner of the property in dispute that on the death of the original owner [741] Narotam, his widow Jasoda succeeded to his estate that she made a will bequeathing the houses to Bai Mani that Bai Mani thus became the owner that Bai Mani by will appointed defendants Nos 1 to 4 her trustees to dispose of her property, that by this will she had given the property to her *pitrus* defendants Nos 5 and 6 that according to custom and law the *pitras* (paternal kindred) of Tulsidas were the heirs and not the plaintiff and that Bai Mani being the absolute owner had a right to dispose of the property by will

The Subordinate Judge of Broach found that Bai Mani had no authority to dispose by will of the property in dispute He also found that the plaintiff was the heir of Tulsidas, observing —

"Thus it is satisfactorily proved that according to the prevailing custom of the Bhargava Brahmin caste the plaintiff Madhavram is the proper heir to inherit the property of his maternal uncle Tulsidas and his widow Bai Mani after their death in preference to their *pitras* Tuljaram and Kakubhai defendants Nos 5 and 6"

He, therefore, passed a decree in favour of the plaintiff awarding him possession of the property claimed

In appeal the Assistant Judge, F P at Broach reversed this decree and dismissed the suit

From this decision plaintiff preferred a second appeal to the High Court.

*Vasudev Gopal Bhandarkar* for *Dr Atmaram Khare* for the Plaintiff Appellant.

*Gokaldas Kahandas Parekh* for Respondents (Defendants)

The following authorities were cited during the course of argument — *Vinayak* v *Lakshmibai*, 1 Bom H C Rep 117, O C J, *Pranjivandas* v. *Devkuvarbai* 1 Bom H C Rep 130 O C J, *Mayaram* v *Motiram* 2 Bom. H C Rep 313, A C J., *Bai Mamla* v *Manchhabai* 2 Bom H C Rep, 5 A C. J, *Jamnadram* v *Bai Jamna* 2 Bom H C Rep, 11 at p 15, A C J, *Lakshman Dada* v *Ganpat Moroba* 5 Bom H C Rep, 128, O C J, *Bhaskar* v *Mahadev* 6 Bom H C Rep, 1 O C J *Narsappa* v *Sakharam*, 6 Bom H C Rep, 215 A C J *Lakshmibai* v *Jayram*, 6 Bom H C Rep, 152, A C. J, *Tuljaram* v *Lakshuman* 8 Bom H C Rep, 244, O C J, *Kotarbasapa* v. *Chanverava* 10 Bom H C Rep, 403, [742] West and Buhler, pp 145 151, 157, 518 and 519 Vyavahara Mayukha, Ch IV, S 6, Pl 26, Pl 28 Pl 30, *Lallubhai* v *Mankuvarbai* I L R, 2 Bom, 388 *Haribhat* v *Damodarbhat*, I L R, 3 Bom, 171, *Sakharam* v *Sitabai* I L R 3 Bom., 353, *Dhondu* v *Gangabai*, I L R, 3 Bom, 369, *Bhau* v *Khandu*, I L R, 4 Bom, 214, *Vithaldas* v *Jeshubai*, I L R, 4 Bom, 219, *Bhagirthibai* v *Baya*, I L R, 5 Bom., 264, *Babaji* v. *Balaji*, I. L R., 5 Bom., 660, *Bulakhidas* v *Keshavlal*,

I L R, 6 Bom, 85 *Dalpat* v *Bhagvan*, I L R 9 Bom, 301 *Bai Narmada* v *Bhagvantrai*, I L R, 12 Bom 505 *Muttu Vaduganadha Tevar* v *Dora singa Tevar*, L R, 8 I A 99 *Mussamat Thakoor Deyhee* v *Rai Baluk Ram*, 11 M I A, 139 *Jankibai* v *Sundra* I L R 14 Bom 612 *Bindalai* v *Anacharya* I L R, 15 Bom 206 *Harilal* v *Pranvala* d is I L R, 16 Bom 229 and 230 *Vamlal* v *Bai Reva* I L R 17 Bom 758 *Chunilal* v *Itchachand*, P J 1893, p 88 *Motilal Lalubhai* v *Ratilal* int p 170

**Ranade J** —The contest for succession to the two houses in dispute in this case lies between the appellant plaintiff who is a *bandhu* (sister s son) of deceased Tulsidas, and respondent (defendant) Nos 5 6 who are distant *samanodak* agnate relations of the said Tulsidas and his uncle Narotumdas

This Narotumdas was the original owner of the two houses He had a brother named Harjivan who died before Narotum and Tulsidas was Harjivan s son Narotum s widow Jasoda gave the two houses in dispute by her will to Tulsidas and on Tulsidas death during Jasoda s lifetime she made a second will in favour of Bai Mani widow of Tulsidas Bai Mani in her turn made a will in favour of respondents Nos 5 6 and appointed the other respondents as trustees

Plaintiff was Harjivan s daughter s son and as such relying chiefly on a caste custom he brought his suit to recover possession of the two houses in respondents possession In this suit plaintiff claimed to be Tulsidas heir as *bandhu* in preference to respondents Nos 5 6 who are distant *samanodak* agnates The respondents denied the alleged custom and claimed to be heirs under the general Hindu law as also owners of the property under Bai Mani s will The Court of First Instance found that the alleged custom was proved It also found that Narotum and Tulsidas were united in interests and that on Tulsidas s death Bai Mani was under the general law Narotum s heir in right of being Tulsidas wife and finally that plaintiff was Tulsidas heir Setting aside Bai Mani s will in respondents favour it passed a decree affirming plaintiff appellant s right

In appeal the Assistant Judge did not decide the issue about the alleged custom but he held that Narotum and Tulsidas were separated in interests, and that Bai Jasoda and after her Bai Mani succeeded only to a widow s estate in the property which devolved on Bai Mani s death to the respondents as heirs of Narotum, the last male owner both Jasoda s and Mani s wills being inoperative and invalid Plaintiff was no way related to Narotum and his claim was accordingly thrown out

In the appeal before us appellant s pleader gave up the original contention by which he sought to establish his right over the property under a special custom as *bandhu* and heir of Tulsidas It was urged that Bai Mani was the last full owner, and the houses belonged to her as her *stridhan* acquired by inheritance, and as such the appellant a *bandhu* of Tulsidas was heir to Bai Mani, who died without issue The ruling in *Vamlal* v *Bai Reva* I L R 17 Bom, 758, was cited as the chief authority in support of this contention

By reason of this change of front it becomes necessary to inquire whether the property in dispute was Bai Mani s *stridhan* in the sense that heirship would have to be traced to it through Bai Mani and her husband Tulsidas and a special rule of succession would apply excluding the respondents Nos 5, 6, and giving preference to the appellant as being Bai Mani s heir on account of his being Tulsidas *bandhu* under the general law On a careful consideration of the authorities cited on both sides I feel satisfied that the appellant s contention cannot be upheld [744] Independently of the objection that this claim is opposed to the right set up in the plaint, and that on which the

parties joined issue in the lower Courts there is the consideration that it seeks to re open a question which has been satisfactorily settled by a long course of decision, solely on the authority of a ruling which has no direct application to the circumstances of the present case Accepting the finding of the lower appeal Court on the point of the separation of interests, it is clear that Bai Mani succeeded to the property on Jasoda's death as a *gotraja sapinda* being the widow of the nephew of Narotum A *gotraja sapinda* widow succeeding to any property under the circumstances stated above takes only a widow's interest in the property and has no absolute interest in the same as in her *stridhan* property proper As observed by Mr Mayne in his work, paragraph 569 In this Presidency the Courts divide female heirs into two classes (1) those who by marriage enter into the *gotra* of the male whom they succeed and 2) those who are born in a different *gotra* and who on marriage become of a different *gotra* The difference between the two schools relates chiefly to the extent of the rights of this second class among which may be mentioned the daughter sister niece grand niece As regards the first class which includes widow mother grand mother the widow of a *gotraja sapinda* &c they only take a widow's estate in property which they take from the last male owner husband, son &c Whether the estate inherited by these female heirs is called their *stridhan* or not their restricted rights over it are admitted by all schools

A long course of decision has established this distinction The earliest case where it was formally recognized and acted upon is *Lallubhai* v *Mankuvarbai* I L R 2 Bom 388 which ruled that in this Presidency the wife is a *gotraja sapinda* of her husband and in the absence of specially designated heirs succeeds as heir to a separated *sapinda* in the same way as her husband would have done The daughter in law's right to succeed after the death of the widow without issue was upheld in *Vithaldas* v *Jeshubai*, I L R 4 Bom 219 (See also *Lakhmibai* v *Jayram* 6 B m H C Rep 152) The distinction between the two classes of female heirs noticed above was solemnly affirmed in *Babaji* v [745] *Balaji* I L R 5 Bom 660 As regards the daughters their rights have all along been held to be absolute *Haribhat* v *Damodarbhat*, I L R 3 Bom 171 *Tulakhidas* v *Keshavlal* I L R 6 Bom 85 *Jankibai* v *Sundra* I L R 14 Bom 612 So also the sister's absolute right has been upheld in *Vinayak* v *Lakshmibai* 1 Bom H C Rep 117 *Dhondu* v *Gangabai* I L R 3 Bom 369 *Tukaram* v *Khandu* I L R 4 Bom, 214 *Bhagirthibai* v *Baya* I L R 5 Bom 264

Some doubt has been thrown upon the correctness of these rulings so far as parties subject to the Mitakshara law are concerned in *Dalpat* v *Bhagvan*, I L R 9 Bom 301 but it leaves the authority of the Mayukha untouched The restricted character of the estate taken by a widow and a mother or grandmother or *gotraja sapinda* female heir is best illustrated by the rulings in *Pranjivandas* v *Ichharambhai* 1 Bom H C Rep 130 *Narsappa* v *Sakharam*, 6 Bom H C Rep 215 and *Sakharam* v *Sitabai*, I L R 3 Bom, 353

The two classes of female heirs being thus distinctly marked, it is clear that Bai Mani as a widow of a *gotraja sapinda* could not take the inherited property in dispute as her *stridhan* in the full sense so as to devolve it on her decease to her heir in place of the heirs of the last male owner Both Courts have held that her alienation of it was invalid This follows as a corrolary from the rulings of the Privy Council in *Mussamat Thakoor Deyhee* v *Rai Baluk Ram*, 11 M I A 139 referred to in *Harilal* v *Pranvaldas*, I L R, 16 Bom at p 232, and *Mutta Vaduganadha Tevar* v *Dorasinga Tevar*, L R, 8 I A, 99, referred to in *Dalpat* v *Bhagvan* I L. R, 9 Bom, 301

The only authorities to the contrary are the ruling in *Vijiarangam* v. *Lakshuman*, 8 Bom H C Rep, 241, and the ruling chiefly relied on by the appellant's pleader in *Manilal* v *Bai Rewa*, I L R, 17 Bom, 758 In this last case the property in dispute was arrears of maintenance due to a wife from her husband, while the authority of the ruling in *Vijiarangam's case* has been considerably modified by subsequent decisions There was no dispute in the first case about inherited immoveable **[746]** property, and the opposing claimants were the daughters and husband of a deceased woman I do not think that this authority has any application to the circumstances of the present case The Assistant Judge appears, therefore, to have correctly decided the present case when he rejected the appellant plaintiff's claim

It is admitted now that no heirship can be traced through Tulsidas by reason of plaintiff's being his *bandhu* as Tulsidas was separated and never succeeded to the property It, therefore, does not seem necessary to remand the case back to the lower Court for a finding on the issue about the alleged custom.

I would accordingly confirm the decree and reject the appeal with costs

**Jardine, J** —The facts to which the Court has to apply the law are the following Narotam and Harjivan were divided brothers, and Narotam was the owner of the houses, the property in suit Narotam who survived Harjivan, died childless, leaving him surviving a widow named Jasoda, and a nephew Tulsidas, the son of Harjivan Tulsidas died, leaving him surviving a widow Bai Mani To this Bai Mani Jasoda devised the property in suit The defendants Nos 5 and 6 are *gotraja samanodakas* being descendants of an ancestor of Narotam several degrees removed The plaintiff is the son of Harjivan's daughter, Tulsidas's sister and thus a *bandhu* of Narotam He sued for the houses, averring that they had belonged to Tulsidas The Assistant Judge has found to the contrary that the last male owner was Narotam The Assistant Judge dismissed the suit on the ground that at Hindu law the *samanodakas* and not the *bandhu* of Narotam are entitled

Mr Wasudev Gopal Bhandarkar argued here that the houses became the *stridhan* improper of the childless widow Mani as would follow from the *dicta* of TELANG, J, in *Manilal* v *Bai Rewa* I L R, 17 Bom, 758, and that the same *dicta* showed that in default of children the heirs would be the same as the heirs to *stridhan* proper among whom the husband's sister's son is placed in the Vyavahara Mayukha, for which we were referred to West and Buhler, 519

I agree with Mr Justice RANADE that we cannot treat these *dicta* as equal to a decision, and that we ought not to go contrary **[747]** to the decisions such as *Harilal* v *Pranvalavdas*, I L R 16 Bom 229 which restrict the widow's dominion over immoveable property inherited from a husband

As the Assistant Judge has found as a fact that the houses never were the property of Tulsidas, there is no reason for requiring a finding on the issue as to the special custom of the Bhargava Brahman caste alleged by the plaintiff whereby he says a sister's son is entitled as a nearer heir than relatives connected by descent from a remote common ancestor such as the defendants Nos 5 and 6. The Court confirms the decree with costs

*Decree confirmed*

NOTES

[ The case of *stridhan* was distinguished in (1899) 24 Bom, 192, as regard women who become *gotrajas* by birth, see also (1907) 1 Lor, 100, (1907) 32 Bom, 59 ]

[21 Bom 747]

## APPELLATE CIVIL

*The 20th February, 1896*

PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE, AND MR. JUSTICE PARSONS

Gambhirmal and another .(Original Plaintiffs) Appellants

*versus*

Hamirmal . . . . .(Original Defendant) Respondent.*

*Partition—Maintenance Mortgage – Assignment of the mortgaged property as maintenance of a widow – Subsequent redemption of the mortgage – Widow entitled to the redemption money*

A field held in mortgage by the family of the parties was assigned to a widow in the family for her maintenance when the family divided The mortgage money was subsequently paid into Court in pursuance of a decree for redemption.

*Held*, that it was clear on the assignment that the widow was entitled to the money just as she was entitled to the field, i.e. to the usufruct of it for her life

SECOND APPEAL from the decision of A Steward, District Judge of Ahmednagar, reversing the decree of Rao Saheb K S Rasvalkar, Subordinate Judge of Parner.

Three undivided brothers Hamirmal, Gambhirmal and Gulabchand, held certain land as mortgagees One of them (Gulabchand) died, leaving a widow Rupabai, and on partition of the family property between the two surviving brothers the mortgaged land was given to the widow Rupabai as her maintenance In the year 1890 the mortgagor sued to redeem the mortgaged land, and obtained a decree for redemption on payment of [748] Rs 491 1 0. He accordingly paid this amount into Court Hamirmal having endeavoured to obtain it for himself, Gambhirmal and Rupabai filed the present suit, claiming that Rupabai only was entitled to it

The Subordinate Judge allowed the claim, holding that plaintiff Rupabai alone was entitled to the money

On appeal by defendant the Judge reversed the decree

The following is an extract from his judgment —

I am of opinion that the accident of the mortgage being redeemed, renders it necessary for plaintiff No 2 on the one hand to give up all claim to the redemption money which should be handed over in equal shares to defendant and plaintiff No 1 if these two brothers have really become separate and divided in interest, and it renders it necessary for the two [illegible] on the other hand to make fresh arrangement for her maintenance The [illegible] the mortgage being redeemed the arrangements made for the maintenance of plaintiff No 2 have been [illegible]

The plaintiffs preferred a second appeal

*Govardhanram M Tripathi* for the Appellants (Plaintiffs).—The field was given to plaintiff No 2 (Rupabai) for her maintenance and she enjoyed the income of it Now the field has been redeemed. The redemption money represents the field, and she is entitled as maintenance to the interest on the redemption money

*Mahadeo B Chaubal*, for the Respondent —The question is whether the arrangement with respect to the maintenance of plaintiff No 2 has fallen through owing to redemption by the mortgagor The mortgaged property was, no doubt, charged with the plaintiff's maintenance, but now the question is

* Second Appeal No. 525 of 1895.

whether she has a lien on the redemption money. We submit that she has not. The mortgage was effected when the family was united: therefore the redemption money belongs to the whole family

**Parsons, J.**:—A field that was held in mortgage by the family of the parties was assigned to the plaintiff No. 2 for her maintenance when the family divided. The mortgage money has now been paid into Court in pursuance of a decree for redemption, and the question is to whom the money is to be paid. The defendant, a male member of the family, claims one-half of it, it being, according to his contention, joint property divisible between himself and the plaintiff No. 1.

**[749]** The plaintiff No. 2 claims it as being assigned to her for her maintenance The plaintiff No. 1 sides with her We think it is clear on the assignment that the plaintiff No 2 is entitled to the money just as she was entitled to the field, *i.e*, to the usufruct of it for her life.

We amend the decree and grant the plaintiff No. 2 a declaration that she is entitled to the usufruct of the money for her life. In the absence of any agreement between the parties the Subordinate Judge should see that the capital amount is secured, so that on plaintiff No. 2's death it may pass intact to those entitled thereto, plaintiff No 2 being paid the interest only for the term of her natural life. We order the plaintiff No. 1 to bear his own costs and defendant to pay his own costs and to pay a moiety of plaintiff No 2's costs throughout.

*Decree amended.*

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[ 21 Bom 749 ]

## APPELLATE CIVIL.

*The 24th February, 1896.*

PRESENT.

SIR C. FARRAN, KT, CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Dattaji Sakharam Rajadhiksh ........ (Original Plaintiff) Appellant

*versus*

Kalba Yese Parabhu and another............(Original Defendants) Respondents.*

*Hindu law— Widow – Powers of management– Lease granted by the widow for long term of years—Lease voidable on the widow's death, but not* ipso facto *void– Suit by heir to recover property from lessee six years after widow's death - Compensation for tenant's improvements—Lying by—Landlord and tenant.*

A Hindu widow adopted a son, but reserved to herself for life the right of managing her husband's property. The adopted son sold his interest in the property to the plaintiff. In 1885 the widow granted a lease of the property to defendants for fifty-nine years at a rent of Rs. 50 a year. She died the following year (1886) The defendants continued in possession of the property under the lease and expended money in improvements. In 1892 the plaintiff as purchaser from the adopted son sued for possession.

*Held*, that he was entitled to recover and to have the lease set aside, but only on payment to the defendants of compensation for the sum properly expended by them in improving the land after the widow's death.

The lease granted by the widow Jankibai was not *ipso facto* void, but only voidable by the plaintiff on her death. It did not necessarily determine at her death. That being the

* Second Appeal, No. 308 of 1895.

legal position of the defendants, the plaintiff allowed the defendants to go on improving the property and took no steps to warn the defendants until he brought [750] this suit to recover possession His conduct was such as to induce a belief in the mind of the defendants that the lease would be treated as valid There was not merely a lying by, but a lying by under such circumstances as to induce a belief that a voidable lease would be treated as valid

SECOND APPEAL from the decision of H L Hervey, Assistant Judge of Ratnagiri

Plaintiff sued for possession of certain property alleging that in 1875 he had purchased it from one Chitko the adopted son of one Raghunath Rajadhyaksh, to whom it originally belonged This suit was filed in 1892

It appeared that Chitko had been adopted by Raghunath s widow Jankibai, who, at his adoption had reserved to herself the right of managing her husband s property for her life She died on the 13th October 1886 and the plaintiff contended that he then became entitled to possession He prayed for possession and for mesne profits for three years preceding suit

The defendants pleaded that by a lease dated 18th June 1885, Jankibai had let the lands in question to them for fifty nine years at a rent of Rs 50 per year, that they had expended a large sum of money in improving the property, and as to the claim for mesne profits they alleged that by Jankibai s directions they had paid the rent to one Vithal Atmaram They contended that they had a right to retain possession for the period of the lease but if not, that the plaintiff should repay them the amount expended in improving the property

The Subordinate Judge held that the plaintiff was entitled to recover possession of the land, and that he was not bound to recoup the defendants the sums expended in improving the property He further held that the plaintiff could not recover the rent which the defendants had paid to Vithal Atmaram He gave the plaintiff a decree for possession with mesne profits from the date of suit till delivery of possession

On appeal the Judge held that the plaintiff should refund to the defendants the sums expended in improvement He, therefore, amended the decree by directing " that plaintiff do recover possession from the defendants of the property together with mesne profits (to be determined in execution) from the date of [751] suit till delivery, on payment to defendant No 2 of the sum of Rs 203 3 7 which the Subordinate Judge had found to have been spent by the defendant on the property The following is an extract from his judgment —

Nevertheless defendant No 2 at once proceeded to spend money in carrying out improvements on the property by planting trees sinking a well &c If he had been conscious of fraud on his own part or even if he had realized that the validity of his title was doubtful it appears to me that he would have acted more cautiously Further it has been shown that plaintiff after Jankibai s death allowed defendant to go on for some years improving the property and took no steps to obtain possession until he instituted the present suit Under these circumstances I see no injustice in ordering plaintiff to pay a fair sum as compensation for the improvement by which he will benefit and I am of opinion that defendant No 2 is in equity entitled to receive such compensation

The plaintiff preferred a second appeal

*Vasudev G Bhandarkar*, for the Appellant (Plaintiff) —We are entitled to recover the land without paying the defendants for the improvements Jankibai had no right to grant the lease She had only a life-interest The plaintiff s right accrued at her death She died in 1886, a year after granting the lease, and the improvements were made after her death The lower Court has made the plaintiff pay the costs of the improvements, because the defendants appear not to have been aware that Jankibai had no power to give the lease. They ought to have ascertained what her power was before taking it. Having

failed to do so they cannot now claim the benefit of the lease or compensation for improvements—Act XI of 1855, section 2; Transfer of Property Act (IV of 1882), section 51; *Gourgopaul Dutt* v. *Bissonath Ghose*, Coryton's Reports, p. 41; *Shaik Husain* v. *Govardhandas Parmanandas*, I L. R., 20 Bom., 1; *Sadashiv Bhaskar Joshi* v. *Dhakubai*, I L R, 5 Bom, 450, *Radanath Doss* v. *Gisborne and Co*, 14 Moore's I App., 1; Dart on Vendors and Purchasers, p. 1032; Sugden on Vendors and Purchasers, p. 747.

The defendants did not plead that the plaintiff stood by while the improvements were made. That point was suggested by the first Court, which, however, held that the plaintiff had no knowledge of the improvements Further, it should be remembered that the defendants have enjoyed the profits of the land, [762] which is a sufficient compensation for the improvements they have made.

*Ghanasham N Nadkarni*, for the Respondents (Defendants).—Jankibai was full owner during her life, and the lease is good She granted it as manager of the property. The plaintiff ought to have asserted his right immediately after her death If he had done so, the defendants would not have spent money on improvements But he did not bring this suit for six years, and during all that time allowed us to expend money in improving the land. The improvements made became remunerative just at the time the suit was brought, and the plaintiff claims to have the benefit of them. He ought to pay for them —*Navalchand* v *Amichand*, P. J., 1891, p 104 The defendants are entitled to get compensation - *Kunhammed* v. *Narayanan*, I L. R, 12 Mad., 320, *Yeshwadabai* v *Ramchandra*, I L. R, 18 Bom, 66, *Dattatraya* v. *Shridhar*, I L R, 17 Bom, 736, *Dunna Lal Seal* v *Gopinath Khetry*, I L. R., 22 Cal, 820; *In the matter of the petition of Thakoor Chunder Paramanick*, Beng L R Full Bench Rul, 595, *Judhoo Soodun Chatterjee* v *Juddoopatty Chuckerbutty*, 9 Cal. W. R, 115, *Bai Kesar* v. *Bai Ganga*, 8 Bom H C Rep., A. C. J., 31.

*Vasudev G Bhandarkar*, in reply —The rule to be applied is the rule in *Ramsden* v *Dyson*, L R, 1 H L, 129, *Shaik Husain* v. *Goverdhandas*, I. L. R., 20 Bom., 1. The Judge has not found facts which would entitle the defendant to compensation. Further, there is no evidence in the case to show that we were aware that the improvements were being made Excepting the circumstance that we did not take steps earlier, the Judge has not found anything in favour of the defendant and against us Mere delay in bringing the suit is not sufficient to entitle the defendant to claim compensation. In the pleadings in the Courts below the defendants did not rest their case on the delay in bringing the suit—Woodfall on Landlord and Tenant, p 9; *Premji Jivan Bhate* v. *Haji Cassum Jooma Ahmed*, I L. R., 20 Bom, 298. As to acquiescence by us, see *Willmott* v. *Barber*, 15 Ch. Div., 96.

[763] **Farran, C. J.**:—We have already intimated our opinion that the defendant Kalba having *bonâ fide* paid the rent of the garden land to Vithal Atmaram before suit, cannot be called on again to pay that rent or mesne profits to the plaintiff. The farm lease granted by Jankibai, while the manager of the estate, to Vithal had not been set aside, nor had the plaintiff given notice to the defendant Kalba not to pay his rent to Vithal. The lease granted by Jankibai to Vithal was voidable, not void, on the death of Jankibai, and the defendant Kalba was, therefore, justified in paying his rent to Vithal until he received notice not to do so.

We also agree with the Assistant Judge that equity requires that the plaintiff in setting aside the lease granted by Jankibai to the defendant Kalba should compensate the latter for the money properly expended by the defendant in improving the land after the death of Jankibai. The plaintiff failed to give

the defendant notice of his intention to set the lease aside, and it, like that o Vithal, was voidable only by the plaintiff on the death of Jankibai, and wa not *ipso facto* void

A Hindu widow is not a mere tenant for life She is invested with fuller estate and more ample powers of management, and a lease granted b her at a fair rent, as in this case, though for a long term of years, does no necessarily determine at her death The heir coming in after her has to show that in granting it she has exceeded her power That being the legal positio of the defendant, the Assistant Judge has found that the plaintiff after Jankibai' death allowed the defendant to go on for some years improving the propert and took no steps to warn the defendant or proceedings to obtain possession c the garden until he instituted the present suit His conduct was such as to in duce a belief in the mind of the defendant that his lease would be treated as valic It is not, it is true, specifically found by the Assistant Judge that the plaintif knew that the defendant was making those improvements, but he was th owner of the land on Jankibai's death, and there is no reason for believing tha he did not keep himself aware of what was being done upon it The cas seems to us to fall within the principle laid down in *Stiles* v *Cowpe* 3 Atk, p 692, which is thus stated by Mr Woodfall (p 9) in his work o [755] Landlord and Tenant 'But in a case where the remainder man lay by and suffered an assignee of an invalid lease to lay out money in rebuilding an might be presumed to have had notice of the fact, Lord HARDWICKE directed new lease with proper covenants to be granted to the assignee for the remainde of the term ' Here there is not merely a lying by, but a lying by under suc circumstances as to induce the belief that a voidable lease will be treated a binding We confirm the decree of the Assistant Judge with costs

*Decree confirmed*

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**NOTES**

[See also (1915) 27 I C 859 (minor) ]

[21 Bom 754]

# FULL BENCH

## APPELLATE CIVIL

*The 9th March 1896*

PRESENT

SIR C FARRAN, KT CHIEF JUSTICE, MR JUSTICE PARSONS AND MR JUSTICE CANDY

William Allen and another (Original Defendants) Appellants

*versus*

Bai Shri Dariaba (Original Plaintiff) Respondent *

*Jurisdiction—Bombay Civil Courts Act (Bom Act XIV of 1869), Sec 32†, as amended by Act X of 1876, Sec 15 and Act XV of 1880, Sec 3 Regulation II of 1827 Sec 43— Suit against officer of Government—Acts done by the defendant in his official capacity*

On the death of the Talukdar of Kerwada leaving a widow and minor son the Mamlatdar of Amod acting under the order of the Collector of Broach entered the Talukdar's house made an inventory of the moveables, took possession of the property of the deceased and locked up some of the rooms Among the property seized (it was alleged) was certain property belonging to the widow She brought this suit against the Collector and Mamlatdar claiming damages for the wrongful act The suit was filed in the Court of the Subordinate Judge

[755] *Held* that the acts complained of were done by the defendants in their official capacity and that under section 32 of the Bombay Civil Courts Act (XIV of 1869) the Subordinate Judge had no jurisdiction to entertain the suit

APPEAL from the decision of JARDINE and RANADE, JJ under section 575 of the Civil Procedure Code (Act XIV of 1882)

Suit for damages for trespass The defendants were the Collector of Broach and the Mamlatdar of Amod The suit was filed in the Court of the Subordinate Judge, and the question raised was whether the acts complained of were done by the defendants in their private capacity or in their official capacity, in which latter case the Subordinate Judge had no jurisdiction to entertain the suit under section 32 of the Bombay Civil Courts Act (XIV of 1869)

The plaintiff was the widow of the Talukdar of Kerwada He died on the 20th October 1891, leaving a widow (the plaintiff) and a minor son The patil of the village forthwith reported the death to the Mamlatdar (defendant No 2), who in turn reported it to the Collector (defendant No 1)

The Collector (defendant No 1) thereupon issued an order to the Mamlatdar (defendant No 2) to make an inventory of the property of the deceased

* Appeal No 36 of 1894 under the Letter Patent

† Section 32 of Bombay Civil Courts' Act (Bom Act XIV of 1869) as amended by Act X of 1876 Section 15, and Act XV of 1880 Section 3 —

32 No Subordinate Judge or Court of Small Causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party but in every such case such Judge or Court shall refer the plaintiff to the District Judge in whose Court alone (subject to the provisions of section 19) such suit shall be instituted

Provided that nothing in this section shall be deemed to apply to any suit merely because—

(a) A Municipal Corporation constituted under Bombay Act No VI of 1873 or any other enactment for the time being in force is a party to such suit, and an officer of Government is, in his official capacity, a member of such corporation, or

(b) An officer of a Court appointed under the Code of Civil Procedure, section 456 last paragraph, is, in virtue of such appointment, a party to such suit

and to take measures to secure its safety. In obedience to this order the Mamlatdar went to the house of the deceased and made an inventory, and locked up some of the rooms, and placed his seal upon certain boxes.

The plaintiff complained that some of her property was also seized and locked up, and she claimed damages for the trespass of the defendants.

The defendants (*inter alia*) pleaded that the acts complained of were done by them in their official capacity and that the Subordinate Judge had no jurisdiction to try the suit having regard to section 32 of Act XIV of 1869. The Subordinate Judge found that the acts in question were not done by the defendants in their official capacity, and that the Court had jurisdiction to try the suit, and that notice of action was, therefore, not necessary under section 424 of the Civil Procedure Code (Act XIV of 1882). He passed a decree for the plaintiff for Rs. 500 damages. The following is an extract from his judgment:—

**[756]** "The petitions A and B were indeed made to Mr. Allen as Collector of Broach. But it cannot be argued from the oppressed addressing the oppressor '*Oh ' Collector Sahib, pray don't oppress me !*' that the person addressed is acting in his official capacity. Whether he is acting so or not, is to be seen not from any such thing, but from the fact whether *he was or not acting* in the discharge of his duties, whether he had or not 'authority or power to act in the matter.' When the Government Pleader said that the Collector on hearing of the late Thakore's death required the Mamlatdar to make an inventory of his effects, and to put them under lock and seal, he was asked under what law or authority did he do so, but he gave no satisfactory answer to this. If the petitions A and B purport to be addressed to Mr. Allen as Collector of Broach, it is as clear from them as this fact that the petitioner spoke therein not only of the Mamlatdar acting unauthorizedly and in an arbitrary manner, but also of the Collector himself acting so. Petition B says: 'The reason is quite patent that, as stated in your petitioner's petition of 7th instant, neither your direction for an inventory of the property nor the actions under it are within the purview of the revenue administration, and as such, non-official and absolutely unlawful and arbitrary.' The defendants have as yet failed to show that their acts, even though they might not be under any particular law, are 'within the purview of the revenue administration' * * * * * What made me hesitate in giving my findings at once in favour of the plaintiff was her allegations in paragraph 7 of her plaint. Therein she says that 'the defendant No. 2, *as* Mamlatdar of Amod, wrongfully seized the property of the plaintiff in pursuance of the absolutely unlawful direction of the defendant No. 1 *as* Collector of Broach mentioned above' As said by the plaintiff's pleader and her counsel, the defendants are sued not in their official, but in their individual, capacity. But, as said by me, I am sure the plaint could not have been drawn up by such a skilful counsel in the way it appeared to have been drawn up. The official capacities, said they, were mentioned merely as descriptive of the defendants. And after reading the petitions A and B, attached to the plaint, *I think that the explanation must be taken to be true.* And supposing that I am not entitled to take into consideration the contents of the said petitions in judging of the matter, it cannot be gainsaid, that the matter must be judged of not from any isolated expressions in the plaint, but from the plaint taken as a whole. The plaint shows that the gist of the action is not that the defendants acting in their official capacity exceeded their powers, not that they had any authority or power to act in manner or form which they had no authority or power to act in, but that they had no authority or power to act at all in the matter."

The defendants appealed.

Rao Saheb *Vasudeo J. Kirtikar* (Government Pleader) appeared for the Appellants (Defendants).

*Manekshah J. Taleyarkhan* appeared for the Respondent (Plaintiff)

**Jardine, J.** —The plaint sets forth the circumstances under which this suit was brought after a letter of notice appended to the plaint, by the widow of the Talukdar of Kerwada, in the **[757]** Court of the Subordinate Judge of the First Class against the Collector of Broach and the Mamlatdar of Amod. The lady claims damages for a continuing trespass and the Subordinate Judge has awarded to her Rs 500 The facts are substantially undisputed, the pleader for the plaintiff has stated that she is content with the relief given, and has admitted that there was no improper animus on the part of either defendant, as has also been found by the Court below It has not been contended that any serious pecuniary or other injury was done

The facts are that the Talukdar of Kerwada died on the 20th October 1891, leaving a widow (the plaintiff) and a minor son, and that on the 22nd October 1891, the Mamlatdar, acting under the Collector's order, accompanied with divers peons and others, entered the Talukdar's mansion house, made an inventory of the moveables, took possession of some belonging to the plaintiff, and locked them up in the premises, and also locked up some of the rooms of the house so as to deprive the plaintiff of her use and enjoyment of the moveables and the rooms The suit was brought on refusal made to remove the locks and restore the property and rooms

The main question argued here for the defendants in support of their appeal is whether the jurisdiction of the Subordinate Judge to try the suit is excluded by section 32 of Act XIV of 1869 Two objections have been taken First, it is said that the plaint is suicidal in that the defendants are described in the heading as Collector and Mamlatdar and that in paragraph 7 the acts done are said to be done by them as such The Subordinate Judge has dealt fully with this point, and I concur in his views The plaint and its appendages are to be considered as a whole, and I am of opinion that the use of the official titles is by way of description only It is perfectly clear that the intention of the plaintiff was to sue these public servants on the allegation that their acts had no real official colour about them She sought to make them liable in their private capacity and applying this test to the words about suing in section 32, and following *Venkat* v *Narayan* I L R, 11 Bom, 370, I hold that the Subordinate Judge had jurisdiction

**[758]** Any irregularity in description is immaterial under section 578 of the Code of Civil Procedure and may be treated as superfluity —*Rajah Pedda* v. *Arooiala*, 2 M I A, 504 at p 512 The rest of the plaint is not, in my opinion, suicidal—I mean in the sense that the Subordinate Judge was bound, on perusal of it or merely after defendants pleading, to refuse jurisdiction under section 32 *Primâ facie* the act complained of is a wrongful act, and it has been admitted at the hearing that no statute in existence or repealed ever conferred any jurisdiction on the Collector It may be that on going to trial and proving that the act complained of was, whether tortious or not done in the course of official duty, the proper course would be for the Subordinate Judge to dismiss the suit on the ground of want of jurisdiction But this proof is matter of defence like justification under Act XVIII of 1850 —*Venkat* v *Armstrong*, 3 Bom H C Rep, 47, A C J, or in cases about notice under section 424 of the Civil Procedure Code —*Shahebzadee* v *Fergusson*, I L R, 7 Cal, 499, and to be proved, not merely alleged *Gopi* v *Sheso*, I L R, 12 Bom, 358, is direct authority on the question of the forum under section 32 of Act XIV of 1869 The Court there in dealing with the words "in his official

capacity" say that "a prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law." And at p 363: "The allegation of an official justification must be made out by the individual sued as a private person, and it must amount to more than a mere pretext or colour, as good faith is required in the discharge of all public functions that affect the persons or possessions of subjects of the Crown. For these reasons we must hold that the defendant, sued as a private person for an alleged wrong to the plaintiff, was rightly sued in the Court of the Subordinate Judge."

Now assuming, in the absence of any decision on the point, that the Subordinate Judge ought, on proof that the acts done by these officers of Government were done in an official capacity, to have dismissed the suit, we have to form an opinion on the evidence and cases as to whether they were acting in an official capacity. The cases I have quoted from Vols. 11 and 12 of our Bombay Law Reports show that mere allegation of a defendant, [759] or his proving the consent or the order of an official superior, does not satisfy section 32 of Act XIV of 1869. In *Gopi* v. *Sheso* the test applied is whether the officer is discharging a duty expressly or impliedly assigned to him by law. This is the *ratio decidendi* of *Waman* v *Dipchand*, P. J. for 1888, p 121, and apparently of *Swamirayacharya* v. *The Collector of Dharwar*, I. L R., 15 Bom., 441. There must be good faith on the part of the officer as distinguished from mere pretext or colour There are very few reported cases on section 32 of Act XIV of 1869 on this point. But those just cited seem to recognize the same principles as have been applied by the Courts to protection by notice. Thus the wider words of section 424 of the Civil Procedure Code "in respect of an act purporting to be done by him in his official capacity" have been interpreted by the light of the English decisions, *Shahebzadee* v. *Fergusson*, I L. R, 7 Cal., 499, to some of which I will refer presently. The same introduction of the element of good faith governs the interpretation of section 86 of the Bombay Municipal Act of 1873—*Ranchhod* v. *The Municipality of Dakor*, I. L. R., 8 Bom, 421, and the corresponding enactment in Bengal—*Chunder* v. *Obhoy*, I. L R, 6 Cal, 8. Again, in *Impeatrix* v *Ganu*, Criminal Ruling No. 51 of the 22nd August 1889, we held, after considering many authorities in a case of notice turning on section 42 of Bombay Act VIII of 1867, that "the protection extends to official acts done in good faith and which may reasonably be supposed to be done in pursuance of official duty, even though legal powers may be exceeded, but not to acts for which there is a total absence of authority." All these decisions show that the Courts will not treat an act as official merely because at the time of doing it, or when defending the suit, the officer asserts, however unreasonably, that his action was official This view, which is very fully stated in the English cases, is that adopted by the Judge below, although pressed, as this Court has been, by arguments which ignored the decisions; he used more language of hyperbole than was wanted.

This is a convenient place to notice the motive of the defendants' action. It is undisputed that the Collector wished to pro-[760]tect the interest of the minor by making an inventory of the moveable property, conduct which in the cases about the *executor de son tort* has been held to be friendly, similar to the feeding and caring for the children. All the placing of locks and keys was ancillary to the securing of the moveables, and there was no harshness used, but much respect paid to the feelings and position of the widowed lady. The learned Government Pleader declined to admit that there was any tort. His argument was that talukdars being a seignorial class receive special treatment from the Government; and that as their minor sons require more instant

protection of their pecuniary interest on the death of the father, the Collector has a right to act in the manner charged, as if, irrespective of statute, there was a prerogative of the Crown as *parens patriæ*, which he may exercise under the authority of the Governor in Council. To this Mr Manekshah replied that the Collector is the creature of statute law, and that the Legislature has made what it thinks sufficient provision by enacting Act XIX of 1841 and Act VIII of 1890. I am of opinion that Mr Manekshah's argument is sound, even a Governor's powers about prerogative matters are limited —*Rex* v *Symons*, 2 Strange Madras R, 93, mentioned in Forsyth's Constitutional Law, 370. The function of protecting minors and their property has long been vested in the Adalats; and it is hard to understand how the Collector defendant could suppose that he had any authority in the matter except to move the civil Court.

Some evidence has been given that former revenue officers have acted in the same way as regards the moveable property of deceased talukdars in the Collectorate of Broach and with the approval of the Governor in Council. Those precedents are but feeble proof of legality, as is said by Lord DENMAN in *Stockdale* v. *Hansard*, 9 A. and E., 1 at p. 155, and I come to the opinion that the acts done are not to be justified by earlier practice in the face of the provision made by the statutes.

The last question is whether the Collector and the Mamlatdar, though not justified by the law, though without authority to act as they did, had any colour or reasonable ground for supposing [761] that they had —*Cook* v. *Leonard*, 6 B. and C., 351, *Greenway* v *Hurd*, 4 Term R., 555, *Cann* v *Clipperton*, 10 A. and E., 589, and other cases collected in Addison on Torts in the Chapter on Notice. Most of these cases as well as those in the Indian books deal with suits about misuse or excess of powers conferred by statute. Here the defendants acted without statute at all. It is not a blunder of construction, as in *R Ragunada* v *Nathamuni*, 6 Mad H C R, 423 at pp 441 and 448. The Government Pleader has urged that there was an honest belief and that this belief, even if erroneous, was justified by the former precedents. But there was a total absence of authority, which appears to me to bring this case outside the definition of official capacity as the phrase in section 32 of Act XIV of 1869 is construed in *Gopi* v *Sheso*.

In *Spooner* v *Juddou*, 4 M I A 353 at p 379, the privilege conceded to a public officer of a special forum is treated as a protection. Lord CAMPBELL observes: "Our books actually swarm with decisions * * and there can be no rule more firmly established than that if parties *bonâ fide*, and not absurdly, believe that they are acting in pursuance of statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act." The Judicial Committee here evidently apply the decisions about notice to the matter of an exception of jurisdiction. Following so high an authority I am willing, in the absence of reported decisions, to hold that they apply to the exception of jurisdiction made by section 32 of Act XIV of 1869 and to extend its purview so as to exclude from the Court of the Subordinate Judge those cases of misuse, omission or excess of powers, which lie between a mere foolish imagination and a perfect observance of a statute—*Cann* v *Clipperton*, 10 A and E 589. But I do not think the Privy Council, in the language used by Lord CAMPBELL in *Spooner* v. *Juddow* or Mr Justice WEST in *Gopi* v *Sheso*, includes in the exception of jurisdiction cases like the present where there has never been any authority at all under the common law or any statute. Public officers must not be presumed wholly ignorant of such statutes as Act XIX of 1841 and Act VIII of 1890. The distinction of powers and [762] duties of the Collector and the

Judge is ancient and well known It has been held in England that a mere general persuasion of an officer about his official powers is not enough to confer the protection of notice—*Kine* v *Evershed*, 10 Q B 143, and there appears to be no Indian decision which applies the doctrine of protection to a case like the present

The Collector might under section 8 of Act VIII of 1890 have moved the District Court for an order under section 12 for temporary custody and protection of the property It has been held that *when appointed by the Court* to take charge of the property of a minor a Collector is an officer within the meaning of section 32 of Ac XIV of 1869—*Narsingrav* v *Luxumanrav*, I L R, 1 Bom 318 *Mohan* v *Haku* I L R 4 Bom 638 But the inference is that *until appointed* he cannot be so regarded See, too, *The Collector of Bijnor* v *Munuvar* I L R 3 All 20 and *Shahzadee* v *Ferguson* I L R 7 Cal, 499

Owing to a mistake of law, the Collector and the other defendant have in my opinion, acted wholly without authority They might have used the power conferred by Act VIII of 1890 and possibly obtained an order They are liable in damages—*Sinclair* v *Broughton* I L R 9 Cal 341 I would add that although the previous decisions on section 32 of Act XIV of 1869 show that, if a plaintiff desires to sue a public official in his private capacity he may bring the suit in the Court of the Subordinate Judge or the Court of Small Causes there will still be a tendency to sue in the District Court which has a plenary jurisdiction Otherwise the plaintiff takes the risk of his plaint being rejected or a reference made to the High Court and even if he succeeds in the original Court the objection to the jurisdiction may have again to be faced in a Court of appeal

Since the hearing I have considered the older law section 43 of Regulation II of 1827 The exception of jurisdiction was made where it appeared "that the defendant is a public servant and that the suit is brought for acts done by him in his public capacity" Then the Native Commissioner had to send up the [763] suit to the Judge The change of language made in 1869 does not appear to me to signify any change in the law I would for these reasons confirm the decree although I have the misfortune to differ with my brother RANADE on the interpretation of the law

By operation of section 575 of the Code of Civil Procedure the Court confirms the decree Costs on the appellants

**Ranade J** —The chief question that was argued before us by the appellant pleader relates to the jurisdiction of the lower Court to entertain this suit under the bar created by section 32 of Act XIV of 1869 The question is one of the proper forum and not of the protection of the officers concerned These two points do not appear to have been sufficiently distinguished by the learned Judge of the lower Court He held that the question of his own jurisdiction to try the suit depended for its decision upon the question whether the Collector Mr Allen had authority or power to act in the matter If the act was done under no law or authority it could not, in the Subordinate Judge's opinion be said to have been done in the Collector's or Mamlatdar's official capacity as such Collector or Mamlatdar, and therefore it was their private act, and in respect of such an act the Collector and the Mamlatdar could be sued as defendants in the Subordinate Judge's Court The Subordinate Judge held that defendants had failed not only to show that their act was supported by any particular law but that it fell within the purview of the revenue, judicial, or any other administration

I am unable to accept the correctness of this description of the defendants' conduct in the present case. The plaintiff herself in her plaint charged defendant No. 2, as Mamlatdar, with having seized her property in pursuance of the absolutely unlawful direction of the defendant No. 1, as Collector of Broach. It is true that in her petitions A and B, plaintiff gave an indication that she intended to sue the defendants in their private capacity. The first question, which the lower Court had to decide, was thus, whether, under the circumstances, this intimation could by itself change the character of the suit. This Court has held that even where an amendment had been made in the plaint itself to the effect that a certain [764] forest officer was sued in his private, and not in his official, capacity, such an amendment did not remedy the defect of jurisdiction. Such description by the plaintiff in his suit, (or as in this case in supplementary petitions), cannot alter the character of the suit "which must be determined from the contents of the plaint itself, and a consideration of the position occupied by the defendant."— *Waman* v *Dipchand*, P. J., 1888, p. 121. To the same effect are the decisions in *Wamnaji* v *Balkrishna*, P. J., 1888, p 122, and *Martand* v. *Mahadji*, P. J., 1875, p 161.

It is indeed suggested in the judgment of the lower Court that in all these cases, the officers concerned were alleged to have misused the powers conferred upon them by law, whereas in the present case, there was no such law or authority which conferred any power on the defendants to interfere in the way they did. And in support of this view, reference was made by the respondent's pleader to *Bankat* v *Narayan*, I. L. R., 11 Bom., 370, and *Gopi* v. *Sheso*, I. L. R., 12 Bom., 358 where this Court recognized a distinction between an officer's private and official acts. In one of these cases, the officer concerned was sued for defamation, and in the other for malicious prosecution. These acts were held by this Court to be private and personal acts of the officers concerned, and as such rendered them amenable to the jurisdiction of the Subordinate Judges' Courts.

Accepting the test laid down in *Waman* v *Dipchand*, it must be seen whether the defendants' act in this case can be regarded as falling within the category of the acts complained of in that case, or in *Wamnaji* v. *Balkrishna* and *Martand* v. *Mahadji*, or within the class of cases referred to in *Bankat* v. *Narayan* and *Gopi* v *Sheso*. The question for consideration, it must be again noted, is not a question of the legality or otherwise of the act, but a question of the proper forum, the power of the Court to adjudicate upon the legality or otherwise of the act. The acts complained of are that the defendant No. 2, by the order of defendant No. 1, went to plaintiff's place soon after the death of her husband, the Thakore, and in [765] the presence of plaintiff's men made out lists or inventories of the deceased Thakore's property and the property in plaintiff's possession, both of which were admittedly mixed up together, professedly, in the interest of his minor son, and put locks and seals upon some room or rooms in plaintiff's occupation along with plaintiff's locks and seals. It is admitted that no undue severity was shown on the occasion, and that no pressure was put upon the plaintiff or her men in the performance of this process of temporary sequestration. It is admitted also that if the defendant No 1 had first moved the District Court, and had then, under the powers conferred by Act XIX of 1841 and Act VIII of 1890, proceeded to make out the lists and place locks upon the boxes and rooms, defendants' acts would have been perfectly justified. The report of the defendant No. 1 to his official superior, the Revenue Commissioner, shows that an application to the District Court was contemplated as an accompaniment to the making of the inventory, and it further appears that the Revenue Commissioner

and also the Government approved of the steps taken by the Collector. The proceeding in anticipation of the orders of the District Court was no doubt irregular and unusual, but the immediate question before us is whether the making of the inventory and the locking up of the rooms were, by reason of this omission, private and personal acts of the defendants, or whether they were performed by them as such officers in their official capacity. The Collector, when he is appointed to take charge of a minor's estate, is so appointed in his official capacity as Collector, and he cannot, as such, be sued in the Subordinate Judge's Court for acts done or omitted as guardian and administrator—*Narsingrav* v. *Luxumanrav*, I. L. R., 1 Bom., at p. 320; *Mohan Ishwar* v. *Baku Rupa*, I. L. R., 4 Bom., at p. 641. The Collector's proceeding as Municipal Commissioner has been similarly held to be an act done by him in his official capacity - *Gangadhar* v. *The Collector of Ahmednagar*, I. L. R., 1 Bom., p. 623. To the same effect is the ruling in *Swamirayacharya* v. *The Collector of Dharwar*, I. L. R., 15 Bom., 441, where the Court held, without deciding whether the act complained of [766] (the destruction of certain testimonials) was right or wrong, that the District Court alone was the proper forum to inquire into the question of legality. The power of the lower Court to inquire into the question whether defendants' act was right or wrong, presupposes that it had jurisdiction to inquire into such a complaint against an officer for such an act committed by him.

All the cases decided under Act XVIII of 1850 that have been reported, whether plaintiffs succeeded in establishing the illegality or abuse of power, or whether they failed to do so, appear to have been instituted in the District Courts, or on the Original Side of the High Courts. I have not come across a single case where officers have been sued for acts purporting to be done in their official capacity in the Subordinate Judges Courts: see *Ammiappa* v *Moulavi Mahomed*, 2 Mad H C Rep, 443, *Shahebzadee* v. *Fergusson*, I. L. R., 7 Cal., 499; *Sinclair* v. *Broughton*, L. R., 9 I. A., 152; s. c. I. L. R., 9 Cal., p. 341, *Spooner* v *Juddow*, 4 M. I. A., 353, *Collector of Sea Customs, Madras* v *Punniar Chithambaram*, I. L. R., 1 Mad., 89; *Seshaiyangar* v. *R. Raghunatha Row*, 5 Mad. H. C. Rep., 345, *Vinayak* v. *Bai Itcha*, 3 Bom. H. C. Rep., A. C. J., 36; *Venkat Shrinivas* v *Armstrong*, 3 Bom H. C. Rep., A. C. J., 47; *Meghraj* v. *Zakir Hussain*, I. L. R., 1 All., 280.

I cannot bring myself to believe that if the question of the power of the Subordinate Judges' Courts to entertain such suits depended entirely on the proof or otherwise of want of legal authority, no objection would have been taken to the institution of these suits in the District Courts in cases where the defendants were shown to have acted illegally and *ultra vires*.

The English decisions under local Acts, which require notice to be given to public servants when they are sued in respect of acts performed by them in pursuance of, or in execution of, their statutory powers, are very useful as guides in determining the principles on which protection to such officers may be granted or disallowed. They are not of such use when the question is one of the jurisdiction of Subordinate Courts over [767] certain class of persons in respect of a certain class of acts. The Subordinate Judges' Courts are not Courts of plenary jurisdiction. The English law recognizes a distinction between the Judges of Superior Courts and Judges of Inferior Courts of Record. In regard to this last order of Courts, it has been laid down that the Judge of such a Court must have before him some cause of action into which he has by law authority to inquire, or his proceedings will be extra judicial—Addison on Torts, p. 654, 6th Ed. In regard to revenue officers and tax collectors, it has been held that if a tax *is not legally* payable, but is demanded *bonâ fide* by a

tax collector who intends to act rightly, and has fair and reasonable ground for his belief that he has authority, such a collector is entitled to the statutory protection (Addison on Torts, p. 779) It will be otherwise if the same collector takes a bribe, or extorts money under colour of authority. The distinction here pointed out is really the same distinction which has been noticed above as having been made by this Court between private and official acts— *Waman* v. *Dipchand*, *Wamnaji* v. *Balkrishna*, *Bankat* v. *Narayan*, and *Gopi* v. *Sheso*. The statutory notice referred to in these Acts corresponds to the provisions of section 424 of the Civil Procedure Code. This provision does not furnish any clue to the order of Courts in which such suits must be brought. That is a separate question by itself, to be determined by a consideration of the class of persons and the acts of such persons complained of. The question of the legality or illegality or want of authority has to be raised and decided before a properly constituted Court, and it appears to me to be begging the question to make the Court's jurisdiction depend upon its first assuming to itself and exercising the power of deciding the merits of the case, as has been illustrated in the present case. The English cases—*Norris* v *Smith*, 10 Ad. and E Rep, 188; *Cook* v. *Leonard*, 6 B. and C. Rep, 351, *Kine* v *Evershed*, 10 Ad. and E. Rep., Q. B., 143,—only lay down the principle on which protection should or should not be given to a public officer sued in his official capacity for alleged irregularities or abuse of power. The common law on the subject has been enacted in Act XVIII of 1850 in this country, and [768] these decisions are of great value in interpreting the provisions of that enactment. There is no distinction between the English and Indian law on the subject of the protection to be given to judicial and revenue officers But the provision which limits the jurisdiction of Subordinate Judges' Courts in respect of certain classes of persons and certain acts of such persons has nothing corresponding to it in English law. This limitation is of very old standing, and was obviously laid down for other reasons than those which regulate the limits of just protection The test of the application of this limitation must be other than one which turns on illegality or want of authority. This test must depend upon the character of the person and the nature of the act, and its surrounding circumstances. Judged by this test, there is nothing in the order of defendant No. 1 to make an inventory of the minor's property which was in itself so completely beyond the limits of his official duties as to suggest that the act was, like a private assault or defamation, his own unofficial personal misconduct.

For all these reasons, I am satisfied that the lower Court was in error in assuming to itself a jurisdiction which did not belong to it. The conduct of the defendant No. 1 in subsequently filing a written statement in his private capacity, and raising the same defence again, did not confer on the lower Court a jurisdiction which it did not already possess.

I am of opinion accordingly that the decree of the lower Court must be reversed, and the plaint returned to the plaintiff to be filed in the proper Court.

The Judges having thus differed, and the decree of the Subordinate Court being confirmed under section 575 of the Civil Procedure Code (Act XIV of 1882), the defendants preferred an appeal under the Letters Patent, and the case was argued before a Full Bench composed of FARRAN, C. J., and PARSONS and CANDY, JJ.

Rao Saheb *Vasudeo J. Kirtikar* (Government Pleader), appeared for the Appellants (Defendants):—The evidence shows that it has been the practice in the district for the Collector to take charge of the property of a minor Thakore on his father's death. That is what was done here. The defendants acted simply in their official capacity The death of the Thakore was, according [769] to practice, reported by the patel to the Mamlatdar, who in his turn

made a report to the Collector The Collector directed the Mamlatdar to make an inventory of the property and to take precautions for its safety The Mamlatdar gave due notice to the plaintiff that he was going to make the inventory He subsequently made the inventory and locked up the property He gave to the plaintiff what she claimed to be hers The matter was duly reported to Government, and it passed a resolution (Exhibit 81) on the 14th November 1891, approving of the action taken by the Collector In all these proceedings the Collector acted in his official, and not in his private, capacity The plaint itself admits (paragraph 7) that the acts done by the defendants were done by them in their public capacity Under these circumstances section 32 of the Civil Courts Jurisdiction Act (Bombay Act XIV of 1869) is applicable, and the suit ought to have been brought in the District Court The expressions public capacity and official capacity are synonymous The defendants acted as agents of Government and, therefore as public officers — *Waman* v *Dipchand* P J, 1888, p 121 *Wamnaji* v *Balkrishna* P J 1888 p. 122 *Martand* v *Mahadji* P J, 1875, p 161 *Sumirayacharya* v *The Collector of Dharwar*, I L R 15 Bom, 111

*Manekshah J Taleyarkhan*, appeared for the Respondent (Plaintiff) The Mamlatdar took possession of the plaintiff's property as well as the minor's property It is admitted that some of the plaintiff's property was taken and locked up, and notwithstanding our application to the Collector it was kept in attachment We contend that neither the Collector nor the Mamlatdar had any authority to take possession of the property of the minor and much less to take the plaintiff's property The defendants acted beyond the scope of their authority and therefore they are personally liable No doubt when a Government officer is sued in his official capacity the suit must be brought in the District Court but the defendants here are not sued in their official capacity therefore the Subordinate Judge's Court had jurisdiction to entertain the suit The test is whether the Collector acted as the agent of the Secretary of State The Secretary of State would be liable only when the Collector does an act within [770] the scope of his authority and not otherwise Addison on Torts (7th Ed ), p 95

As to the allegation that it is the practice for the Collector to take possession of a minor Tulsi's property we contend that an illegal practice cannot authorize an act which itself is illegal The patel no doubt reports the death in his official capacity but that report does not justify the Collector in seizing the property The power to take charge of a minor's property is given to the Court under special enactments but the Collector cannot take any action in the matter on his own authority It cannot be said that the Collector acted within the scope of his authority though improperly If a Court acts without jurisdiction the order passed by it is an invalid order But if it is acting within its jurisdiction it may do an act which is wrongful, and yet it may be protected — *Wamnaji* v *Balkrishna* P J 1888 p 122, *Gopi* v *Sheso*, I L R, 12 Bom, 358 *Shah Madee* v *Ferguson*, I L R, 7 Cal, 499

The **judgment** of the Full Bench was delivered by

**Parsons J.** The decision of this appeal depends upon the meaning to be attached to the words any officer of Government in his official capacity which occur in section 32 of the Bombay Civil Courts' Act, 1869, which enacts that " No Subordinate Judge or Court of Small Causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party That section was founded upon a provision contained in the older legislation upon the same subject, which is to be found in section 43 of Regulation II of 1827 which barred the Native Commissioner from

taking cognisance of suits brought against a public servant for acts done by him in his public capacity

These provisions are not exceptions or pleas intended for the protection of officers of Government They are limitations imposed for what may be styled reasons of public policy upon the jurisdiction of Courts of lower grade than the Court of the District Judge to whom such lower Courts are directed to refer the plaintiff in cases coming within the purview of the section The [771] decisions therefore, upon statutes which confer immunity on or afford protection to, officers or public bodies acting or purporting to act in a certain capacity do not appear to us to afford assistance in dealing with questions which arise under the above section

Upon the construction of this section it has been ruled and we agree with that ruling that the question cannot be determined by the description given by the plaintiff himself of his suit He cannot select the forum of jurisdiction by a statement that he sues the officer of Government not in his official capacity but as a private individual This question of the Court in which the suit is to be tried must be determined from the contents of the plaint and a consideration of the position occupied by the defendant *Waman* v *Dip hand*, P J, 1888 p 121 The same ratio decidendi was observed in *Swaminayacharya* v *The Collector of Dharwar* I L R 13 Bom 411 where the Court looked to see not whether the acts were legal or illegal but whether the acts done by the Collector were done by him in his official capacity

The substance of the plaint in the present case is this The first defendant is described as the Collector of Broach and the second defendant as the Mamlatdar of Amod The plaintiff is the widow of the Thakore Raising She says that, on the death of Raising, defendant No 1 directed defendant No 2 to make an inventory of the property left by the deceased and that the defendant No 2 came and took possession not only of the property of the deceased but of the personal property of the plaintiff *viz* cash clothes ornaments &c, of the value of Rs 35 000 The cause of action is put down as accruing against both the defendants on or about the 22nd October 1891 the date on which defendant No 2 as Mamlatdar of Amod wrongfully seized the property of the plaintiff in pursuance of the absolutely unlawful instruction of the defendant No 1 as Collector of Broach Plaintiff prays for Rs 250 damages for the wrongful seizure of her property and for its restoration

From this it will be seen that the defendants are expressly sued for acts done by them in their capacity as officers of Government the one as Collector, the other as Mamlatdar The [772] evidence taken in the case also shows that the defendants acted throughout as officers of Government in their official capacity The Thakore died on the 20th October 1891 The patel of the village reported his death officially to the Mamlatdar (defendant No 2) and the Mamlatdar reported it officially to the Collector (defendant No 1) The Collector issued an official order to the Mamlatdar to go and make an inventory of the property of the deceased Thakore and take precautions for its security He also made an official report of what he had done to the Revenue Commissioner (Exhibit 80 26th October 1891) The Revenue Commissioner sent on the report to Government, and Government passed a resolution on the 14th November, in which they approve of the action of the Collector In obedience to the order of his official superior, the Mamlatdar went to the house of the deceased Thakore, and after giving due notice to the plaintiff made the inventory It is said that he offered to allow the plaintiff to take what property she required, and he placed his seal of office on the boxes, &c, in which the rest of the property was locked up.

It has been argued before us that the acts of the defendants were wholly illegal and unjustified by any Act or Regulation, and that, therefore, they cannot be official acts. This argument, however, begs the whole question. An official act is not necessarily a legal act; it may be a most illegal one. The Legislature has not, as we have pointed out, in the section under discussion given any immunity or protection: all it has done is to provide a particular forum for the trial of suits against Government officers for acts done by them in their official capacity. The question then turns not on whether the acts were legal or illegal, right or wrong, justifiable or unjustifiable, but on whether the acts were or were not official acts: acts, that is to say, done by the officer acting and purporting to act in an official capacity. In the present case there can, we think, be no possible doubt that the defendants were acting officially.

We, therefore, reverse the decrees of the lower Courts and order the plaint to be returned to the plaintiff for presentation to a proper Court. We order the plaintiff to pay defendants' costs throughout.

*Decree reversed.*

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**NOTES**

[ See also (1896) 22 Bom., 170; (1904) 28 Bom., 529 ]

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## [773] APPELLATE CIVIL

*The 25th February, 1896.*

PRESENT

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Budho ... ...(Original Plaintiff) Appellant

*versus*

Keso and another ... ...(Original Defendants) Respondents.*

*Jurisdiction—Subordinate Judge—Patel and kulkarni of village—Official act—Impressment of bullocks by patel and kulkarni of village for use of Government officer—Suit for damage—Act X of 1876—Act XIV of 1869, Sec. 32.*

The patel and kulkarni of a village having impressed a pair of bullocks belonging to the plaintiff for the use of an abkari inspector, the plaintiff sued them for damages in the Court of a Subordinate Judge. The defendants pleaded (*inter alia*) that the Subordinate Judge had no jurisdiction to try the suit under the Bombay Revenue Jurisdiction Act (X of 1876).

*Held*, that the suit was properly instituted in the Court of the Subordinate Judge, as the defendants were sued in their private capacity.

It is not clear that the rules about impressment of carts found in Chapter I of Nairne's Revenue Hand book actually order the village patel to impress carts against the owner's will; neither is it clear what officers are to be supplied. There is nothing to show that any law ever imposed this duty on a kulkarni, or that provision was made after the repeal of the Regulation of 1818 as regards patels except for military bodies.

SECOND APPEAL from the decision of G. C. Whitworth, District Judge of Khandesh. The defendants, who were the police patel and the kulkarni of a village, impressed a pair of bullocks belonging to the plaintiff for the use of a district abkari inspector. The plaintiff sued them in the Court of the Subordinate Judge to recover damages for their wrongful act.

The defendants pleaded that under the Bombay Revenue Jurisdiction Act (X of 1876) the Subordinate Judge's Court had no jurisdiction to try the suit.

* Second Appeal, No. 470 of 1895.

The Subordinate Judge held that he had jurisdiction and awarded the plaintiff's claim.

In appeal the District Judge reversed the decree and referred the plaintiff to the District Court. In his judgment he said :—

"When this appeal was first argued before me, the question of jurisdiction was considered mainly with reference to the Bombay Revenue Jurisdiction Act (X of 1876). I have had the point re-argued to-day with reference to the Bombay Civil Courts Act, 1869. Section 32 of this Act seems to me to bar the jurisdiction of the Subordinate Judge. It is argued that the defendants are not sued in their official capacity, because they were not legally entitled to do the act complained of. But there would be no [774] occasion for this provision of law at all if it were not meant to cover the cases of acts which though not justifiable, are yet done in an official capacity. Besides, it seems to me clear that the patel and kulkarni were acting in their official capacity when they impressed carts for a Government officer's use. And, indeed, it is a part of the complaint that they did the act by virtue of their official position (*amalache balane*) If they were actuated by spite or by any improper motive in impressing the plaintiff's bullocks in particular, the case might be a proper one for damages But still the cause of action would be an abuse of official power and not a private act."

From this decision the plaintiff preferred a second appeal to the High Court.

*Shivram Vithal Bhandarkar*, for the Appellant-Plaintiff :—Defendants were not sued in their official capacity, and the Subordinate Judge has jurisdiction : see *William Allen* v. *Bai Shri Dariaba*, *ante*, p 754 The defendants had no power to impress the bullocks—*In re the petition of Rakhmaji*, I. L R., 9 Bom., 553 , *Bankat Hargovind* v *Narayan*, I L R , 11 Bom., 370 , *Gopi* v. *Shesho*, I L. R , 12 Bom , 358.

*Balaji Abaji Bhagavat*, for the Respondents-Defendants .— Officers, such as the patel and kulkarni, are required to render assistance to Government officers : see Act II of 1843, section 2, and Bombay Act III of 1874, sections 83 and 84. The acts of the defendants, therefore, were done in their official capacity.

**Jardine, J.** —We do not think that the plaint shows on the face of it that the suit was one which under section 32 of Act XIV of 1869 could only be instituted in the Court of the District Judge The authorities show that the plaintiff suing an official in his private capacity is not bound in the first instance to go to that Court. It is open to the defendant official when sued in his private capacity to allege and prove as a defence that the act done, whether tortious or not, was done in the discharge of a duty expressly or impliedly assigned to him by law—*Gopi* v. *Shesho*, I. L. R., 12 Bom , 358. In that case also it is said that the allegation of an official justification must amount to something more than a mere pretext or colour.

We do not think it a justification that an abkari officer ordered the bullocks to be taken by force. We do not understand why the District Judge considered the act of impressment official. [775] Regulation IV of 1818, section 52, was repealed long ago Regulation XXII of 1827, Chapter 7, only applies to military forces on the march. As remarked by the Subordinate Judge, the rules about impressment of carts found in Chapter I of Nairne's Revenue Hand-book were held in *In re the petition of Rakhmaji*, I. L R , 9 Bom., 553, not to have the force of law. It is not clear that these rules actually order the village patel to impress carts against the owner's will, neither is it clear what officers are to be supplied There is nothing to show that any law ever imposed this duty on a kulkarni, or that provision was made after the repeal of the Regulation of 1818, as regards patels, except for military bodies. The decision in *Rakhmaji's case* was passed in 1885 , and we think we must treat the law as generally known, and hold that the defendants patel

and kulkarni did not act with due care and attention or under colour of office in seizing the plaintiff's bullocks. The Court reverses the decree of the District Judge and restores that of the Subordinate Judge, with costs of both appeals on the respondents.

*Decree reversed.*

[ 21 Bom 776 ]

APPELLATE CIVIL.

*The 3rd March, 1896*

PRESENT.

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Chinaya......... (Original Applicant) Applicant

*versus*

Gangava and another... (Original Plaintiffs) Opponents.*

***Execution—Decree—Mamlatdar—Dispossession of a third person not a party to suit—Jurisdiction of Mamlatdar—Remedy of person so dispossessed—Civil Procedure Code (Act XIV of 1882), Sec. 622—Practice—Procedure.***

G got a decree for possession against P in a Mamlatdar's Court. In execution the Mamlatdar directed the ouster of C, who was in possession and who was not a party to the decree

*Held*, that the Mamlatdar's order for the execution of the decree by the ouster of C was without jurisdiction, and that it should be set aside under section 622 of the Civil Procedure Code (Act XIV of 1882)

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Rao Saheb S. V. Mensenkai, Mamlatdar of Belgaum.

[776] Suit for possession. One Gangava kom Nagappa Pujari sued Parapa bin Irama for possession of certain land. At the hearing of the suit, the present applicant Chinaya bin Sidapa applied to be made a party on the ground that the suit was collusive and brought in order to deprive him of the land which was his and in his possession. The Mamlatdar rejected his application and on the same day (20th June 1895,) allowed the claim on the defendant's admission and passed a decree for the plaintiff. On the 8th August the Mamlatdar issued an order to the village officers to execute the decree, but the applicant successfully resisted execution and informed the Mamlatdar to that effect on the 13th August 1895, submitting that he was not liable to be dispossessed in execution of the decree. On the 31st August 1895, the Mamlatdar again issued an order to the village officers to execute the decree, and they having proceeded to execute it, the applicant applied to the High Court under its extraordinary jurisdiction and obtained a *rule nisi* to set aside the order of the Mamlatdar. The rule now came in for hearing.

*Vasudeo G. Bhandarkar*, appeared for the Applicant in support of the rule:—We ought not to be dispossessed. The decree was passed in a suit to which we were not a party. We are, therefore, not bound by it. The Mamlatdar made an order for delivery of possession by any person who might be in possession. He had no jurisdiction to pass such order (*Nathekha* v. *Abdul Alli*, I. L. R., 18 Bom., 449), and the High Court may set the order aside under section 622 of the Civil Procedure Code (Act XIV of 1882).

* Application, No. 235 of 1895 under the extraordinary jurisdiction.

*Balaji A. Bhagavat*, appeared for Opponent No 1 (Plaintiff) to show cause.—This rule must be discharged If the applicant has been wronged, his remedy is by suit, not by application under section 622—*Kasam Saheb* v. *Maruti*, I L R., 13 Bom, 552 *Govinda* v *Naiku*, I L R, 10 Bom, 78

**Parsons, J.**—The order of the Mamlatdar of the 31st August 1895, directing execution of the decree obtained by the opponent in a suit against his tenants by the ouster of the applicant who was no party to that suit, was beyond the jurisdiction of the Mamlatdar —*Nathekha* v *Abdul Alli*, I L R, 18 Bom, 449.

**[777]** We reverse the order If, however, the applicant has actually been dispossessed under that order, his remedy to recover possession is, as pointed out in *Kasam Saheb* v *Maruti*, I L R 13 Bom, 552 by suit either before the Mamlatdar or in a civil Court

We give applicant his costs in this Court

*Order reversed*

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**NOTES**

[This was followed in (1900) [illegible] Bom 297.]

**[21 Bom 777]**

APPELLATE CIVIL

*The 3rd March, 1896*

PRESENT

SIR C FARRAN KT, CHIEF JUSTICE, AND MR JUSTICE PARSONS

Bhau and others (Original Defendants) Applicants
*versus*
Dade Krishnaji Bhagvi (Original Plaintiff) Opponent*

*Mamlatdar Jurisdiction Remedy as between joint owners*

In execution of the decree obtained in 1886 in a civil Court the plaintiff and the defendants were put into joint possession of certain land The plaintiff subsequently brought this suit in the Mamlatdar's Court to recover possession of the said land alleging that the defendants by taking cocoanuts from trees standing thereon had dispossessed him of the said land otherwise than by due course of law The Mamlatdar held that the plaintiff had been thereby dispossessed, and passed a decree ordering the defendants to deliver up possession of the land to the plaintiff, together with the trees growing thereon

*Held*, that the Mamlatdar had no jurisdiction to pass the decree The Civil Court had passed a decree giving the parties joint possession of the land and the Mamlatdar had no jurisdiction to override that decision and to place the plaintiff in exclusive possession By the decree of the civil Court they were determined to be joint owners and the remedy in case of unequal possession or taking of produce was a suit for an account or for partition

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882), against the decision of Rao Saheb M S Vinekar, Mamlatdar of Malvan in the Ratnagiri District, in a possessory suit under the Mamlatdars' Act (Bombay Act III of 1876)

The plaintiff sued the defendants in the Mamlatdar's Court to recover possession of certain land, alleging that the defendants had dispossessed him otherwise than by due course of law by taking cocoanuts from certain trees standing on the land on the 30th June 1895

**[778]** The defendants replied that under a decree in Civil Suit No 571 of 1886, to which the plaintiff was a party, they were in the year 1888 put into

* Application, No 248 of 1895 under the extraordinary jurisdiction.

possession of the land in suit jointly with the plaintiff, and that they had been in enjoyment of the said land and its produce ever since.

The Mamlatdar passed a decree directing the defendants to deliver up possession of the land together with trees standing thereon to the plaintiff, holding that the defendants had by taking the fruit of the trees dispossessed the plaintiff of the land

The defendants applied to the High Court under its extraordinary jurisdiction and obtained a *rule nisi* to set aside the decision of the Mamlatdar, contending (*inter alia*) that the Mamlatdar had no jurisdiction to make a decree against the applicants (defendants) contrary to the order of the civil Court in the matter, and that joint possession of the whole *thikan* having been lawfully delivered to the applicants, they had as much right to enjoy the *thikan* and to take the fruit of the trees growing on it as the opponent (plaintiff) himself

*Manekshah J Taleyarkhan*, appeared for the Applicants (Defendants) in support of the rule — We rely on *Magan Manikchand* v *Vithal valad Hari*, P J, 1890, p 159, *Mahadaji Karandikar* v *Hari D Chikne*, I L R, 7 Bom., 332

*Ghanasham N Nadkarni*, appeared for the Opponent (Plaintiff) to show cause —The Mamlatdar's order is correct Plaintiff and defendants are co-parceners and they are in possession of different portions of the *thikan*

**Parsons, J** —The effect of the decree in Suit No 571 of 1886 when executed, as it was on the 30th October 1888, was to place the parties in joint possession of the property, the subject of that suit The Mamlatdar has entirely overlooked this and has assumed to himself a jurisdiction to override that decree and to place the plaintiff in exclusive possession of the land in dispute together with the trees standing thereon This he had no jurisdiction to do The rights of the parties must be held to be governed by the decree By it they are determined to be joint owners, and the remedy in the case of unequal possession or **[779]** taking of produce must be remedied by a suit for account or a suit for partition In such a case the Mamlatdar has no jurisdiction to interfere The exercise by a joint owner of the right he has over the joint property is not a dispossession of the other joint owners

We make the rule absolute, reverse the decree, and dismiss plaintiff's suit with costs throughout

*Rule made absolute*

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**[21 Bom 779]**

ORIGINAL CIVIL

*The 31st July, 1897*

PRESENT

MR JUSTICE FULTON

Yonosuke Mitsui and another Plaintiffs

*versus*

Ookurdas Khetsy Defendant *

*Costs—Right of successful plaintiff to costs —Plaintiff recovering less than Rs 2,000—Presidency Small Cause Court Act (XV of 1882), Sec 22—Amending Act (I of 1895) General Clauses Act (I of 1868), Sec 6 —Construction — Practice —Procedure*

In this suit the plaintiffs recovered a total sum of Rs 1 907 from the defendant for breach of contract The suit was brought in 1894 It was contended for the defendant that section

* Suit No 187 of 1894

22 of the Presidency Small Cause Court Act (XV of 1882), which was in force at the date of the institution of the suit, applied to the case, and that under that section the plaintiffs, although successful, were not entitled to their costs.

*Held*, that the plaintiffs were entitled to recover costs The power to award costs is derived entirely from Acts of the Legislature, and in making the award the Court cannot base its decision on provisions which have been repealed and are no longer effective at the time its order is passed

*Held* also, that section 6 of the General Clauses Act (I of 1868) did not apply to this case

*Ismail* v *Leslie*, I L R 24 Cal , 399 not followed

THE plaintiffs, who were residents of Tokio in Japan, sued by their agent in Bombay to recover from the defendant two sums *viz* Rs 129 14 7 and Rs 5,835 3 5

The first sum (Rs 129 14 7) was alleged to be due in respect of a consignment of cotton made by the defendant to the plaintiffs, the sale of which did not realize sufficient to cover the amount of the bill drawn by the defendant against it

[780] The second sum (Rs 5 385 3 5) was damages claimed by the plaintiffs in respect of another consignment of cotton made by the defendant not according to sample

*Starling* and *Russell* for Plaintiffs

*Lang* (Advocate General) and *Macpherson* for Defendant

The Court held that the plaintiffs were entitled to recover the said sum of Rs. 129 14 7 and also the sum of Rs 1,778 as damages in respect of the second claim of the plaintiffs

*Lang* (Advocate General) contended that under section 22 of Act XV of 1882, the plaintiffs were not entitled to their costs having recovered less than Rs 2 000, that the amending Act 1 of 1895 did not apply to this suit, which was instituted in 1894 He relied on section 6 of the General Clauses Act (I of 1868)

*Starling*, *contra*

On the question of costs the judgment was as follows

**Fulton, J** —The question whether the plaintiffs are entitled to costs is one of considerable nicety The learned Advocate-General contended that they were not entitled, inasmuch as the suit having been instituted in 1894 was governed by section 22 of Act XV of 1882 as it stood before its amendment by section 11 of Act I of 1895 On the other hand, Mr Starling urged that the question of costs being one of procedure must be determined by the law in force at the time of the decision

The material part of section 22 of Act XV of 1882 is as follows —" If any suit cognizable by the Small Cause Court other than a suit to which section 21 applies, is instituted in the High Court, and if in such suit the plaintiff obtains, in the case of a suit founded on contract a decree for any matter of an amount or value less than Rs 2,000, no costs shall be allowed to the plaintiff The foregoing rules shall not apply to any suit in which the Judge who tries the same certifies that it was one fit to be brought in the High Court

Section 11 of Act I of 1895 provides that in section 22 of the said Act for the words "two thousand" the words one thousand shall be substituted

It is not disputed that the case is one falling under section 22 The plaintiff has got a decree for more than Rs 1 000 and less [781] than Rs 2 000 And I do not think it is a case in which I could properly certify for costs if it were governed by the unamended section

The question, then, to be decided is simply whether the law to be applied in this matter of costs is the law in force at the commencement or that in force at the termination of the suit.

In *Ismail Ariff* v. *Leslie*, I. L. R., 24 Cal., 399, the Calcutta High Court have lately decided in similar circumstances that the old law must be applied. Their Lordships' decision was based mainly on section 6 of the General Clauses Act of 1868, which is as follows. —"The repeal of any Statute, Act, or Regulation shall not affect anything done or any offence committed or any fine or penalty incurred or any proceedings commenced before the repealing Act shall have come into operation."

Now it appears to me that it is impossible in this Presidency, having regard to the previous course of decisions, to adopt this ruling. It cannot, I think, be said, without using the language of the section in a sense not hitherto generally attributed to it in this Presidency, that the amendment of a section of an Act is the repeal of a Statute, Act, or Regulation. In one sense no doubt the alteration of a law always necessitates the repeal, *pro tanto*, of the older law. But in this Presidency it has, I believe, been the practice of this Court, in cases not expressly falling within the wording of section 6 of the General Clauses Act, to apply the principle that when new arrangements come into force for regulating procedure they operate on pending as well as on future suits. This principle was adopted in *Framji* v. *Hormasji*, 3 Bom. H. C. Rep., (O. C. J.), 49, and has been followed in later cases since the passing of Act I of 1868, as for instance in *Shivram* v. *Kondiba*, I. L. R., 8 Bom., 345; and in *Jasraj* v. *Chudasama Vakhatsang*, P. J. for 1891, p. 294, in which SARGENT, C J., said "I cannot doubt that the general rule, as stated by Lord BLACKBURN in *Gardner* v. *Lucas*, 3 Ap Ca, 582, that alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be, is applicable." In the case of *Ratanchand* v. *Hanmantrao*, 6 Bom. H. C. Rep, 166, it is true, when certain regulations [782] governing appeals from decrees of Subordinate Courts had been repealed by Act XIV of 1869, it was held that the case of pending suits was governed by section 6 of the General Clauses Act, but in that case the language of the section was apparently applicable, and, besides, the new Act contained no provision for appeals from decrees already passed, and, therefore, left it to be inferred that they were to be treated under the old law In *Gangaram* v *Punamchand*, P J., 1896, p. 212, *infra* p 822, which came before Chief Justice FARRAN and myself, we held that the repeal in an amending Act of section 73 of the Dekkhan Agriculturists' Relief Act was not the repeal of a Statute, Act or Regulation within the meaning of section 6 of the General Clauses Act and applied the principle above referred to, which it is obvious could have no effect whatever if every amendment of the law fell within the provisions of section 6.

Possibly if the matter were *res integra* it might reasonably be urged that every amendment of the law of procedure falls within the spirit of the section, but it is too late, I think, in this Presidency to entertain any such argument. Hereafter in dealing with Acts affected by the new General Clauses Act (X of 1897), in which the word "enactment" is substituted in section 6 for the words "Statute, Act or Regulation," and in which "enactment" is defined so as to include any provision in any Act or Regulation, a different course of interpretation may perhaps prevail. But even though the construction hitherto put in this Presidency on section 6 of Act I of 1868 may seem somewhat narrow, consistency, I think, requires that it shall be followed when dealing with the few remaining cases in which the meaning of that section may come under consideration hereafter. However, attention must be called to the fact that

when in section 9 of Act I of 1887, the words "wholly or partially" were inserted before the word "repealed" in clause (1) of section 3 of the General Clauses Act, 1868, no similar amendment was made in section 6. If it had been the intention of the Legislature to make the section applicable to all amendments of the law, it would have been very easy to say so.

In these circumstances I am not prepared to hold that this case is governed by section 6.

[783] The only other question for determination is whether a question of costs is one of procedure or one affecting vested rights. The answer appears to be supplied by the cases of *Freeman* v *Moyes*, 1 Ad and El, 338; *Grant* v. *Kemp*, 2 C. and M., 636; *Wright* v *Hale*, 30 L. J. (Ex.), 40, *Kimbray* v. *Draper*, L. R., 3 Q. B., 160. Of these *Wright* v. *Hale* is most frequently referred to. It has been doubted and questioned, but apparently never overruled, and I can see no good reason for not following it in this country. The Legislature when amending section 22 of the Small Cause Court Act doubtless considered it more reasonable to reduce the limit below which costs in the High Court were not to be allowed, than to retain the former limit. It is difficult, then, to see on what principle the concession should be refused to litigants before the Court at the time it was made, and confined merely to future litigants. The policy of the law being to relieve from the restriction plaintiffs getting decrees for over Rs. 1,000, there seems, in the absence of any statutory bar like section 6 of the General Clauses Act, no good reason for refusing the relief to persons whose suits were instituted before, but not decided till after the 1st April 1895.

Moreover, it is difficult to see how it is possible to apply any but the existing law. The power to award costs is derived entirely from Acts of the Legislature, and in making the award the Court cannot base its decisions on provisions which have been repealed and are no longer effective at the time its order is passed. Of course, if *pro hâc vice* the old provisions were kept in force by section 6 of the General Clauses Act, the case would be otherwise, but in the absence of legislative authority for relying on the old law the Court must, I think, be guided entirely by the terms of the existing law. Its decision cannot be controlled by a law which no longer exists.

I am, therefore, of opinion that the plaintiffs are entitled to their costs.

Attorney for the Plaintiffs —Mr. *M N Sakhlatvala.*

Attorneys for the Defendant —Messrs. *Ardesir Hormasji and Dinsha.*

NOTES

[ See also (1910) 13 O. C., 152.]

## [784] ORIGINAL CIVIL

### FULL BENCH

*The 20th August, 1897*
PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE, MR JUSTICE STRACHEY, AND MR JUSTICE B TYABJI

Fernandez and others ... Plaintiffs
*versus*
Rodrigues and others ... Defendants *

*Civil Procedure Code (Act XIV of 1882) Sec 30—Permission of Court Leave of Court when to be given Practice Procedure*

In a suit brought under section 30 of the Civil Procedure Code (Act XIV of 1882) the permission of the Court required by that section may be given subsequently to the filing of the suit

REFERENCE from chambers

This suit was filed on the 17th December 1896, by the plaintiffs, who described themselves in the title of the plaint as ' the Fabriqueiro and Wardens of the property of the Church of N S de Salvacao, on behalf of themselves and all others the parishioners of the said church

The suit was brought against the Vicar of the said church the Bishop of Daman and others to have certain funds and properties declared to belong to the parishioners or congregation of the said church, &c, &c

On the 14th June 1897 the defendants filed their written statement in which they contended (*inter alia*) that the suit was not maintainable without permission of the Court under section 30 of the Civil Procedure Code (Act XIV of 1882), and that the requisite permission had not been obtained by the plaintiffs

On the 29th July 1897, the plaintiffs took out a summons calling on the defendants to show cause why the Court should not give permission to the plaintiffs (if such permission be necessary) under section 30 of the Civil Procedure Code (Act XIV of 1882) to prosecute this suit on behalf of all parties interested in the subject matter of the suit, and why the Court should not give notice of the institution of this suit by advertisement as provided by the said section'

[785] At the hearing before the Judge in chamber it was contended on behalf of the defendants that under section 30 the permission of the Court must be given before or at the filing of the plaint and could not be given subsequently and that the Judge in chamber had no jurisdiction to make the summons in this case absolute

*Macpherson* for Defendants showed cause —The suit is brought under section 30 of the Civil Procedure Code (Act XIV of 1882), but leave to sue should have been first obtained —*Jan Ali* v *Ataur Ruhmun*, 9 Cal L R, 433, at p 443, *Jan Ali* v *Ram Nath* I L R, 8 Cal, 32, *Maharajah of Burdwan* v *Tarasundari*, I L R 9 Cal, 619 at 624 Leave cannot be granted afterwards—*Lutifunnissa* v *Nazirun*, I L R, 11 Cal, 33, *Dhunput* v *Paresh Nath*, I L R, 21 Cal 180 *Chandulal* v *Awad bin Umar Sultan*, I L R, 21 Bom

* Suit No. 667 of 1896.

351, English Judicature Act, 1875 Order XVI, Rule 9, Order XVIII, Rule 2; *Clark* v *Wray*, 31 Ch D, 68, *Hunt* v *Worsfold*, (1896) 2 Ch, 224.

*Lang* (Advocate-General), for Plaintiffs in support of the summons —The Court can give the required leave when it is applied for, just as it can add parties In effect we are applying to add parties section 32 of the Civil Procedure Code (Act XIV of 1882) *Hira Lal* v *Bhairon*, I L R, 5 All, 602. The acceptance of the plaint was sufficient permission to sue

**Farran, C J** —I am of opinion that the Judge below had power to make this summons absolute Under the old Chancery practice it was not necessary to obtain leave before the trial The question was considered at the trial, and if the suit was not properly brought it was then dismissed That was the practice at first introduced and prevailing in these Courts and it was subsequently enacted in the Civil Procedure Code

The question raises no point of jurisdiction and there is nothing which makes it essential that leave should be given before the filing of the suit It is a point analogous to that of adding of parties It is clear that where a suit is defective as to parties the requisite parties can be added after suit filed

[786] No doubt the proper course is to obtain leave before suit filed, but there is nothing to show that if this is not done, the omission cannot be supplied The Civil Procedure Code itself does not make it necessary, and after all it is that which must be our guide

**Strachey, J** —I am of the same opinion No doubt the word "sue" used in the section includes the whole suit and everything done in the suit, and therefore, seems to imply that leave should be given before anything done in the suit But there is nothing to indicate that when that is not done, the matter should not be set right on the earliest occasion afterwards

Some sections in the code which require leave to be given obviously imply that, if it is not given before suit it cannot be given at all and the suit must be dismissed But I do not think that is the case in suits coming under section 30 In such cases the defect may be remedied at the earliest moment

**B Tyabji, J** —I have little to add I have taken the same view from the first It is really a question of adding parties On a former occasion in a case of similar character I have added members of a caste both as plaintiffs and defendants This case is not exactly the same but I think the principle to be applied is the same

In construing section 30 we must look to see if the jurisdiction depends on permission only, clearly here it does not In the case of *Chandulal* v *Awad bin Umar Sultan ante*, p 351, decided by STRACHEY J the suit was against a foreign prince Such a case is on a different footing altogether *Primâ facie* the Court had no jurisdiction in that case It had none at all but for the permission given This however is a provision dealing merely with the most convenient way of bringing the proper parties before the Court and has nothing to do with jurisdiction The interests of justice require that the Court should have such a power as we are asked to exercise here

*Summons absolute*

Attorneys for the Plaintiffs —Messrs *Little and Co*

Attorneys for the Defendants —Messrs *Daphtary and Ferreira*

NOTES

[Similar decisions were given in (1901) 25 Mad 399 (1915) 29 M L J, 91, (1900) 22 All 269 ]

# [787] APPELLATE CIVIL

*The 24th February, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Chinava and another ........ (Original Defendants Nos. 1 and 2), Appellants

*versus*

Bhimangauda ........ (Original Plaintiff), Respondent.*

*Vatandar, who is a—Person having an hereditary interest—Hereditary interest what is—Hereditary Offices Act (Bom. Act III of 1874), Secs. 4 and 5†—Amending Act (Bom. Act V of 1886), Sec. 2.‡*

Girimapa by his will devised all his property, which was vatan property, to Venkangauda, a distant cousin. The plaintiff as the nearest heir of Girimapa [788] claimed the property, contending that Venkangauda had not an hereditary interest in the vatan within the meaning of section 4 of the Bombay Hereditary Offices Act (III of 1874), that he was not a vatandar capable of taking under the will of Girimapa within the meaning of section 5, and that the will of Girimapa was therefore inoperative.

*Held*, that Venkangauda had not an hereditary interest in the vatan, and that the devise to him was therefore inoperative. The expression in section 4 "persons having an hereditary interest in a vatan" means persons having a present interest of an hereditary character in the vatan, and does not include persons who may have a *spes successionis* however remote. "Hereditary interest" means an interest acquired by inheritance as distinguished from an interest acquired by purchase, gift or other mode of acquisition.

* Second Appeal No. [illegible] of 189[illegible].

† Sections 4 and 5 of the Bombay Hereditary Offices Act (Bombay Act III of 1874):—

4. "Hereditary office" means every office held hereditarily for the performance of duties connected with the administration or collection of the public revenue or with the village police, or with the settlement of boundaries or other matters of civil administration.

The expression includes such office even where the services originally appertaining to it have ceased to be demanded.

The vatan property, if any, and the hereditary office and the rights and privileges attached to them together constitute the vatan.

"Vatandar" means a person having an hereditary interest in a vatan. It includes a person holding vatan property acquired by him before the introduction of the British Government into the locality of the vatan, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance. It includes a person adopted by an owner of a vatan or part of a vatan subject to the conditions specified in sections 33 to 35.

5. (1) Without the sanction of Government it shall not be competent—

(*a*) to a vatandar to mortgage, charge, alienate or lease for a period beyond the term of his natural life any vatan or any part thereof or any interest therein to or for the benefit of any person who is not a vatandar of the same vatan;

(*b*) to a representative vatandar to mortgage, charge, lease or alienate any right with which he is invested, as such, under this Act.

In the case of any vatan in respect of which a service commutation settlement has been effected either under section 15 or before that section came into force, clause (*a*) of this section shall apply to such vatan unless the right of alienating the vatan without the sanction of Government has been conferred upon the vatandars by the terms of such settlement or has been acquired by them under the said terms.

‡ Section 2, Bombay Act V of 1886:—

2. Every female member of a vatan family other than the widows of the last male owner, and every person claiming through a female, shall be postponed, in the order of succession to any vatan, or part thereof or interest therein, devolving by inheritance after the date when this Act comes into force, to every male member of the family qualified to inherit such vatan, or part thereof, or interest therein.

* * *

The interest of a widow in any vatan or part thereof shall be for the term of her life or until her marriage only.

SECOND APPEAL from the decision of J.L. Johnston, District Judge of Dharwar

The plaintiff, who claimed to be the heir of one Girapa, the deceased husband of the first defendant (Chinava), sued for a declaration that the second defendant had been invalidly adopted by the first defendant (Chinava), she having no authority to make the adoption The parties were Jains

The defendants pleaded (*inter alia*) that plaintiff was not the heir of Girapa, but that in any case he could not succeed as the property was vatan property and he had forfeited his portion of the vatan thereby ceasing to be a vatandar qualified to inherit

At the hearing it was proved that Girapa had left a will whereby he had devised all his property to one of his relations named Venkangauda and had forbidden his widow (defendant No 1) to adopt without Venkangauda's consent The plaintiff contended that as to vatan property at all events the will was invalid

The Subordinate Judge found that the adoption of the second defendant having been prohibited by Girapa was invalid He held also that the plaintiff having forfeited his share of the vatan property was no longer a vatandar and was therefore not entitled to succeed to Girapa's vatan property

[789] As, however, Girapa had left other property (not vatan) to which the plaintiff might succeed after the death of the widow (defendant No 1) the Subordinate Judge passed a decree declaring the adoption of defendant No 2 null and void as against the plaintiff

The District Judge confirmed the decree

The defendants filed a second appeal in the High Court

The High Court (SARGENT, C J and FULTON, J) held that unless it was found that the plaintiff was entitled to some of the property left by Girapa, the Court ought not (as there was no other special reason for making it) to make any declaration as to the validity or otherwise of the adoption of the second defendant As to the plaintiff's claim to the property, Girapa had left all his property to Venkangauda As to such part of it as was not vatan, no question could arise between the parties to the suit As to such part as was vatan, the validity of the devise would depend on whether Venkangauda was a vatandar at the time of the testator's death If he was not then the devise would be invalid and the plaintiff would be entitled unless he had ceased to be a vatandar at the time of the testator's death The High Court therefore sent back issues on both those points The following was the interlocutory judgment —

"It has been argued before us on this second appeal that a suit would lie for a declaratory decree setting aside the alleged adoption of the defendant No 2 quite independently of any claim by the plaintiff to property The case of *Kalova* v *Padapa*, I L R, 1 Bom, 248 has been relied on by the plaintiff There the son sought to impeach the adoption and the Court held that he was entitled to do so as it would enable him, if successful to obtain an injunction against any intervention by the alleged adopted son in the performance of the *Shradh* and other ceremonies However, amongst Jains, to which caste the parties belong, there are no *Shradh* or other religious ceremonies of any description, and as no other special reason has been assigned for seeking the declaration in the present suit, we do not think that in the absence of any property the Court in the exercise of its discretion ought to make a declaration

"As the testator gave all his property by his will to Venkangauda, no question could arise between the parties, at any rate in regard to property other than vatan property. As to the latter, the validity of the alienation by will to

[790] Venkangauda would depend under the Vatandar Act on his being a vatandar at the time of Giriapa's death.

"Assuming that such devise would not pass the property to Venkangauda, there still remains the question whether the plaintiff would inherit such property in view of the defendants' contention that the plaintiff had forfeited his right of inheritance We do not think that either of these questions has been satisfactorily dealt with by the Court below, and, therefore, it will be necessary to send down issues for that purpose.

"As to the validity of defendant No. 2's adoption, assuming that plaintiff can impugn it by this suit, we think the decision of the District Court is correct. The law is well settled, as laid down by Sir M. WESTROPP in *Bayabai* v. *Bala*, 7 Bom. H. C. Rep., Appendix I, that if the implied authority of the widow to adopt is rebutted by an express refusal on the part of the husband to allow his widow to adopt, the adoption by her is rendered invalid. In this case Giriapa by his will distinctly forbids his widow to adopt without the consent of Venkangauda, which has never been obtained We must, therefore, send down the following issues.--

"1. Whether Venkangauda was not a vatandar of the vatan at the time of Giriapa's death?

"2. If that is answered in plaintiff's favour, then, whether the plaintiff was precluded by the forfeiture of his share in 1834 or otherwise from inheriting the vatan from Giriapa?

"The *onus* of proving that he was not a vatandar to lie on the plaintiff

"The *onus* of proving the second issue to be on the defendants.

"If the findings on these issues determine that the plaintiff had a *locus standi* in respect of the vatan, then the decree should be confirmed, if not, the decree must be reversed, and the plaint stand dismissed with costs throughout on plaintiff. Fresh evidence may be taken."

On the first issue the District Judge found in plaintiff's favour, *viz.*, that Venkangauda was not a vatandar, and on the second issue he found that the plaintiff was not precluded by forfeiture from inheriting the vatan property.

The defendants again appealed to the High Court, which again remanded the case to the District Court for a finding on the first of the issues, directing him to "consider whether Venkangauda is a member of this vatan family or not, and whether if he be, he has 'an hereditary interest in the vatan' so as to constitute him a vatandar within the meaning of the Act."

[791] The District Judge found that Venkangauda was not a vatandar of the vatan at the time of Giriapa's death within the meaning of section 4 of Bom. Act III of 1874.

The defendants appealed to the High Court

*Scott* (with *Shivram V. Bhandarkar*), for the Appellants (Defendants). - The Judge was wrong in holding that Venkangauda was not a vatandar under section 4 of the Vatan Act. No doubt his relationship was distant, but we contend that any member of the vatan family who might, possibly at any future time, inherit a share of the vatan has an hereditary interest in the vatan and is, therefore, a vatandar within the meaning of section 4. The term hereditary merely implies the death of a prior owner. It does not necessarily imply lineal descent. Collaterals can come in. The circumstance that Venkangauda's ancestor's share in the vatan was confiscated, would not debar him from inheriting Giriapagauda's share either under his will or independently of it. Section 56 of the Vatan Act is applicable to the present case,

*Inverarity* (with *Narayan G. Chandavarkar*), for the Respondent (Plaintiff): —It is only a person with a present interest in the property who can be regarded as having an "hereditary interest" in it, such as sons, grandsons, lineal descendants, &c. The meaning which the appellants seek to attach to the expression is too vague and broad, and it is not warranted having regard to the object with which the Vatan Act was passed.

**Farran, C. J.** :—As we substantially agree with the District Judge in regard to the meaning to be ascribed to the expression "vatandar" as used in the "Bombay Hereditary Offices Act" (III of 1874) the question raised by Mr. Inverarity as to Venkangauda not being entitled to succeed to the vatan under the will of Giriapa being *res judicata* will not arise.

Section 5 of the Act prohibits a vatandar without the sanction of Government from selling, mortgaging, or otherwise alienating, or assigning any "vatan or part thereof or interest therein" to any person not a vatandar of the same vatan. The will of Giriapa in favour of Venkangauda will, therefore, be inoperative in so far as the vatan property is concerned, unless Venkangauda [792] is a vatandar of Giriapa's vatan within the meaning of the Act; and the plaintiff, as the nearest heir of Giriapa, will in that case succeed upon the death of Giriapa's widow. "Vatandar" by section 4 is defined to mean 'a person having an hereditary interest in a vatan" It has not been contended before us that this definition does not apply to the alienee vatandar mentioned in the 5th section, or that a devise by will of the whole vatan does not fall within its scope. So the question for determination is, whether Venkangauda, who is now found to be a distant cousin of the late Giriapa, being descended in the male line from the same common ancestor Giriapa, (see Exhibit 87) had when the will of Giriapa came into force by reason of his consanguinity to the deceased and his descent from a common ancestor "an hereditary interest" in Giriapa's vatan

For the appellants it is argued that any one who is in the direct line of heirship to the original vatandar ancestor or can possibly be an heir to the last vatandar has an "hereditary interest"—an interest by way of heirship in the vatan. Hereditary interest according to this contention is equivalent to a *spes successionis* however remote. It would embrace heirs in the female as well as in the male line. This interpretation in our opinion gives far too wide a meaning to the expression, and one which, we think, the words do not legitimately bear. It is not correct either under English or Hindu law to speak of the remote expectation which a collateral kinsman has of succeeding to an estate as an interest in the estate. A collateral relation has no interest in the vatan of the present holder Besides, although there is no preamble to the Act, it is impossible to read its several sections without seeing that one of its main objects is to keep the vatan property intact in the same family, an object which would be readily frustrated if alienation in favour of a person in the female line of heirship were permitted. A field mortgaged or sold to the son of a daughter passes as completely out of the vatan family as if it were alienated in favour of a complete stranger. The same grammatical objection and, though in a lesser degree, the same argument founded upon the object of the Act, exist against extending the expression to all members of the vatan "family" which (section 2) includes each of the branches [793] of the family descended from an original vatandar. If, too, "hereditary interest" is read as equivalent to "hope of succession" there would be no warrant for limiting its operation to the members of the vatan family.

The ordinary grammatical meaning of the phrase "persons having an hereditary interest in a vatan" is, we think, best observed, and the object of

the Act is certainly advanced by confining it to persons having a present interest of an hereditary character in the vatan In this sense it would include all the co-sharers for the time being in the vatan estate and probably also the sons of co-sharers, who, according to the principles of Hindu law, by birth acquire an interest in their fathers' ancestral property. "Hereditary interest" will, thus interpreted, mean an "interest acquired by inheritance" as distinguished from an interest acquired by purchase, gift, or other modes of acquisition. In this sense, subject to the qualifications and explanations contained in the fifth clause of the fourth section, we are of opinion that it is used in the Act

The result of these protracted proceedings will thus be to establish the title of the plaintiff in the event of his surviving the widow of Giriapa to succeed to the vatan in perference to the defendant We confirm the decree with costs.

*Decree confirmed.*

NOTES

[ This was followed in (1899) 23 Bom , 715 ]

[ 21 Bom. 793 ]

APPELLATE CIVIL

*The 3rd March, 1896*

PRESENT

MR JUSTICE JARDINE AND MR. JUSTICE RANADE.

Pandu Lakshman Masurekar ....... ..(Original Plaintiff) Appellant

*versus*

Anpurna and others . .. .(Original Defendants) Respondents.*

*Mortgage—Redemption—Mortgagee purchasing equity of redemption from one without title to it—Adverse possession of mortgagee against true owner of equity of redemption—Limitation Act (XV of 1877), Art. 148.*

In the absence of any act showing that the mortgagee is asserting himself against the owner of the equity of redemption, his possession is not adverse against the latter as regards limitation. The mere assertion of his claim by the mortgagee would not affect the right of the real owner of the equity of [794] redemption where a person having no right in the property pretends to sell the equity of redemption to the mortgagee

SECOND APPEAL from the decision of H. L Hervey, Assistant Judge of Ratnagiri.

Suit for redemption In 1863 one Ram Farzand mortgaged with possession the land in dispute to Zilla

Subsequently Ram Farzand died without issue and his sister Yesu succeeded to his property She died in 1873, leaving a son Hari and an unmarried daughter Avda

In 1874 Hari purported to sell the equity of redemption in the land in question to the mortgagee Zilla

In 1893 Avda sold her interest in the property to the plaintiff Pandu, who now sued to redeem the mortgage of 1863

Zilla, the mortgagee, being dead, his widow Anpurna and nephew were defendants in the suit They had been in possession of the mortgaged property since Zilla's death

The defendants pleaded that the plaintiff was not entitled to obtain possession or redemption, inasmuch as at the date of the mortgage in 1863

* Second Appeal, No. 486 of 1895.

Ram Farzand had executed a perpetual lease of the mortgaged property to Zilla They also contended that Hari and not Avda inherited the property on Yesu's death, that Hari had sold the equity of redemption in 1874 to Zilla, that Zilla and the defendants had ever since been in possession as owners and not as mortgagees, and that the plaintiff's claim was barred by limitation

The Subordinate Judge of Malvan held that the plaintiff was entitled to redeem on his paying to defendant No 2 (Zilla's nephew) the sum of Rs 91

In appeal the Assistant Judge of Ratnagiri reversed the decree and dismissed the suit, holding that Avda, who was living with her brother Hari, had notice of the sale in 1874 by him to Zilla and that the plaintiff's claim through her was barred by adverse possession for more than twelve years

The plaintiff appealed to the High Court

[795] *Manekshah*, for the Appellant (Plaintiff) —Yesu took the property as her *stridhan* when she inherited from her brother the mortgagor Ram Farzand. On her death, therefore, it passed to her daughter Avda and not to her son Hari. Avda took it as full owner—*Bulakhidas* v *Keshavlal*, I L R, 6 Bom, 85, and she has sold it to the plaintiff No doubt Hari assumed to sell the property in 1874 to Zilla, but Hari had no title whatever, and the transaction did not in any way affect Avda's right It could not make Zilla's subsequent possession adverse to her It continued as before to be possession under the mortgage of 1863, which she had the right to redeem That right would continue for sixty years—article 148 of the Limitation Act (XV of 1877), and within that period she has sold it to the plaintiff, who now claims to exercise it—*Puttappa* v *Timmaji*, I L R, 14 Bom, 176, *Bhagvant* v *Kondi* I L R, 14 Bom, 279, *Mathurabai* v *Gunaji*, P J, 1876, p 155, also *Ali Muhammad* v. *Lalta Baksh*, I L R, 1 All, 658 *Tanji* v *Nagamma*, 3 M H C Rep, 137, *Bejoy Chunder Banerjee* v *Kally Prosonno Mookerjee*, I L R, 4 Cal, 327, *Chinto* v *Janki*, I L R, 18 Bom, 51 As to the perpetual lease alleged by the defendants, it is a clog in the equity of redemption and the Court will not enforce it—*Mahomed Muse* v *Jijibhai Bhagwan* I L R, 9 Bom, 524

*Daji Abaji Khare*, for the Respondents (Defendants Nos 1 and 2) — Avda acquiesced in Hari's sale of the equity of redemption to Zilla in 1874 and was estopped from suing That estoppel now binds the plaintiff, who claims through her

**Jardine, J** —The defendant did not plead that the plaintiff is estopped by any conduct of his assignor Avda and there is no finding that he is We must, therefore, consider the case as if there was no estoppel

It has not been seriously disputed that when Yesu died in 1873 her unmarried daughter Avda became the owner of the equity of redemption The period of limitation is under article 148 sixty years The Assistant Judge has held the suit barred by the adverse possession of more than twelve years of the mortgagee in possession

[796] The first question is whether that possession was adverse In the absence of any act showing that the mortgagee was asserting himself against the owner of the equity of redemption as in *Puttappa* v *Timmaji* I L R, 14 Bom, 176, and in *Mathurabai* v *Gunaji*, P J, 1876, p 155, we are of opinion that it was not adverse The present case resembles *Bhagvant* v *Kondi*, I L R, 14 Bom., 279, and the two cases there followed, *Ali Mohammad* v *Lalta Baksh*, I L R, 1 All, 658, and *Tanji* v *Nagamma*, 3 M H C Rep 137 The mere assertion of his claim by the mortgagee would not affect the right of the real owner of the equity of redemption—*Bejoy Chunder Banerjee* v *Kally Prosonno Mookerjee*, I. L R, 4 Cal, 327 It follows, then, that the mortgagee added nothing to what he took from Avda's brother Hari, who, having no right

in the property, and not being the heir of Yesu, pretended to sell to the mortgagee the equity of redemption That transaction in no way affected the rights of Avda, who was not under any obligation to take any notice of it The maxim *caveat emptor* applies The vendee might have inquired what rights of heirship were conferred by the Hindu law

For these reasons we reverse the decree of the Assistant Judge It is unnecessary to remand the appeal as after argument we can decide the matters left undecided below Whether proved or not, the perpetual lease, being a clog to the equity of redemption, cannot be enforced in equity—*Mahomed* v *Jijibhai*, I L R. 9 Bom , 534,—and is not binding on the plaintiff

We now reverse the decree of the Assistant Judge and restore that of the Subordinate Judge costs throughout on the respondents

*Decree reversed*

## [797] APPELLATE CIVIL

*The 4th March, 1896*

PRESENT

SIR C FARRAN, KT , CHIEF JUSTICE, AND MR JUSTICE CANDY

Gurlingapa Satwirapa Gidwir (Original Plaintiff) Appellant

*versus*

Nandapa Chanbasapa Solapuri. . .(Original Defendant No 2) Respondent

*Hindu law—Joint family—Alienation of his share by a co-parcener—His position and rights after such alienation—Position of purchaser—Subsequent death or birth of other co parceners—Effect on position of purchaser—Rights of alienor*

1 The alienation by a Hindu co parcener of his rights in part or the whole of the joint family property does not place the purchaser of such rights in his own position The purchaser becomes a sort of tenant in common with the co parceners, admissible, as such, to his distributive share upon a partition taking place

2 Such an alienation before partition does not deprive the alienating co-parcener of his rights in the joint family

3 As the purchaser does not by the death of the vendor lose his right to a partition, so his position is not improved by the death of the other co parceners before partition

4 The purchaser like his alienor is liable to have his share diminished upon partition by the birth of other co parceners if he stands by and does not insist on an immediate partition.

Three undivided brothers, *viz* Sidmalapa, Nijlingapa and Murgyapa, were the owners of a certain house which on the 1st August 1845, Nijlingapa mortgaged with possession to one Shidlingapa In 1878 the house was vested in the respective sons of the said three brothers, *viz* , Basapa (son of Sidmalapa), Revapa (son of Nijlingapa), and Khubana (son of Murgyapa) In September 1878 in execution of a decree against Basapa alone, the house was sold *eo nomine* (not merely Basapa's interest) to one Gurpadapa Formal possession was given to the purchaser but the actual possession remained with the mortgagee (Shidlingapa). After this sale took place no other family property remained in which Basapa had an interest.

Khubana died in 1880 and Revapa died in 1883, no partition having been made between them and Basapa In March 1891 Basapa sold his interest in the house to the plaintiff, who in 1892 filed this suit to redeem the mortgage of 1845 The Lower Appellate Court

* Second Appeal, No. 503 of 1895.

dismissed the suit, holding that when in 1878 Gurpadapa purchased Basapa's right and interest in the last remaining portion of the family property, Basapa ceased to be a co parcener with Khubana and Revapa, and consequently took nothing by survivorship on their death their shares going to Gurpadapa On appeal to the High Court

[798] *Held*, that Basapa's rights to succeed to his brothers' shares were not affected by the sale of his interest in the last item of joint family property to Gurpadapa so long as the latter did not proceed to work out his rights by partition Basapa became entitled on the death of Khubana and Revapa to their respective shares

SECOND APPEAL from G Jacob, District Judge of Belgaum

Suit for redemption. The house in question belonged to three undivided brothers, *viz* Sidmalapa, Nijlingapa and Murgyapa On the 1st August 1845, Nijlingapa mortgaged the property with possession to one Shidlingapa

In 1878 all three brothers were dead and the house was the property of their sons, *viz*, Basapa (the son of Sidmalapa) Revapa (the son of Nijlingapa) and Khubana (the son of Murgyapa)

On the 28th September 1878 in execution of a decree obtained against Basapa alone the house was sold *eo nomine* (not merely the interest of Basapa therein) to one Gurpadapa Formal possession was given to the purchaser, but the actual possession remained with the abovenamed mortgagee (Shidlingapa) After this sale took place no other family property remained in which Basapa had an interest

Khubana died in 1880 or 1881 and Revapa died in 1883 No partition had previously been made between the cousins

On the 21st March 1891 Basapa sold his interest in the house to the plaintiff, and in 1892 the plaintiff filed this suit to redeem the mortgage of 1845 The defendants pleaded that the equity of redemption had been sold in 1878 to Gurpadapa, who had sold it to them

The Subordinate Judge held that Basapa's original one third share of the property had been sold in 1878 to Gurpadapa but that the family being undivided, the shares of Khubana and Revapa had subsequently come to Basapa by survivorship on their respective deaths that he had sold this two third share of the property to the plaintiff, who was thereupon entitled to redeem the mortgage He, therefore passed a decree for the plaintiff for redemption

[799] On appeal the Judge reversed the decree and dismissed the suit He held that when in 1878 Gurpadapa purchased Basapa's right title and interest, Basapa ceased to be a co parcener with Khubana and Revapa and was not in a position when they died to take their shares by survivorship and that their shares would go not to him but to Gurpadapa the purchaser

The following are extracts from his judgment —

"The plaintiff claims through Basapa The Subordinate Judge found that the house was purchased by Gurpadapa on 28th September 1878 (Exhibit 58), but held that as Basapa's cousins Revapa and Khubana, who were then alive, were not parties to the decree or to the execution proceedings, only Basapa's right, title and interest passed to the purchaser and finding that Basapa on the subsequent death of his cousins became entitled by survivorship to their shares, he held that plaintiff had acquired from him a two third share in the house, and was, therefore, as owner of share of the equity of redemption entitled to redeem the whole

"This decision cannot, I think, be supported The purchaser affected to buy the whole house, and seems to have been put in possession by the Court. The possession was not apparently physical, as there was a mortgagee in

possession, but the question would arise whether any title claimed through Basapa's cousins would not now be barred by limitation.

"However that may be, the purchaser would have stepped into Basapa's shoes. If there was more undivided property, and if this house might on partition have fallen within Basapa's share, the purchaser might have been entitled to claim the whole house under his purchase.

"If there was no other undivided property, Basapa, from the date of Gurpadapa's purchase of his right, title and interest, ceased to be a co-parcener with his cousins, and was not in a position when they subsequently died to take their shares by survivorship. Their shares would have gone not to him but to Gurpadapa. The learned pleader for the respondents, relies on the judgment in Civil Suit No. 761 of 1883, (Exhibit 62), as showing that Basapa and his cousins were undivided, and that there was other property.

"It may be noted here that as the appellant claimed under Gurpadapa, whose title through Basapa came into existence some years before that decision, he could not be bound by the decision in that suit, as the Subordinate Judge seemed to suppose. It may be added that Chanbasapa and Basapa appear to have been merely formal parties to that suit; and again the decision could not be taken as establishing that Revapa and Chanbasapa were undivided up to the time of their death.

"Then again although the house involved in that suit would appear originally to have formed part of the joint family property, it seems that no [800] contention was then raised that there was any other such property besides the house in dispute in their suit; and it appears that Basapa's interest in the other house had been sold under a decree in 1876, or two years before the purchase of this house by Gurpadapa.

"It is clear, therefore, that at the date of Gurpadapa's purchase, Basapa had no interest in any other joint family property, and there was, therefore, no foundation upon which his right to take his cousins' shares, on their death, by survivorship would be based; and he had, therefore, no interest in the equity of redemption which he could convey to the plaintiff, who has thus no right to sue for redemption."

The plaintiff preferred a second appeal.

*Dhondu P. Kirloskar*, for the Appellant (Plaintiff).

*Balaji A. Bhagvat*, for the Respondent (Defendant No. 2).

**Farran, C.J.** :—The facts of this case, which appear to have been either assumed or found by the District Judge though he has not precisely stated them, are these. The property in suit (a house) originally belonged to Nijlingapa and his brothers Sidmalapa and Murgyapa. The pleader for the respondent contends that the District Judge did not assume this original joint ownership though it was found by the Subordinate Judge, but we think that this is not so. If it were, Basapa, Nijlingapa's nephew, would have had no interest in the premises, and the District Judge certainly speaks of the family of Nijlingapa as joint and as owning joint family property.

On the 1st August 1845, Nijlingapa mortgaged the house with possession to Shidlingapa whom the defendants or some of them now represent. In 1878 the interests of the three brothers, whom we have named, were vested in their respective sons, Basapa, son of Sidmalapa, Revapa, son of Nijlingapa, and Khubana, son of Murgyapa. On the 28th of September in that year in execution of a decree obtained against Basapa alone the house was sold *eo nomine* and not the mere interest of Basapa therein. Formal paper possession was given to the purchaser Gurpadapa, but actual possession continued with the

mortgagee. This was the last item of family immoveable property in which Basapa was interested, his interest in the other house which had been similarly mortgaged having been sold in execution of a decree against him in 1876. The District Judge expressly says that, at the date of the [801] sale in 1878, Basapa had no interest in any other joint family property. Khubana died in 1880 or 1881 and Revapa died in or after 1883. There is no evidence of any partition having, in fact, been come to between the cousins before the respective deaths of Khubana and Revapa.

On the 28th March 1891, Basapa sold his interest in the house to the plaintiff, who in 1892 filed the present suit to redeem the mortgage upon it of 1845. The defendants set up a sale of the equity of redemption by Gurpadapa to them, but its execution has not been established, nor the *factum* of the sale to the satisfaction of the Subordinate Judge. The District Judge has not dealt with this part of the case. These are the facts.

The Subordinate Judge held that the family being undivided, the shares of Khubana and Revapa in the equity of redemption in the house in suit vested in Basapa by survivorship on their respective deaths, and that the plaintiff as Basapa's vendee was entitled to redeem the house. He relied upon the judgment in a suit to which the three brothers were parties in 1882 as showing that they were joint at that date, but the District Judge points out that the judgment is not evidence against Gurpadapa or the defendants and this would seem to be so.

The District Judge has held, in the alternative, that if Basapa was separate from his cousins in 1878, the house in suit passed to Gurpadapa by his purchase at the execution sale in 1878, and that the claims of Revapa and Khubana to it have become time-barred. This alternative would, no doubt, defeat the plaintiff's claim though not by the operation of the law of limitation, as Basapa's interest in the house passed to the purchaser and the interest of Khubana and Revapa in it would have centred on the death of the latter in his mother who is still living, and nothing would have passed to the divided brother Basapa. There is, however, no evidence, as we have said, of an actual division between Basapa and his cousins, and the original state of union must be presumed to have continued until the death of Revapa, unless the other alternative, upon which the District Judge relies, bars the right of Basapa by survivorship. This is the main question in the case.

[802] It is argued by the pleader for the respondent that the interest of not only Basapa, but also that of Revapa and Khubana, passed by the execution sale in 1878, but that is not so. The decree was against Basapa alone. It is not suggested that he was the manager of the undivided family or that the decree was passed against him as such. Though the house was sold under the decree, the interest of Basapa alone in it passed to the purchaser and not that of his cousins who were not parties to the proceedings

The District Judge is of opinion that as at the date of Gurpadapa's purchase Basapa had no interest in any other joint family property than the house in question there was no foundation upon which his right to take his cousins' shares on their deaths by survivorship could be based and so on their deaths their interests in the equity of redemption in the house did not pass to him by survivorship We have to consider whether this is the correct interpretation of the law. The District Judge has not cited any authority in support of his view.

No express authority on the subject is found in the Hindu law books. It is questionable whether an alienation by a co-parcener of his undivided interest in the family property was recognized by Hindu jurists. The legal mode of

breaking up the family union and joint ownership was by partition Even now in Bengal a voluntary alienation by a co parcener of his interest in joint family property is ineffectual — *Sadabart Parshad* v *Foolbash*, 12 Cal W R, F B 1 *Madho Parshad* v *Mehrban Singh* L R, 17 I A, 194 An alienation for value is, however, allowed in Bombay as in Madras and a sale in execution of a decree of a co parcener's interest in undivided family estate is valid in all the Presidencies —*Deendyal Lal* v *Jugdeep Narain* L R 4 I A, 247 *Suraj Bunsi* v *Sheo Proshad* L R 6 I A, 88 ' There can be little doubt that all such alienations whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family and the law as administered in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his right by means of a partition This is the view which the [803] Judicial Committee of the Privy Council took of the position of the purchaser of the property of a Hindu coparcener It seems to follow from it that the sale of a co parcener's interest in joint family property cannot affect the position of such co parcener in the joint family or alter the rights of the several coparceners *inter se* though it confers upon the purchaser the equity by means of a partition to obtain the benefit of his purchase and thus wholly or in part to break up the family union and joint estate Basappa's rights to succeed to his brothers' shares by survivorship were not therefore we think affected by the sale of his interest in the last item of joint family property to Gurpadappa so long as the purchaser did not proceed to work out his rights by partition

It remains to consider whether the interests of Revappa and Khubanna when they devolved upon Basappa devolved upon him for his own benefit or for the benefit of Gurpadappa The sale being a compulsory sale by the Court and not a sale by Basappa himself the principle laid down in *Hukmono Dalee* v *Ban Vithul Chuckerbutty* I L R 4 Cal 657 at p 682 and recognized by section 43 of the Transfer of Property Act (IV of 1882) does not apply to the case Is there then any general principles applicable to purchasers from a Hindu coparcener entitled to the share of his vendor as it existed at the date of the purchase or to that same as increased by subsequent accretions The question has been dealt with by the Madras High Court in *Rangasami* v *Krishnayyan* I L R 14 Mad 408 The share purchased in that case had diminished by the birth of new coparceners before partition took place and it was held that the purchaser was only entitled to the diminished share ascertained at the time of partition It was not necessary for the Full Bench to give an opinion upon the converse case and they gave none The referring Bench seem to consider that both should be governed by the same rule In *Suraj Bunsi* v *Sheo Proshad* (*supra*) the Privy Council have, in effect held that if the undivided coparcener whose share has been sold in execution dies before that share has been ascertained by partition the right of the purchaser nevertheless is not defeated Their Lordships ' think that at the time of [804] Adit Sahai's death the execution proceedings under which the Mouzah had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment creditor a valid charge upon the land to the extent of Adit Sahai's undivided share and interest therein which could not be defeated by his death before the actual sale ' If this be so, the effect of the execution sale was to transfer to the respondents the undivided share in 8 annas of Mouzah Bissumbhurpore which had formerly belonged to Adit Sahai in his lifetime, and their Lordships are of opinion that notwithstanding his death the respondents are entitled to work out the rights which they have thus acquired by means of a partition " (p 109)

The principle upon which their Lordships proceeded was deduced from the analogous case of a share in a partnership sold by a creditor of one of the partners It seems to their Lordship that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate and that it may be so applied without unduly in th m w t the p culiar *status* and rights of the co parceners i i such an e tate it the ri ht f the purchaser at the execution sale be limited to that of compelling the partition which his debtor might have compelled had he been so minded before th alienation of his share took place " (p 255)

The Madras Full Bench dealt with this aspect of the c c i the c c above referred to in the following manner As regards the contention that if the vendor dies before the purchaser effect a partition the purchaser will take nothing, it is also one which does not arise ... the ... us If it is necessary ... indicated above the answer is that the ... the purch ser at once ... comp t nt to ... subsequent death is an event which cannot ... has once vested and for the purpose of ... must be ... demands partition

The result of that v w ... would be th Gurupadapp ... purchase [805] by the death of Basapp ... death of ... a result which appears to us to be neither logical nor equitable

The decision in *Lalkrishna* v *Lashman* 11 Bom H C R p 7? points to the ... with the voluntary ... That decision was approved in *Madanna* v *Timma* 12 Bom H C Rep 138

During the course of the ... in *Kristnasamy* v *Krishnamyan* Mr Justice MUTTUSAMI AYYAR ... Full Bench ... vendor's right to a partition ... When a Court ... sells the interest of the judgment debtor it cannot ... that interest by the words which it uses ... half share ... the judgment debt ... whatever it may be ...

The conclusions to which we are led by the decisions and their result upon this branch of the law are these

(1) That the position of the purchaser of the interest of a Hindu co parcener in part or the whole of a joint estate is very anomalous It ... possible to work out his rights on an exact legal basis As ... in equity it must be worked out upon equitable principles

(2) That a Hindu co parcener by an alienation of his rights in part or the whole of the joint family property does not place the purchaser of ... rights in his own position does not confer ... him the *status* of an undivided Hindu See *Lalubhai Das* v *Sunder Das* I L R ... Such a purchaser is in *Vasudev Bhat* v *Venkatesh* 10 Bom H C Rep 139 ... becoming a sort of tenant in common with the co parceners ... as such to his distributive share upon a partition taking place (p 147)

[806] (3) That such an alienation before partition does not deprive the alienating co parcenor of his rights in the Hindu joint family If the alienation of his rights in each individual portion of the joint family property has not that effect,

the fact that it is the last item which is being alienated cannot alter the position. The purchaser of the last part of the property of the co-parcener cannot be in a better or worse position than the purchaser of the penultimate portion.

(4) That as the purchaser does not by the death of his vendor lose his right to a partition, so his position is not improved by the death of other co-parceners before partition.

(5) That he stands in no better position than his alienor and consequently like the latter is liable to have his share diminished before partition by the birth of other co-parceners if he stands by and does not insist on an immediate partition.

The result is that, in our opinion, upon the death of Revapa, Basapa was entitled to ⅓rd of the equity of redemption in the house in suit and he or his vendee is now entitled to redeem it.

We reverse the decree of the District Judge and remand the case for a retrial of the appeal. Costs, costs in the cause.

*Decree reversed and case remanded.*

NOTES

[The date of alienation determines the respective rights of the co-parceners and the alienee :—(1910) 21 M L. J , 246 ; (1902) 25 Mad , 690. See also (1900) 26 All., 106 ; (1900) 2 Bom. L. R., 197 ; (1903) 28 Bom., 201.]

[21 Bom 806]

## APPELLATE CIVIL

*The 5th March, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Pandu............Plaintiff

*versus*

Bhavdu.........  ..Defendant.*

*High Court—Extraordinary jurisdiction—Reference by Collector—Civil Procedure Code (Act XIV of 1882), Sec. 622—Practice—Procedure.*

The High Court will not interfere on a reference by the Collector with a Mamlatdar's Court's decision in a possessory suit. The aggrieved party can himself apply to the Court.

*Satu v Shivrambhat*, P. J., 1891, p. 52, followed.

REFERENCE from A. Cumine, Acting Collector of Khandesh, in a case decided by Mr. Ganesh Kashinath Lele, Mahalkari of petha Bhadgaum, under Bombay Act III of 1876 (Mamlatdar's Act).

[807] The reference was as follows :—

"The plaintiff Pandu valad Malhari, of kasba Bhadgaum, laid a plaint under Bombay Act III of 1876, alleging that he has only one way of getting to and from his house, *viz*., along a lane 3 cubits broad, that the defendant had recently placed a pipe in his (defendant's) house, that this pipe had never been there before, and that the water from the pipe fell on the plaintiff's body whenever he (the plaintiff) went to and from his (plaintiff's) house, and that great obstruction is thus caused to his (plaintiff's) going into or coming out from his (plaintiff's) house.

"The Mahalkari, Mr Ganesh Kashinath Lele, who has powers of a Mamlatdar under the Act, found in favour of the plaintiff, and ordered injunction

* Civil Reference No 1 of 1896

to issue to defendant 'to abstain from allowing the water from his house to fall on the premises or street used by the plaintiff.'

"The order seems irregular, as the lane was not land in plaintiff's possession, nor was it a road to a field: and even if it had been, it could hardly be said that water dropping from a pipe disturbed or obstructed plaintiff in using the lane.

"It is submitted, therefore, that the plaintiff might be called on to show cause why the Mahalkari's order should not be quashed."

There was no appearance for the parties.

**Farran, C. J.**:—Following the practice of this Court as laid down in *Satu* v. *Shivrambhat*, P. J., 1894, p. 52, we decline to interfere in this matter on the application of the Collector. The defendant, if he feels aggrieved, can himself apply to this Court.

*Interference declined.*

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## [808] APPELLATE CIVIL.

*The 9th March, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Krishna Ramaya Naik and others............(Original Defendants Nos. 2, 3 and 4) Appellants

*versus*

Vasudev Venkatesh Pai and others............(Original Plaintiffs and Defendants Nos. 1, 5 and 6) Respondents.*

Vasudev Venkatesh Pai............(Original Plaintiff) Appellant

*versus*

Mhasti and others............(Original Defendants) Respondents.†

*Hindu law—Joint family—Manager—Loan—Family purposes—Evidence—Debt contracted for family purposes—Evidence required where there has been a series of transactions—Decree—Mortgage bond in satisfaction of decree—Sanction of mortgage by Court—Civil Procedure Code (Act XIV of 1882), Sec. 257A.*

Although there is no presumption that moneys borrowed by the manager of a Hindu family are borrowed for family purposes, and a plaintiff seeking to make the family property liable must prove that the loans were contracted for the family, it is not incumbent on the plaintiff to show, in respect of each item in a long series of borrowings, the particular purpose for which it was borrowed. It will be sufficient for him to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects. And if the fair inference to be drawn from all the circumstances of the case leaves no doubt that the moneys were borrowed for family reasons, the plaintiff is entitled to succeed, although he is not able to indicate the particular purpose for which each sum has been borrowed

* Appeal, No. 101 of 1895.

† Second Appeal, No. 595 of 1894.

Where mortgage bonds were passed for debts due on decrees, and the execution of the bonds (which had been sanctioned by the Court) and the amounts for which they were passed were certified to the Court, and the Court recorded the adjustment without objection, and the decrees by reason of such certified and recorded adjustment became incapable of execution,

*Held*, that sufficient had been done by the Court to satisfy the requirements of section 257A of the Civil Procedure Code (Act XIV of 1882) although no formal sanction had been recorded.

APPEAL from the decision of Rao Bahadur R. R Gangolli, First Class Subordinate Judge of Karwar, and second appeal from the decision of E. H. Moscardi, Acting District Judge of Kanara, amending the decree of Rao Saheb H. S. Phadnis, Second Class Subordinate Judge of Kumta.

[809] The plaintiff's father Venkatesh Pai for many years was in the habit of lending money to the defendant's family. The ancestor of the defendant's family was one Thanna Naik, the elder, who had two sons, *viz.*, Ramaya and Ballyappa In the year 1845, Thanna Naik was the eldest male member in Ramaya's branch of the family. Ballyappa, however, was alive and he as well as Thanna Naik acted as manager of the joint family. Between 1845 and 1856 there were seven bonds executed to the plaintiff, all of which were duly satisfied Some of these bonds were signed by Thanna Naik and Ballyappa, some by Ballyappa alone, and some by Thanna Naik alone In 1857 or 1858 Ballyappa died and Thanna Naik became sole manager of the family. He passed a series of bonds in favour of the plaintiff from the year 1858 to 1873. These bonds were expressed to be for moneys borrowed "for my necessities."

In 1873 two bonds, one for Rs. 1,000 and one for Rs. 2,000, were passed by Thanna Naik to the plaintiff, consolidating the earlier bonds which had been given by him for sums borrowed for family purposes.

In 1878 the plaintiff obtained decrees upon these two bonds, one for Rs. 1,473-12-0 and costs Rs. 154-3-1 and one for Rs 2,431 and costs Rs. 230-9-11.

In execution of these decrees, some of the joint family property was attached, whereupon Thanna Naik applied for and obtained the permission of the Court to mortgage it, and on 14th July 1880, he executed two mortgage bonds in favour of the plaintiff. In each bond it was recited that Thanna Naik's borrowings had been for the use of the family. In them the amounts due under the above decrees were ascertained and stated and other loans were mentioned, and the total sum due to the plaintiff was stated to be Rs. 4,803-1-4. The two mortgage bonds were given to secure this sum. One was for Rs 3,800 payable in nineteen instalments of Rs. 200 each The other was for Rs 1,000 payable in four months.

On obtaining these mortgage bonds the plaintiff passed a receipt to the Court for payment of the two decrees. It was duly recorded by the Court and the legal proceedings thus terminated.

[810] In 1886 the plaintiff sued (Suit No. 560 of 1886, Second Appeal No 595 of 1894, the defendants, who were the son, the brother and the nephews of Thanna Naik, upon the aforesaid bond for Rs 1,000 to recover the said sum and Rs. 377-8-0 as interest, alleging that in executing the second bond Thanna Naik was acting as manager and that the joint family was liable.

Defendant No. 2, who was Thanna Naik's brother, denied his liability. He alleged that Thanna Naik was not the manager of the family and that the bond was passed in satisfaction of judgment-debts of Thanna Naik alone. He further contended that the bond being an agreement to give time for the satisfaction of a judgment-debt, and not having been sanctioned by the Court, was void under section 257 A of the Civil Procedure Code (Act XIV of 1882).

The Lower Appellate Court held that Thanna Naik was the manager of the joint family and that the greater portion and not all of the debts had been incurred for family purposes. He, therefore, passed a decree for the former part against all the defendants payable within six months, and in default of payment directed a sale of the mortgaged property ; and, in respect of the latter part of the debt, directed that the same should be recovered by attachment and sale of Thanna Naik's interest in the property in the hands of his son (defendant No. 1).

The plaintiff filed a second appeal to the High Court (No 595 of 1894).

While the above proceedings were pending, the plaintiff filed another suit against the defendants (son, brother and nephew) of Thanna Naik upon the other mortgage bond of the 14th July 1880, for Rs. 3,800 together with Rs. 4,118-4-0 interest. The brother of Thanna Naik pleaded the same defence as in the former suit. The lower Court passed a decree for the plaintiff.

The brother and nephews of Thanna Naik (defendants Nos. 2, 3 and 4) appealed to the High Court (No. 101 of 1895).

*Macpherson* (with *Shamrav Vitthal* and *Narayan G. Chandavarkar*) appeared for the Appellants (Defendants Nos 2 3, and 4).

**[811]** *Inverarity* (with *Ghanashām N. Nadkarni*) appeared for the Respondents (Plaintiffs, &c )

In Second Appeal No. 595 of 1894:

*Ghanasham N Nadkarni* appeared for the Appellant (Plaintiff).

*Dattatraya A. Idgunji* appeared for Respondent No. 1 (Defendant No. 1).

*Narayan G. Chandavarkar* appeared for Respondent No 2 (Defendant No. 2).

*Macpherson*: —The question is whether the debts in dispute were incurred by Thanna Naik for family purposes. If they were incurred for his private purposes the suit against us must fail. The burden of proving that the debt was a family debt lies on the plaintiff. Under the Hindu law there is no presumption that a debt was contracted for family purposes—*Soiru* v. *Narayanrao*, I. L. R, 18 Bom, 520. The oral as well as the documentary evidence in the case shows that the debt was not contracted for family purposes. (Evidence referred to.)

Another question also arises under section 257A of the Civil Procedure Code. The bonds in dispute were passed in adjustment of decrees, and they stipulate for the payment of larger amounts than the amounts of the decrees. The bonds were, no doubt, certified to the Court, but the sanction of the Court was not obtained for the larger sum. The bonds are, therefore, void.

*Inverarity* :—So far as the law is concerned, the Judge has looked at the case from a right point of view. There is no evidence in the case to show that the amounts borrowed from us by Thanna Naik on several occasions were ever used by him for his private purposes. Our family has been the *savkar* of defendants' family for many years. The dealings began in 1845. Ballyappa and Thanna Naik used to pass bonds to us. Subsequent to Ballyappa's death Thanna Naik alone executed the bonds. Another important circumstance is that no one has come forward to resist our claim except defendant No. 2

The bond was passed for a larger sum than that of the decree. But the bond accounts for the excess amount. One hundred **[812]** rupees were taken for the marriage of defendant No. 2 and two hundred rupees were taken for the payment of assessment. The bond was not a fraudulent arrangement between us and Thanna Naik. The whole of the money was borrowed for the purposes of the family. Under the circumstances of the case, Thanna Naik had a right to bind all defendants even without their consent.

Section 257A of the Civil Procedure Code is not applicable. There were two decrees and the principal amount of each decree carried interest which was calculated up to the date of the bond. But the bond being an instalment bond, further interest was stopped until default was made in the payment of an instalment. Therefore, the bond provided for the payment of a sum smaller than the amount that would have actually become due under the decree, while section 257A contemplates payment in excess of the amount of the decree. Even supposing that section 257A is applicable, then we submit that we have sufficiently complied with its provisions, because the adjustment was certified to the Court and we got its permission for the bond. The permission is tantamount to sanction. What was necessary was to certify the adjustment and we had done it. The bond is, therefore, not void—*Jhabar Mahomed* v *Modan Sonahar*, I. L. R., 11 Cal., 671, *Hukum Chand* v. *Taharunnessa*, I. L. R., 16 Cal., 504 ; *Sellamayyan* v. *Muthan*, I. L. R., 12 Mad., 61, *Juji* v. *Annai*, I. L. R., 17 Mad., 382.

*Macpherson*, in reply.

**Farran, C. J.**—The able and careful argument which has been addressed to us by counsel for the appellant in this case has failed to convince us that the conclusion which the Subordinate Judge has arrived at upon the facts is incorrect. It will be, therefore, sufficient if we state broadly the grounds upon which our judgment is based without entering upon minute details.

The suit is upon a bond (Exhibit 221) for Rs. 3,800 passed by one Thanna Naik, deceased, in favour of the father of the plaintiff. The subject of contest is whether it was given for family debts so as to bind the defendants collaterally related to Thanna Naik. His son, the defendant Mhasti, has not appeared **[813]** to dispute it, nor have the defendants Nos. 5 and 6, his somewhat distant cousins. The defendants Nos. 2, 3 and 4 respectively, the brother of Thanna Naik and his nephews, resist the plaintiffs' claim. We may for the sake of brevity refer to them as the defendants.

It is not now disputed that the family to which Thanna Naik belonged was joint in estate and continued so until 1882 The defendants originally alleged an earlier partition, but it was found against them by the Subordinate Judge upon such conclusive grounds that their counsel in appeal has felt himself unable to contest the finding. Two other Courts in a suit arising out of a bond, passed by Thanna Naik at the same time as that now sued upon, have also arrived at the same conclusion We, upon the same grounds as the Subordinate Judge, consider the union to be an established fact and deal with the case upon that basis.

The ancestor of the family was one Thanna Naik the elder. He had two sons Ramaya and Ballyappa The evidence in the case goes back to the year 1845. At that time Thanna Naik the younger was the eldest male member in Ramaya's branch of the family Ballyappa, the brother of Ramaya, was alive. He was blind, but notwithstanding his blindness, he as well as Thanna acted as a manager of the joint family. Between 1845 and 1856 there is a series of bonds in favour of the plaintiff's father, Venkatesh Pai (Exhibits 184, 185, 186, 187, 188, 182 and 183), which were all satisfied. Some of these were signed by Thanna Naik and Ballyappa jointly, some by Ballyappa alone, and some by Thanna Naik alone. The joint signatures to some of the bonds and the mutual connection between others show that they all formed one connected series ; and their terms and the fact that the two family managers of different branches joined in raising the loans establish with a considerable degree of certainty that the bonds were executed for family purposes. This was indeed practically conceded in argument. The bonds show that the family was in the habit of borrowing money in compara-

tively small sums to meet family exigencies; and that it was not usually convenient to pay the sums so borrowed is proved by the execution of the instalment bond, Exhibit 182, and by the sum [814] of Rs. 350 being borrowed on the same day (the 14th November 1855) to pay the first instalment due under Exhibit 182 Ballyappa died shortly after this time in 1857 or 1858. The evidence shows that Thanna Naik then became the sole manager of the family. He passed a series of bonds in favour of the plaintiff's father ranging from the year 1858 to the year 1873 (Exhibits 178, 179, 181, 180, 177, 176, 174 and 173). The case hinges on the determination of the question whether these bonds were given for debts contracted by Thanna Naik for family or his own private purposes.

The bonds in this series, when not renewed bonds, for the most are expressed to have been passed to recover money borrowed "for my necessities." This change of phraseology has been much relied on by counsel for the appellant. It does not, when all the circumstances are taken into consideration, appear to us to necessarily indicate a change in the nature of the borrowings.

Coincident in point of time with the use of this expression the management had devolved upon Thanna Naik alone. This affords a reason for a change of language. The mention of "necessities" in the bonds indicates, we think, in the mind of the lender an intention to charge some one other than the borrower himself. It may be that the idea was to charge his son, but the other circumstances to which we now refer appear rather to negative that idea.

It is improbable that a family which had been regularly borrowing until 1855, and which in that year was involved in debt, should have suddenly ceased the practice altogether and needed no more advances coincidently with a time when its manager began to borrow on his own account. The terms of the bonds, Exhibits 178, 179, 181 and of the endorsement on Exhibits 182 and 177 show that the parties to these instruments treated the new series beginning in 1858 as a mere continuation of the old series ending about that time. There is nothing indeed to distinguish the two series except the change of language which may be otherwise accounted for The accounts were all adjusted on 9th November 1861, when a bond for Rs 3,000 was given for the consolidated debt (Exhibit 177).

[815] Again, Exhibit 176, which is a bond for Rs. 1,650 borrowed for "the cloth trade," which is shown to be a family business, amalgamates that sum with the previous borrowings consolidated in Exhibit 177. This does not, of course, show that the previous borrowings were for family purposes, but it proves that the parties dealt with the whole account on the same footing, not distinguishing the money borrowed "for my necessity" from those which must have been borrowed for family purposes. The whole series ultimately culminated in the bonds, Exhibits 173 and 174, passed in 1873 for Rs. 1,000 and Rs. 2,000 respectively.

We think, therefore, that the whole series of bonds from 1845 to 1873 must be treated, notwithstanding the change of language in 1858, as one series, and that the fact that the earlier items in that series were borrowed for family purposes affords some inference that the whole series stands on the same footing.

Admitting, as laid down in *Sennu* v. *Narayanrao*, I. L R., 18 Bom, 520, that there is no presumption that moneys borrowed by a manager are borrowed for family purposes, and that a plaintiff seeking to make the family property liable must prove that the loans were contracted for the family, we do not consider that it is incumbent on the plaintiff to show, in respect of each item in a long series of borrowings, the particular purpose for which it was borrowed. If it were, it would be impossible for a Hindu saukar keeping a running account

with the manager of a family to succeed in proving his account against the family. It will, we apprehend, be sufficient for the creditor to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects. And if the fair inference to be drawn from all the circumstances of the case leaves no doubt in the mind of the Court that the moneys were borrowed for family reasons, the plaintiff is entitled to succeed although he is not able to indicate the particular purpose for which each sum has been borrowed. This is the view adopted by the Subordinate Judge and it is in our opinion the correct one.

[816] Now it is clear that the family expenses and necessities down to 1858 were not met by their current income.

The oral evidence given for the plaintiffs is not of a conclusive character. The witnesses are Narayan Bab Shenvi (Exhibit 33), Pursaya Bharmaya (Exhibit 46), Krishna Bab Shanbhog (Exhibit 49), Narayan Nagappa (Exhibit 52), Divapayya Thanlapayya (Exhibit 54) and Timappa Govind (Exhibit 121) who, however, establish that during the management of Thanna Naik a new family house was built at considerable expense, the Ghasni land of the family was improved and two or three marriages were performed, and that a family trade in betel nuts and cloth was carried on. Lachmayya Devu Shanbog (Exhibit 122) says that he knows that money was advanced by the plaintiff's father to Thanna Naik on several occasions for the payment of assessment or family purposes including the cloth trade. There is no evidence on the other side to show that the moneys, which formed the consideration for the consolidating bonds (Exhibits 173 and 174) were borrowed for the private purposes of Thanna Naik. It was suggested that they may have been borrowed for the prostitute Jayu with whom Thanna Naik appears to have consorted, but there does not appear to be any real basis for that suggestion. The case really made by the defendants and their witnesses was that there had been a separation between Thanna Naik and the rest of the family which, as we have said, is quite untenable. The evidence we think gives rise to an exceedingly strong inference or presumption that the bonds, Exhibits 173 and 174 were passed to consolidate earlier bonds given to secure sums borrowed by Thanna Naik for family purposes.

We proceed to consider the subsequent occurrences in the life time of Thanna Naik. He died about 1881. Nothing had been paid in respect of the bonds in 1878, and in that year the plaintiff's father Venkatesh Pai filed two suits (being Suits Nos. 373 and 374 of 1878) upon them against Thanna Naik alone and on the 10th December 1878, he obtained decrees in those suits (Exhibits 220 and 212) that in Suit No. 373 of 1878 was for Rs. 1,473-12-0 and costs Rs. 154-3-4, with interest on the principal sum at the rate of 9 per cent. per annum; that in Suit [817] No. 374 of 1878 was for Rs. 2,431 and costs Rs. 230-9-11 and interest on the principal amount at 6 per cent. per annum.

In execution of these decrees, Venkatesh Pai attached some property belonging to the joint family. On the 17th April 1880, Krishna Ramaya made an application (Exhibit 103) to raise the attachment, alleging that he and Thanna Naik and Subraya were joint owners of the attached property which was the self-acquisition of Ramaya, their father, and that the decree was against the defendant Thanna Naik alone, and that he (the applicant) was not liable, nor was his share. A similar application (Exhibit 104) was made by the other brother Subraya. Thanna Naik was arrested in execution of the decrees. On the 30th June 1880, Thanna Naik, stating that Venkatesh Pai's attachment and that the auction sale of the property would deprive his family of support

and that he had requested the plaintiff and had resolved to mortgage it with instalments, applied for permission to do so (Exhibit 158). This was granted the same day, Venkatesh Pai consenting (Exhibit 161). Similar applications were made in both suits. On the 3rd of July an order was passed upon the attachment application of Krishna Ramaya as follows :--" Plaintiff has given up the attachment. Therefore there is no occasion for this application. The application is struck off" (Exhibit 103). A similar order was passed upon the application of Subraya, which was also struck off, but with costs (Exhibit 104).

On the 14th July 1880, Thanna Naik executed two mortgage bonds in favour of Venkatesh Pai. In each of these bonds it is recited that the borrowings of Thanna Naik had been for the use of the family. In them the accounts under the decrees are made up, the interest being calculated, and from the total amount Rs. 200 already paid by a transfer are deducted. To the balance Rs. 100, said to be borrowed for the expenses of the marriage of Krishna, and Rs. 200, said to be borrowed to pay assessment, are added and the total Rs. 4,803-1-4 is arrived at. Rs. 3-1-4 are given up. The mortgage bonds are passed to secure the balance. One is for Rs 3 800 payable in 19 instalments of Rs. 200 each. In default of payment of the instalments this whole was made payable with interest at 9 per cent. per annum (Exhibit 224) [818] The other bond is for Rs. 1,000 payable in four months with interest at the rate of 6 per cent. per annum. The same lands are again mortgaged to secure payment of this sum (Exhibit 170). Both mortgages are without possession.

On obtaining these mortgages, Venkatesh Pai on the same day passed a receipt to the Court for payment of the two decrees. It mentioned the fact of the mortgages and their amount and was recorded by the Court (Exhibit 159). The legal proceedings thus came to an end. By the appellants we are asked to regard these two mortgages (Exhibits 224 and 170) as frauds by Thanna Naik on his brothers Krishna and Subraya. Ballyappa's branch of the family does not appear to have taken any part in the matter, possibly they were not interested in the attached lands, as Krishna's application asserts that the lands were self-acquired by Ramaya. If we come, as we have done, to the conclusion that there is a strong presumption that the earlier bonds passed by Thanna Naik were for family purposes, there is no foundation for attributing any fraud to Thanna Naik in the transaction. If there was, in fact, no fraud there is no reason for believing that the younger brothers were not fully aware of what was being done by their elder brother Thanna Naik Subraya was living with Thanna Naik, and the marriage of Krishna had just been arranged for by Thanna It is difficult to believe that they did not, in fact, know of it. If they were prosecuting their attachment applications it is almost incredible that they were not made aware of the application of Thanna Naik to the Court to mortgage the attached lands, seeing that it was the granting of that application which put an end to the attachment and made their own applications unnecessary. It is asked why in that case they did not join in the mortgages. Venkatesh is dead and the reasons for their not doing so can only be conjectural. The inveterate practice of Venkatesh to deal only with the managing member of the family may possibly account for it. Even after its date, bonds continued to be passed by Thanna alone. See Exhibits 165 to 169 and 241, which are the decrees passed against the whole family upon bonds signed in this manner between 1882 and 1884. On the whole we have come to the conclusion that the mortgages [819] are sufficiently proved to have been given for family purposes and that they are binding upon the family.

In the suit filed upon the bond for Rs. 1,000 the District Judge of Kanara has, upon a review of the evidence differing from the Subordinate Judge of Kumta, come to a different conclusion except as to the bond for Rs. 1,650

(Exhibit 176). His judgment is the subject of Second Appeal No. 595 of 1894. We must accept his finding, though it does not accord with our own view, as it is not open to us to deal with it upon the facts in second appeal. The arguments urged upon us by the appellants do not disclose any errors of law on the part of the District Judge which would warrant our interference with his decision upon the facts.

It remains to consider the objections to the mortgages founded upon the provisions of section 257A of the Civil Procedure Code which are common to both appeals. The adjustment of the decree by the bonds having been certified to the Court, no difficulty arises on that score, nor could any arise since the alteration in the wording of section 258 of the Civil Procedure Code—*Swamirao* v. *Kashinath*, I. L. R., 15 Bom., 419. The provisions of section 257A occasion some difficulty. A long series of decisions in this Court has interpreted the section as applicable to agreements which operate to extinguish the original decree. They are all (except *Vishnu* v. *Hur Patel*, I. L. R., 12 Bom., 499) mentioned in *Swamirao* v. *Kashinath* (*supra*) and are not dissented from in *Bank of Bengal* v. *Vyabhoy Gangji*, I. L. R., 16 Bom., 618, though in the former of these cases, SARGENT, C.J., speaks somewhat hesitatingly as to their binding force since the Legislature has declared its purpose by the alteration made in the 258th section of the Civil Procedure Code. The Calcutta High Court, on the other hand, in *Jhabar Mahomed* v. *Modan Sonahar*, I. L. R., 11 Cal., 671, after a consideration of the Bombay authorities has, agreeing with the Allahabad High Court, held that the provisions of section 257A are only intended to prevent any binding agreement between judgment-debtors and judgment-creditors for extending the time for enforcing decrees by execution without consideration and without the sanction of the Court, a [820] ruling which would equally apply to agreements falling within the 2nd clause of the section and which has been so applied in *Hukum Chand* v. *Taharunnessa Bibi*, I. L. R., 16 Cal., 504. These rulings have been followed in the Madras High Court—*Sellamayyan* v. *Muthan*, I. L R., 12 Mad., 61, and *Juji* v. *Annai*, I L. R, 17 Mad., 382. There is thus a consensus of opinion in all the other High Courts that the Legislature in framing the Code of Civil Procedure did not intend to effect, and did not, therefore, effect any change in the substantive law relating to the consideration for agreements, an opinion which by the alteration of section 258 the Legislature would seem to countenance. When it again comes before this Court it may be proper to refer it for consideration to a Full Bench. The question is of the highest importance, and it is one upon which it is desirable that there should be uniformity in the law.

In the present case as the execution of the mortgages (which had been sanctioned by the Court) and the amounts for which they were passed, which in the aggregate exceeded the amount of the decrees, were certified to the Court, and the Court recorded the adjustment without objection, and as the decrees by reason of such certified and recorded adjustment have become incapable of execution, we think, as held by the lower Courts, that sufficient has been done by the Court to satisfy the requirements of section 257A. The bonds are so eminently reasonable that the recording of a formal sanction was possibly deemed unnecessary. We, for the reasons which we have given, confirm both decrees with costs.

*Decrees confirmed.*

NOTES.

[1. As regards the liability of co-parceners other than the actual executants, see also (1907) 9 Bom. L.R., 274; (1905) 9 C.W.N., 922; (1902) 4 Bom. L.R., 587; (1911) 34 All., 135.

2. Bonds in satisfaction of the decrees were held to have extinguished the decree in (1900) 25 Bom., 252.]

## [821] APPELLATE CIVIL.

*The 9th March. 1896*

PRESENT

SIR C FARRAN, KT., CHIEF JUSTICE, AND MR JUSTICE PARSONS

Moro Mahadev and others . . .... .(Original Defendants) Appellants

*versus*

Anant Bhimaji. . . .(Original Plaintiff) Respondent *

*Vatan—Kulkarni vatan*—Joshi vritti—*Purchaser of share in—Obstruction in performance of duties—Injunction —Specific Relief Act* (*I of 1877*), *Sec. 54*

The plaintiff, who had bought a share in a kulkarni vatan and *joshi vritti*, was obstructed by the defendants in the performance of his duties

*Held*, that he was entitled to an injunction against the defendant.

SECOND APPEAL from the decision of A Steward, District Judge of Ahmednagar, confirming the decree of Rao Bahadur G A Mankar, First Class Subordinate Judge.

The plaintiff sued for a declaration against the defendants that he was entitled to enjoy the profits every fourth year of a fourth share in the kulkarni vatan and *joshi vritti* of the village of Nimbolak which he alleged he had purchased from one Rango Ganesh, and for a perpetual injunction against the defendants, alleging that he had been obstructed by them in officiating and receiving the fees at certain marriages, the consequence of which was that the *yajamans* paid the fees to neither but were deposited with third parties

The Subordinate Judge granted the injunction prayed for.

On appeal by the defendants the Judge confirmed the decree

The defendants preferred a second appeal

*Gangaram B Rele*, for the Appellants (Defendants) - This is not a case in which an injunction should be granted If we have caused obstruction to the plaintiff's enjoyment, he is, at most, entitled to recover damages from us The plaintiff is not our co sharer He has purchased the right, title and interest of one of our co-sharers Some of the *yajamans* may not wish that the plaintiff, who is not a member of our family, should officiate at ceremonies at their houses, but they would be compelled to accept him if an injunction be granted—*Raja* v *Krishnabhat*, I L R, 3 Bom, 232

[822] *Balaji A Bhagavat*, for the Respondent (Plaintiff) —Under section 54 (*e*) of the Specific Relief Act we are entitled to sue for an injunction A *vritti* can be sold—*Mancharam* v *Pranshankar*, I L R, 6 Bom 298 There is nothing in the present case to show that the *yajamans* are unwilling to allow us to officiate

**Parsons, J** —This case is distinguishable from *Raja* v *Krishnabhat*, I L R, 3 Bom, 232 There the Court would not force a joshi on unwilling *yajamans* The *yajamans* here were employing and willing to employ the plaintiff, but the defendants obstructed him in the performance of his duties. We think that under section 54 of the Specific Relief Act he is entitled to an injunction under these circumstances Decree confirmed with costs

*Decree confirmed*

* Second Appeal, No 130 of 1895

[21 Bom 823]

## APPELLATE CIVIL

*The 24th March, 1896.*

PRESENT

SIR C FARRAN, KT, CHIEF JUSTICE, AND MR JUSTICE FULTON

Gangaram . (Original Defendant) Applicant

*versus*

Punamchand Nathuram .. (Original Plaintiff) Opponent *

*Construction—Acts relating to procedure—Retrospective operation of—Practice—Procedure—Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec 73† —Act VI of 1895 ‡*

In this suit the Subordinate Judge of Karmala held that the defendant was an agriculturist and that therefore the suit could not be maintained without a certificate under section 47 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) Under section 73 of that Act the finding of the Subordinate Judge upon the point was final The plaintiff appealed the appeal including other points of objection to the decree as well as that with regard to the status of the defendant Pending his appeal Act VI of 1895 was passed which repealed section 73 At the hearing of the appeal the Judge considered the question of the status of the defendant and held that he was not an agriculturist overruling the decision of the Subordinate Judge upon that point

[823] *Held* that the Judge in appeal was right in entertaining the question The provisions of Act VI of 1895 altered the procedure and were therefore applicable to proceedings already commenced at the time of their enactment

*Held* also that even if the General Clauses Act (I of 1868) section 6 applied to Acts not conferring rights but simply concerning judicial procedure it could not affect the present case, as the repeal is not one of the Act itself but only of a section in the same relating to procedure

APPLICATION under the extraordinary jurisdiction of the High Court (sections 586 and 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur Narhar Gadadhar Phadke First Class Subordinate Judge of Sholapur with appellate powers

The plaintiff sued to recover rupees one hundred and forty, the balance including interest due on a current account

The defendant took a preliminary objection that he was an agriculturist and therefore, the suit could not be maintained without a conciliator's certificate under section 47 of the Dekkhan Agriculturists' Relief Act

The Subordinate Judge allowed the defendant's plea and dismissed the suit He rejected the plaintiff s application for time to produce a conciliator s certificate

The plaintiff appealed, alleging (*inter alia*) that the defendant was not an agriculturist

On the 29th August 1895, the Judge reversed the decree He held that the defendant was not an agriculturist, and partially allowed the plaintiff's claim The following is an extract under disposal judgment —

' The present suit was file[d] ... 1893, and was disposed of on 8th March 1894 The a[ppeal] ... 10th April 1894

* Application N[o] ... 1896 under the Extraordinary Jurisdiction ... Agriculturists' Relief Act (Act XVII of 1879)—

† Section 73 of the Dek[khan] ... Court of First Instance, that any person is or is not an

73 The decision of ... [pur]poses of this Act, be final

agriculturist, shall for the ... 1895—

‡ Amending Act VI o[f] ...

Sections 8, 9, 14, 1[8], 19 and 73 are hereby repealed.

The appeal embodies other grounds for it than that in respect of the status of the defendant as an agriculturist or otherwise. An appeal on these grounds evidently lay and lies even now. The Dekkhan Agriculturists' Relief Acts, 1879, 1886, are amended by Act VI of 1895. This Act repeals section 73 of the Act of 1879. The Amending Act came into force on the 1st May last. Section 73 made the decision of any Court of First Instance that any person is or is not an agriculturist final for the purposes of the Act In the present case, the Karmala Court has held the defendant to be an agriculturist and dismissed the suit for want of a conciliator's certificate. " The claim here was for Rs. 140 [824] and was heard by a Subordinate Judge of the second class, and no consent of the parties was obtained by the lower Court for the application of the provisions of Chapter II of the Act to the same. An appeal, therefore, already lay from the decree of the lower Court on grounds other than that in respect of the status of the defendant, as I have said above.

"It is a general principle of law that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. The repeal of section 73 deprives the decision of the lower Court in the matter of status of its finality from the 1st May last. The present suit was decided in the beginning of 1894, but it is not *res judicata*, since an appeal is made from the decree of the lower Court therein When the judgment of the Court of First Instance upon a particular issue is appealed against, that judgment ceases to be *res judicata* and becomes *res sub judice*."

The defendant applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling on the plaintiff to show cause why the decision of the Judge should not be set aside on the ground (*inter alia*) that the Judge erred in holding that the finding of the first Court with respect to the status of the defendant as an agriculturist could be questioned in appeal

*Trimbak R. Kotwal* for the Applicant (Defendant), in support of the rule:—Under section 73 of the Dekkhan Agriculturists' Relief Act the finding of the first Court, that the defendant was an agriculturist, was final and could not be appealed against The Judge was, therefore, wrong in entertaining the appeal When the appeal was presented to the Judge, the Amending Act had not come into force. It was wrong to re-open the question of the defendant's status. The Amending Act came into force pending the appeal and before it was decided. The Act is not retrospective and does not apply to pending proceedings—section 6 of the General Clauses Act (I of 1868). The principles on which a particular enactment should be considered as retrospective or otherwise are given in *In Re Ratansi Kalianji*, I. L. R., 2 Bom., 148.

*Mahadeo B. Chaubal*, for the Opponent (Plaintiff) to show cause.—The plaintiff had a right to appeal against the decree. The amount of his claim was more than one hundred rupees. The repeal of section 73 by the Amending Act did not confer upon the appellate Court any special jurisdiction with respect to the present case. The appeal came on in ordinary course and the [825] Judge took into consideration the change then made by the repeal of section 73. The repeal merely removed the restriction on the jurisdiction of the appellate Court. This is purely a matter of procedure and does not involve any question as to any substantial right—Maxwell on Statutes, pp. 269, 270; *Shivram* v. *Kondiba*, I. L. R., 8 Bom., 340, *Shamlal* v *Hirachand*, I. L R., 10 Bom., 367; *Anund Chunder* v. *Nitai Bhoomij*, I L.R, 16 Cal, 429; *Kondi* v. *Gunda*, P. J., 1882, p. 156; *Padgaya* v. *Baji Babaji*, I. L. R., 11 Bom, 469; *Framji* v. *Hormusji*, 3 Bom. H. C. Rep., O. C. J., 49; *Ratanchand* v. *Hanmantrao*, 6 Bom. H. C. Rep., A. C. J., 166.

The order of the Subordinate Judge rejecting our application for time to produce a conciliator's certificate was wrong. Thus on this ground also the decree was appealable. The Subordinate Judge ought to have adjourned the hearing for the production of a conciliator's certificate—*Sayad Nyamtula* v. *Nana*, P. J., 1888, p. 221; *Vyankaji* v. *Sarjerav*, P. J., 1891, p. 276; *Nawab Muhammad Azmat Ali Khan* v. *Mussumat Lalli Begum*, L. R., 9 In. App., 8.

**Farran, C. J.**:—We are of opinion that the rule in this case should be discharged.

It has been argued that the District Court had no jurisdiction to entertain an appeal on the question whether the applicant, who was the defendant in the suit, was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act. When the appeal against the decree of the Subordinate Judge was filed in the Court of the District Judge, section 73 of Act XVII of 1879 made the decision of the Subordinate Judge, that the defendant was an agriculturist for the purposes of the Act, final. Pending the appeal that section was repealed by Act VI of 1895, and when the appeal came on for hearing, there being no longer any restriction upon the jurisdiction of the District Court to enter into the question whether the defendant was an agriculturist or not, the District Court entertained it and came to the conclusion that he was not, thus overruling the decision of the Subordinate Judge upon that point. This course was in accordance with the [826] general rule of law that statutes which effect changes in procedure are in their operation, unless the contrary appears on the face of the enactment, retroactive in the sense that the provisions of such statutes are applicable to proceedings already commenced at the time of their enactment—*In Re Ratansi Kalianji*, I. L. R., 2 Bom., 148. This rule has already been recognised by this Court in the case of earlier changes in the same Act. An instance will be found in *Shivram* v *Kondiba*, I. L. R., 8 Bom., 340. And the same principle has been observed in the case of *Anund Chunder* v. *Nitai Bhoomij*, I. L. R, 16 Cal., 429, recently decided in the High Court of Calcutta There the circumstances were very similar to those in the present case. An order had been made on 7th July 1888, from which no appeal lay. Act VII of 1888, which came into force on the 1st July 1888, gave an appeal from the order. The Court held " the general principle of law to be applicable that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made." See *Attorney-General* v. *Sillem*, 10 H. L. Ca., 704.

It is, however, argued that a different rule must be applied in this case by reason of the provisions of section 6 of the General Clauses Act (Act I of 1868) which enacts that " the repeal of any Statute, Act or Regulation shall not affect anything done * * * or any proceedings commenced before the repealing Act shall have come into operation " It may perhaps be doubted whether that section is not confined in its operation to proceedings commenced under an Act conferring a right which has been repealed pending the action to enforce it,—as for example an Act enabling an informer to sue for a penalty,—and whether it is intended to contravene or interfere with the long established principle of law that statutes concerned with judicial procedure, unless such operation be excluded, do affect judicial proceedings pending at the time such statutes come into force, but however that may be, the answer to the argument appears to us to be that the Dekkhan Agriculturists' Relief Act has not been repealed [827] by Act VI of 1895. It is still in full operation. An alteration only has by the latter Act been effected in the procedure under it by doing away with the finality which section 73 imposed upon the finding of a Court of First Instance as to the defendant being an agriculturist. The repeal of a section in

an Act relating to procedure does not appear to us to be the repeal of an Act within the meaning of section 6 of the General Clauses Act. If the change in procedure had been effected by substituting "open to appeal," for "final" in section 73 the argument based on the General Clauses Act would have no application, but every substitution involves *pro tanto* a repeal. We think that the mode adopted by the Legislature in effecting the change of procedure does not affect the result. Rule discharged with costs.

*Rule discharged.*

**NOTES**

**[See also (1910) 7 I. C. 11, (1901) P. L. R., 158.]**

**[21 Bom. 827]**

## APPELLATE CIVIL

### FULL BENCH

*The 31st March, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Ibrahimbhai .......(Original Plaintiff) Appellant

*versus*

Fletcher and others ....... (Original Defendants) Respondents.*

*Vendor and purchaser—Contract to purchase—Construction—Good title—Property in cantonment—Rights of Government in such property—Contract making no mention of Government rights—Knowledge of purchaser—Suit by purchaser for specific performance or return of earnest money—Earnest money when repayable—Amendment of plaint so as to claim refund of earnest money—Practice—Procedure.*

On October 12th, 1887 the first defendant executed the following agreement in favour of plaintiff with respect to certain property situated in the Poona Cantonment:— "I have agreed to sell to you ........ both my bungalows described above including the sites and buildings together with the compounds [828] rooms for servants, stables, out houses ...... and I have this day received from you Rs. 5,000 as earnest money. After the sale deed in regard to the said bungalows is executed I will get them transferred to your name in the Brigade Major's office." On the same day the first defendant received from the plaintiff Rs. 5,000 as earnest-money. A notice of the proposed sale was published in the newspapers, upon which the Poona Cantonment Committee wrote to the plaintiff stating that Government possessed certain rights over the property. Plaintiff then demanded that the first defendant should obtain from Government and transfer to him a full and complete title in the property. The defendant refused and prepared a draft deed transferring the ordinary cantonment tenure which was a mere occupancy and sent it to plaintiff. Plaintiff declined to accept it and brought this suit to compel the first defendant to execute a deed transferring to him a full and complete title for possession of the property and for rent and damages.

Although apparently not arising upon the pleadings, an issue was raised by the parties as to whether by his conduct the plaintiff had forfeited his right to have the earnest money returned to him. This issue was, however, struck out at the trial by the Subordinate Judge,

* Appeal No. 26 of 1898 under section 15 of the Amended Letters Patent.

who also refused to allow the plaint to be amended by inserting a claim for the repayment of the earnest-money, on the ground that it would change the character of the suit from being one based on the contract of the 12th October 1887, into a suit based on the fact that there had never been a contract at all between the parties. He dismissed the suit. The plaintiff appealed and contended that the contract was that the defendant should give an absolute title to the property, and that as he was unable to carry out this contract he should return the earnest-money to the plaintiff.

*Held* (1), upon the evidence (CANDY, J., *dissentiente*) that the knowledge that the property in question was held upon cantonment tenure was not brought home to the plaintiff, and that the Court could not impute such knowledge to him; that the terms of the contract itself were calculated to induce the plaintiff to believe that the defendant was selling not a mere revocable license to occupy the land, but the land itself. The defendant agreed to sell the land, and having done so the *onus* lay upon him to show not only that he intended to sell only cantonment occupancy rights, but also that the plaintiff understood that he was purchasing the same.

(2) That the defendant being in default, and being unable to give the title contracted for, should return the earnest-money to the plaintiff.

*Held* by the Full Bench that the amendment of the plaint so as to make it include a claim for the refund of the earnest-money ought to have been allowed, although not asked for until a late stage of the case.

The right to specific performance of a contract, or, in the alternative, to a return of the earnest-money should be determined in one and the same suit, [829] and the plaintiff failing to obtain a decree for specific performance should not be driven to a separate suit to recover back his deposit, if he is entitled to relief in that form.

The circumstance that a purchaser is not entitled to specific performance by no means conclusive against his right to a return of the deposit. If, having regard to the terms of the contract, he is justified in refusing to accept the title, which the vendor is able to give, he is entitled to a refund of the deposit.

APPEAL under section 15 of the Amended Letters Patent against the decision of CANDY and FULTON, JJ., confirming the decree of Rao Bahadur Chunilal M., First Class Subordinate Judge of Poona, under section 5 of the Civil Procedure Code (Act XIV of 1882).

Suit by purchaser against vendor for specific performance of contract.

On the 12th October 1887, the plaintiff contracted to purchase from the first defendant two bungalows (Nos. 27 and 28) with the land attached thereto, situate in the cantonment at Poona. The contract after describing the situation of the houses was as follows:—

"I have agreed to sell to you * * * both my bungalows described above, including the sites and buildings (*jagia imlya sahit*) together with the compounds, rooms for servants, stables, out-houses . . . and I have this day received from you Rs. 5,000 as earnest-money. You should put a notification regarding the above transaction in respect of the above said bungalows in Bombay or Poona newspapers, and after having satisfied yourself that nobody has right or claim over both the above mentioned bungalows and other things (*saman*) you should, at my expense, within one month get the deed of sale executed by me and registered, and pay me the balance. Should you fail to do so, you will have no claim whatever to the amount of the earnest-money which you paid me this day; but if I do not satisfy you within the aforesaid time that nobody has any right or claim over the above-mentioned estate, and if I object to executing to you the sale deed, I will continue to pay you fair rent for both houses until the sale deed is executed and the houses are put into your possession. After the sale deed in regard to the said bungalows is executed I will get them transferred to your name in the Brigade-Major's office."

On the same day the plaintiff paid the first defendant Rs. 5,000 earnest-money for which the latter duly executed a receipt.

The site and compounds of the bungalows in question were Government property and were situate, as above stated, within the [830] cantonment at Poona The limits of this cantonment were fixed in March 1827 By Regulation XXII of 1827 (section 21) it was directed that private property was not to be included within cantonment limits, but the direction did not appear to have been practicable in all cases Bombay Act III of 1867, section 11, recognises the fact that lands, which belong to private individuals may be included within cantonments By rules framed under this latter Act, the Military authorities were prohibited from allowing other than permissive occupation of Government land within the said cantonments

Permission to occupy the lands in question was granted by the Military authorities to Colonel Waddington (defendant No 3), as to No 27 in the year 1863, and as to No 28 in 1871, the permission in each case bearing the following note, *viz* "Permission to occupy ground in a military cantonment confers no proprietary right" Colonel Waddington erected the bungalows on the land and sold the land and bungalows with the furniture to the first defendant Fletcher in 1885

This was the position when Fletcher entered into the above contract with the plaintiff, save that he had charged the property with the payment of certain sums to his wife (defendant No 2) and to defendants Nos 3 and 4 The contract was signed and the earnest money paid to the first defendant at the office of the plaintiff's pleader who was present.

The contract provided that the plaintiff (purchaser) was to notify the contract in the public newspapers A notice was accordingly drawn up by the plaintiff's pleader and approved by Fletcher, dated 17th October 1887, and was duly published It described the property to be sold as "all that piece or parcel of land or ground with the messuage, tenements or dwelling-houses standing thereon, &c' The result of the publication of this notice was a letter from the Cantonment Committee to the plaintiff's pleader pointing out that Government was the owner of the land and that it could not be sold by the first defendant, and that the plaintiff would purchase at his own risk

The plaintiff's pleader sent the defendant a copy of this letter whereupon the defendant wrote to him as follows -

[831] "The letter contains nothing new, and does not seem to me to call for any action on my part or on yours It is merely equivalent to reminding you that the houses are in cantonment, and that in common with all others so situated their site is held from Government on the usual cantonment tenure This of course you were well aware of before My title is exactly the same as that of other house-owners in cantonment limits, and no one is better able than yourself to advise Mr Ibrahimbhai Hasan as to the value "

The plaintiff's pleader sent the following letter in reply —

"In reply to your letter of the 26th instant, I have to inform you that I cannot ask Mr. Ibrahimbhai Hasan to accept your interpretation of tenures of land in cantonments, and he never contracted to purchase the property under that understanding He agreed to pay you the large sum of Rs 44,750 for the two houses with the ground attached and not the buildings alone "

Subsequent correspondence took place with reference to the defendant's title. The plaintiff's pleader insisted that the defendant should give a good title by getting the notice of the Cantonment Committee cancelled or withdrawn On the 11th November 1887, the first defendant wrote a letter to the plaintiff himself in which he explained his title at length and expressed his willingness to give plaintiff an undertaking that, if Government should resume the land and compel the plaintiff to remove the houses and accept as compensation a less

sum than the price which the plaintiff was paying for the property under the contract, that he (the first defendant) would pay the plaintiff the difference, or if the plaintiff was not satisfied with the title and would not complete the sale, then he (defendant No 1) was ready to return the earnest-money.

The time fixed in the contract for the completion of the sale was extended by the parties to the 12th December 1887 On the 6th December 1887, the defendant forwarded a draft deed to the plaintiff Further correspondence took place, in which the plaintiff insisted that he was entitled to an absolute conveyance, and that the defendant should obtain the withdrawal, by Government, of its rights over the land On the 30th January 1888, the solicitors of first defendant wrote repeating the willingness of the defendant either to complete the sale or to forego the agreement and return the deposit After much further correspondence (set forth in the judgment of CANDY, J , *infra*) the defendant's solicitor wrote on the 6th April 1888, that, unless the draft convey [832]ance was returned at once duly approved, the defendant would consider the whole transaction at an end and retain the earnest-money which had long ago been forfeited by the plaintiff This was repeated in a letter of the 17th April On the 18th April, the plaintiff's solicitor returned the draft conveyance altered in red ink, the effect of the alterations being to assume that the defendant was conveying an absolute title in the land To these alterations the defendant's solicitors did not agree, and as the plaintiff would not withdraw from his position, the defendant's solicitor on the 27th April 1888, gave formal notice that the transaction was at an end

In November 1888, the plaintiff's pleader attempted to re-open the negotiations, the plaintiff being then willing to accept the terms offered by the defendant on the 11th November 1887

On the 2nd February 1889, the plaintiff filed this suit.

The plaint stated the contract of the 12th October 1887 , that subsequently the plaintiff had come to know of the nature of the defendant's tenure and of the charges on the property , that in November 1888, the plaintiff had informed the defendant that he was willing to accept such title as the defendant had, on the terms that the defendant should free the property from its incumbrances, and in case Government should resume the land and pay compensation less than the price stated in the contract of 12th October 1887, then that the defendant should pay to the plaintiff the difference as he had offered to do in his letter of the 11th November 1888 The plaint further stated that the defendant had refused these terms and it prayed

(1 That the defendant should be ordered to execute a conveyance in the terms of a draft annexed to the plaint, and that the property should be entered in the plaintiff's name in the Government books, and that possession thereof should be given to the plaintiff.

(2) That the defendant should pay the plaintiff the rent that accrued due since the 12th October 1887 at Rs. 340 a month, &c , &c

(3) That the charges on the property if not paid off by the defendant, might be paid out of the purchase money

The defendant pleaded (*inter alia*) that at the date of the contract for sale the plaintiff knew the tenure on which the property was held, and that the Government's rights in the said property [833] were not a defect of title within the meaning of the contract that it was always intended that the charges should be paid off out of the purchase money , that he had made the offer contained in the letter of the 11th November 1887, but the plaintiff had rejected it , that owing to the plaintiff's refusal to carry out the contract, he (the defendant) was entitled under the contract to retain the earnest-money.

The case came on before the First Class Subordinate Judge of Poona, who framed issues, the 7th and 10th of which were as follows —

"7 Whether the plaintiff is entitled to specific performance of the agreement, dated the 12th October 1887, with superadded conditions embodied in the notice, dated the 16th November 1888.

'10 Whether the agreement, dated 12th October 1887, has been cancelled by the plaintiff, and whether he has forfeited his right to the above earnest money"

These issues, however, were struck out at the trial, and upon the other issues the Subordinate Judge found in favour of the defendant and dismissed the suit. The following are extracts from his judgment —

"The present suit was brought by the plaintiff on the 1st February 1889, and to the plaint has been annexed a draft of a deed of conveyance and the plaintiff prays that defendant No. 1 be compelled to pass a deed of conveyance in the terms of that draft The draft contains an indemnity clause providing that, in the event of Government resuming the grounds upon which the bungalows stand, defendant No 1 shall be liable for the difference between the amount of the purchase money and that of the compensation which the Government might pay On 3rd January 1891, Mr Gangaram Bhau (plaintiff's pleader) applied that the indemnity clause be expunged and struck out from the draft He also applied for leave to add an alternative prayer for damages This application was refused On the 5th January 1891, the pleader put in another application, praying that the plaint be read as praying for the specific performance of a conveyance in the terms of the draft (Exhibit No 83) as altered in red ink"

* * * * * *

'I, therefore, hold that Mr Fletcher (defendant No 1) did not intend to convey to the plaintiff anything more or less than his occupancy rights to the sites upon which the bungalows stand, and that being so he cannot possibly be charged with having refused to perform his part of the contract The result therefore is that Mr Fletcher having contracted to sell his occupancy rights to the sites upon which the bungalows stand, is not guilty of breach of con [834 tract, and is not, therefore, liable to damages, and this is the reason why I have refused permission to the plaintiff to amend his plaint by adding a prayer for the award of damages"

* * * * * *

"Issue No 10 (which was struck out at the trial) relates to the forfeiture of the earnest-money I have already remarked that, if anybody is guilty of breach of contract, it is the plaintiff and not defendant No 1 and surely it is not in the interests of the plaintiff to have that issue retained His only possible remedy to get back his purchase money is to sue on the ground that there has never been a contract between him and defendant No 1 Be that as it may, so far as the present action is concerned, the plaintiff cannot recover back his earnest-money, because his suit, based as it is upon the contract of 12th October 1887, supposed by the plaintiff to have been modified by the subsequent correspondence, cannot be converted into a suit based upon the ground that there was never a contract between the parties"

The plaintiff appealed, contending that the contract was that the defendant should give an absolute title to the property and that the defendant being unable to carry out the contract should return the earnest money to the plaintiff

*Jardine* (with *Ghanasham N Nadkarni*), for the Appellant (Plaintiff)

*Rivett-Carnac* (with *Crawford, Burder, Buckland* and *Bayley*), appeared for the Respondents (Defendants)

*June* 13, 1893. CANDY, J. —The sums claimed by the plaintiff in this appeal are —

| | Rs. |
|---|---|
| (*a*) Refund of the earnest money | 5,000 |
| With interest at 9 per cent for 3 years | 1,350 |
| (*b*) Rent or damages, *i e.*, rent for 5 months at 300 Rs per mensem | 1,500 |

Item (b) was not pressed in the argument, nor was it mentioned why plaintiff having claimed in his plaint rent for 15 months at Rs. 340 per mensem, had now altered his claim on this account to the item as shown above.

Plaintiff has also appealed against the order of the lower Court as to costs

The important question for consideration is as regards item (a). The contention of the plaintiff-appellant is that defendant No. 1 [835] contracted to give an absolute title to the land on which his houses stood, and that not being able to carry out that promise, defendant No. 1 was in default, and, therefore, plaintiff, the intending purchaser, was entitled to a refund of the earnest-money with interest. If plaintiff can establish the former part of his contention, then, in the absence of such conduct on his part as would deprive him of his rights, he might be entitled to the refund as claimed, even though this was not distinctly recited in the original plaint.

The reasons given by the Subordinate Judge for not allowing the plaintiff to amend his plaint, do not seem very cogent. That the legal advisers of defendant No. 1 understood the pleadings to raise the question as to the plaintiff's right to a refund of the earnest-money is shown by the 10th issue, which distinctly raises the question whether the plaintiff had forfeited his right to the earnest-money. As was done in the well-known case of *Howe* v. *Smith*, 27 Ch. D., 89, the necessary amendment may be considered as made, and the question thus assumes this form, was there a valid contract which the plaintiff repudiated, so as to disentitle him to a refund of the earnest-money? To answer this question we must look at the terms of the contract and the conduct of the parties. The *satekhat* or agreement to sell, dated 12th October 1887, after describing the situation of the houses in the Poona Cantonment proceeds:-

"I have agreed to sell to you * * * both my bungalows described above, including the sites and buildings (*jagia imlya sahit*), together with the compounds, rooms for servants, stables, out-houses.........and I have this day received from you Rs. 5,000 as earnest-money You should put a notification regarding the above transaction in respect of the aforesaid bungalows in Bombay or Poona newspapers, and after having satisfied yourself that nobody has right or claim over both the above-mentioned bungalows and other things (*saman*) you should at my expense within one month get the deed of sale executed by me and registered and pay me the balance. Should you fail to do so, you will have no claim whatever to the amount of earnest-money which you paid me this day, but if I do not satisfy you within the aforesaid time that nobody has any right or claim over the above-mentioned estate, and if I object to executing to you the sale deed, I will continue to pay you fair rent for both houses until the sale deed is executed and the houses are put into your possession. After the sale deed in regard to the said bungalows is executed I will get them transferred to your name in the Brigade-Major's office."

[836] On the same day defendant No. 1 wrote a receipt for the Rs. 5,000 received "as earnest-money for the sale of my two houses, &c., as per preliminary agreement." It is admitted that the plaintiff was present in person with his legal adviser, Mr. Gangaram Bhau Mhaske, when the *satekhat* was executed, and conversation took place, showing that plaintiff's attention could not fail to have been drawn to the fact that the property sold was recited as being within the limits of the cantonment of Poona, and was possibly subject to certain interference on the part of the Military authorities. Mr Gangaram Bhau was well aware that Government asserted the ultimate proprietary title in land within the cantonment; and that if these houses in question had been built on the ordinary terms, *i.e.*, if the land had been granted by the Military authorities for building purposes subject to the right of Government to resume on payment

of compensation, then the owner of the houses could not pretend to contract to give an absolute title to the land. *Primâ facie* this would be the natural state of things. Mr. Gangaram Bhau, who was acting for the plaintiff and drew up the *satekhat*, by not enquiring from defendant No. 1 must be taken to have had full knowledge that defendant No. 1 had nothing more than the ordinary title to land within cantonment.

According to the agreement that there should be an advertisement in the newspapers in order that the plaintiff should satisfy himself that nobody had "any right or claim over the above-mentioned estate," *i.e.*, "over both the above-mentioned bungalows and other things (*saman*)," Mr. Gangaram Bhau drew up a notice, dated 17th October 1887, which was initialled by defendant No. 1, in which the property to be sold was described as "all that piece or parcel of land or ground, with the messuage, tenement or dwelling-houses standing thereon, &c." It will be noticed that the property is not described as the houses with the other incidental rights, but the land with houses. But this fact cannot be taken as showing that defendant No. 1 contracted to give an absolute title in the land. The property was fully described as situate within cantonment limits; nor is there anything to indicate that defendant No. 1 asserted himself to be the absolute owner of the soil, or that the plaintiff had contracted [837] with him under that impression. The result, however, of the notice was a letter from the Cantonment Committee to Mr. Gangaram Bhau, pointing out that Government was the owner of the land, which could not be sold by defendant No. 1, and that plaintiff would purchase at his own risk. As there were subsequent communications from the Cantonment authorities and Government, it may be mentioned here, that though at one time Government asserted a right to issue a direction that a particular clause should be inserted in the sale-deed, and made it a condition that the General Commanding should countersign the deed, these points have not been alleged by the plaintiff as preventing defendant No. 1 from completing the contract. It was explained on the part of Government that all that was intended was an express reservation of the ordinary rights of Government in land within cantonment limits, and as a fact the General raised no objection to the transfer, and no special clause was inserted in the draft sale-deeds proposed by either party. So, here, mention may be made of the mortgages in favour of defendant No. 3 and in favour of defendants Nos 4 and 5, trustees of the marriage settlement of defendant No. 2. It has never been asserted that these defendants ever raised any objection to the completion of the contract. They have always been willing to be paid off from the purchase-money and to join in conveying the estate to the plaintiff.

The question is, therefore, narrowed to this, was the plaintiff justified in insisting on defendant No. 1 giving him an absolute title to the land? On Mr. Gangaram Bhau sending to defendant No 1 a copy of the letter from the Cantonment Committee, defendant No. 1 replied (26th October 1887): "The letter contains nothing new and does not seem to me to call for any action on my part or on yours. It is merely equivalent to reminding you that the houses are in cantonment and that in common with all others so situated their site is held from Government on the usual cantonment tenure. This of course you were well aware of before" To this Mr. Gangaram replied (28th October) that he could not ask plaintiff to accept defendant's interpretation of tenures of land in cantonments, and that plaintiff never contracted to purchase the property under that understanding. A few days later (8th November) Mr. Gangaram insisted that defendant should give a [838] good title by getting the Quarter Master-General of the Army to withdraw or cancel the notice

received from the Cantonment Committee Subsequently, defendant No 1 addressed plaintiff himself (on 11th November 1887), writing a letter in which he explained his title at length and expressed his willingness to give plaintiff an undertaking that if Government should take up the land, and compel plaintiff to remove the houses and accept as compensation a less sum than what plaintiff was paying defendant No 1, then the latter would pay plaintiff the difference, or if plaintiff was not satisfied with the title, and was not content to complete the sale, then defendant No 1 was ready to return the earnest money About the same time defendant No 1 obtained plaintiff s consent to the period of one month in the *satekhat* being extended to two months *i e*, to 12th December 1887 On 6th December defendant No 1 forwarded a draft deed to plaintiff, and on 13th December he wrote at length offering further explanations But Mr Gangaram on behalf of plaintiff still insisted on the condition noted above as to the withdrawal of the assertion by Government regarding its rights over the land On 5th January 1888, the solicitors of defendant No 1 wrote to the solicitors of the plaintiff, forwarding copies of the Cantonment Regulations But the latter replied (14th January) insisting that plaintiff had agreed to pay such a large sum for the property on the understanding that he was buying the land, and, therefore he was entitled to an absolute conveyance thereof On 30th January 1888, the same wrote to the same, repeating the willingness of defendant No 1 either to complete the sale, or to forego the agreement and return the deposit On 14th February 1888, a reply was asked to the letter of 30th January, and so again on 5th March

Eventually on 9th March the solicitors of defendant wrote giving plaintiff 24 hours to complete the purchase or to take back the earnest money Plaintiff's solicitors replied (10th March) insisting on his interpretation of the agreement Subsequently, negotiations were again entered into, and on 15th March a draft conveyance was forwarded to plaintiff s solicitors, and on 27th March it was proposed on defendant s behalf that he should pay rent on account of the time which would be taken in sending the [839] conveyance to England for the signatures of the mortgagee and trustees Further delay occurring, defendant s solicitors wrote on 6th April that unless the draft conveyance was returned at once, duly approved defendant would consider the whole transaction at an end and retain the earnest money which had long ago been forfeited by the plaintiff This was repeated in a letter dated 17th April Then on 18th April plaintiff's solicitors returned the draft conveyance altered in red ink the effect of the alterations being to ignore the rights of Government in the land, and to assume that defendant was conveying an absolute title in the same To these alterations defendant s solicitors would not agree and as plaintiff s solicitors said that plaintiff would not withdraw from his position defendant's solicitors gave formal notice (27th April 1888) that the transaction was at an end After about seven months, in November 1888, Mr Gangaram Bhau for the plaintiff attempted to re open negotiations for the sale afresh plaintiff being then willing to accept the terms offered by defendant on 11th November 1887 and rejected by the plaintiff, but this was declined on defendant's part and on 2nd February 1889, the present suit was filed

On the above facts it seems to me impossible to come to any other conclusion than that the default has, all throughout the transaction, been on the plaintiff's part I have had the advantage of reading a draft judgment prepared in this case by my learned colleague, and I have, therefore, paid special attention to the two English cases quoted by him, but in my opinion they afford no support to the contention now put forward on behalf of the plaintiff

In *Cato* v *Thompson*, 9 Q B D, 616, *T* agreed to sell to *O* certain *freehold* houses, and to make a good marketable title On investigation of the title it

appeared that the houses were part of a property which had been sold by a building society in lots, *subject to stringent restrictive covenants* which were admitted to make the title not a marketable one. *T* having declined to procure a release of the covenants, *C* brought an action to recover back his deposit. Held, that, whether, *C* knew of the restrictions at the [840] time of the covenant or not, he was entitled to recover. He in fact said to *T* · " I know your title is defective, but I will buy if you make a marketable title by getting rid of the covenants." *C's* counsel admitted that " the case is not like that of property being subject to a liability, which can, by no possibility, be got rid of. In such a case a purchaser who buys with knowledge must be supposed to have intended to buy subject to the liability, *but restrictive covenants might be released*." JESSEL, M.R., said. " Here it was known that it was improbable that the restrictive covenant could be got rid of, yet there is an express contract to make a marketable title. It comes to this—' I know that there is a serious defect in your title, but I will buy if you can make it marketable.' "

If the principle in the above case is to be applied to the facts in the present case, then we must suppose that defendant by agreeing to satisfy the plaintiff that " no one had any right or claim over the estate" in fact expressly contracted as follows : -" Though the estate is recited as being within cantonment limits, and thus asserted by Government (whether rightly or wrongly) to be subject to certain rights of Government, I undertake *within a month* to show that Government has no such rights over the land on which my houses stand, or to persuade Government to relinquish those rights." And the plaintiff must be taken to have said . " I know that your houses are in cantonment limits in which Government claim certain rights, but I will buy if you can satisfy me that those rights of Government do not exist in your case." It seems to me that to attach such a sense to the words of the *satekhat* is to do violence to the language of the document and to the facts and conduct of the parties.

In the same way with *In re Gloag Miller's Contract*, 23 Ch. D, 320. There the contract was " I, Joseph Richardson Gloag, hereby agree to sell Athole Lodge, Enfield, with all out-houses thereto belonging, also the ground included in my titles thereto *freehold* for £2,400 subject to delivery of valid title to him ; " and the purchas accepted those terms. As a fact the vendor was the assignee of a lease of the property, but the lease gave the lessee [841] an option of purchasing the fee simple, and it also contained restrictive covenants as to the use of the land It was held that as the purchaser contracted for an absolute title to the fee, he was entitled to the same, even though he had notice of the restrictive conditions, because there was an express contract that a good title would be shown.

Here I fail to see any express contract that the vendor would show an absolute title to the land. On the contrary, if we construe the terms of the *satekhat* strictly and literally, we find that though he sold the two houses, including site and building, with compounds, furniture, gardens, &c., the express contract as to title related solely to the bungalows and furniture, &c., (*saman*). It was with regard to them that he was to satisfy the purchaser that no one had any claim. The words " abovementioned estate " at the conclusion of the document clearly refer to the estate with regard to which the vendor agreed to satisfy the purchaser that he had a good title But even if the land itself be included in the estate, it is evident that the vendor did not expressly contract to make an absolute title to the land. No doubt in England, when a man describes the property he is selling as so many acres of land, that means he is selling the fee simple. But it does not follow that the same rule holds good in India. If AB sells survey number so and so, and expressly

contracts to show a good title thereto, that does not mean that he is selling the fee simple in the land. For instance, the owner of the survey number can never appropriate it to other than agricultural purposes without the permission of the Collector. The vendor's contract does not mean that he will satisfy the purchaser that such restriction does not exist in his case. So here the rights of Government asserted over land within cantonment limits, though expressed at different times in different ways, simply amounts to this, that Government can, if necessary, resume the land, due compensation being given for all buildings, &c., without putting into force the requisitions of the Land Acquisition Act. The title of the occupant as to *proprietorship* is fully recognized (see the letter from the Acting Quarter Master General exhibited in this case, $\frac{10-130}{4667}$ dated 28th No- [842] vember 1887—"The right of occupancy only is vested in you or future *proprietors*,") though no doubt it is a limited proprietorship. The occupancy is treated as a transferable, heritable property. There is nothing apparently in the Regulations which would enable the Military authorities to ignore any legal transfer or succession. In this case there is admittedly no objection on that account.

*But the purchaser was persuaded to decline to complete the purchase until the vendor satisfied him that he had a good title by compelling the Quarter Master General of the Bombay Army to withdraw the letter from the Cantonment Committee, which asserted the rights of Government in the land Unless that objection was reasonable, the purchaser is not entitled to a refund of his deposit. In my opinion it was unreasonable. The assertion of the rights of Government over land within cantonment limits was a liability which could by no possibility be got rid of. As was said in *Cato* v. *Thompson*, 9 Q B. D., 616, "In such a case a purchaser who buys with knowledge must be supposed to have intended to buy subject to the liability." The purchaser had full notice, on the face of the contract, that the land was within cantonment limits, and he was bound to know the legal incidents of such land. Not only did the plaintiff show his knowledge of the fact, as indicated by his conversation at the time when the *satekhat* was executed, but his legal adviser, Mr. Gangaram Bhau Mhaske, was specially affected by such knowledge. This gentleman had himself been plaintiff in the District Court of Poona against Government and the Cantonment Committee and had succeeded in establishing his proprietorship against Government of a piece of land in the Sadar Bazar, of which his predecessors in title were apparently the owners before the demarcation of Poona Cantonment He was thus able to successfully resist the claim of Government that the ordinary occupancy of land within cantonments rested on the occupant's application to be allowed to hold the land subject to the right of Government to resumption. He thus knew that the vendor could not contract to give an absolute title, if he (the vendor) or his predecessor in title had [843] acquired the land in the ordinary way by application to the Military authorities. The defendant has never concealed the fact that his title rested on such an application. Yet Mr Gangaram Bhau Mhaske never made inquiries of plaintiff, and himself dictated the agreement of sale (*satekhat*). Assuming that this document contained an express contract on the part of the vendor to prove an absolute title to the land, (an assumption which is, in my opinion, unfounded) Mr. Gangaram Bhau Mhaske must be taken, in law, to have had full notice that this was an impossibility. He, however, inserted in the newspaper current in Poona Cantonment a notice in his own name. in which he pointedly called attention to the fact that defendant was selling certain land in Poona Cantonment. This, of course, as was no doubt intended, at once drew an assertion of the rights of Government from the

Cantonment Committee. Then, as shown by defendant's deposition, Mr Gangaram Bhau Mhaske tried to induce the vendor to employ him in order to file a suit against Government to establish his absolute title to the ground The result would, of course, have been obvious. The vendor would have failed, and then the purchaser would have turned round, and said "Your vain attempt establishes what your contract was, now give me damages." Fortunately for defendant he refused to listen to Mr Gangaram Bhau Mhaske. He said at once: "Both the purchaser and I were perfectly aware that these houses stood in cantonment and were subject to the ordinary legal incidents of such property. The purchaser is bound to complete the purchase, but rather than that there should be any dispute, I am willing to give him an indemnity, or I will cancel the contract and return his deposit" This offer he répeated over and over again. But it was finally rejected by the plaintiff Then after the lapse of many months the plaintiff comes into Court and by his plaint (as allowed to be amended) says: "Specifically perform the contract (which is impossible) and give me damages, or in the alternative return my deposit." The alternative prayer is now the only question before us, and in my opinion the plaintiff is not entitled either in law or equity to such relief He cannot get back his deposit, for it was owing to his default that the purchase was not completed; and he cannot [844] after this lapse of time, and considering the heavy expenses which the defendant must have incurred, put the vendor in the same situation as he would have been had the contract been performed at the time agreed upon. I would, therefore, confirm the decree of the Subordinate Judge rejecting the claim.

With regard to costs it is clear that defendant No 2 ought never to have been made a party. Nor was it necessary to make defendant No 3 and defendants Nos. 4 and 5 parties. It is unnecessary to say anything about incumbrances if they are to be paid off out of the purchase money (see *Torrance* v. *Bolton*, L R, 14 Eq, 124 at p 134) In the present case the mortgagees have always expressed their willingness to be paid off and to join in conveying the estate It is not contended that the plaintiff was not satisfied in regard to defendant's title on account of these mortgages Therefore, when defendants Nos 2 to 5 filed their written statements and prayed to be dismissed from the suit, plaintiff should have made the necessary application to the Subordinate Judge, and he would have saved a large sum in costs He failed to do so, but kept these defendants on the record. He is, therefore, liable for their costs. But as the defence of defendant No 2 and her trustees, defendants Nos. 4 and 5, was identical, and they had but one pleader, the Subordinate Judge should not, I think, have allowed a separate pleader's fee for defendants Nos 4 and 5 apart from defendant No. 2. In this respect only would I vary the order as to costs.

In appeal, no defendant has appeared but defendant No 1, so there need be no order as to costs except that plaintiff must bear the costs of defendant No 1.

I would confirm the decree of the Subordinate Judge on the merits and as to his order regarding costs, but vary it in taxation of the costs as shown above.

FULTON, J.—The facts of this case have been so fully explained in Mr. Justice CANDY'S judgment that it is unnecessary for me to recapitulate them It appears to me that the agreement of the 12th October 1887, (which has been officially translated by the Court Translator) purports to contain a covenant for title on [845] the part of the vendor The effective part of the document is as follows:—

"I have agreed to sell to you for Rs 44,750 my two bungalows described above including the ground (or site—Marathi '*jaga*') and the building and together with the compounds, rooms for servants, stables, &c., out-houses, bricks, and stones, and earth, trees and shrubs, and together with the well which

is in the compound of the bungalow No. 27, flower pots, and together with the furniture in the bungalows as per lists furnished to you; and have this day received from you in full Rs. 5,000, namely, 5,000 of the Surat currency as earnest-money for which I have given you a separate receipt. You should put a notification regarding the above transaction in respect of the aforesaid bungalows in newspapers of Bombay or Poona, and after having satisfied yourself that nobody has any right or claim over both the bungalows and other things mentioned above you should at my expense, within one month, get the deed of sale executed by me and get the same registered and pay me the remaining amount. Should you fail to do so you will have no claim, whatever, to the amount of earnest-money which you have paid me this day, but if I do not satisfy you within the aforesaid period that nobody has any right or claim over the aforementioned estate, and if I object to executing to you the sale deed, I will continue to pay proper rent for both the bungalows until the sale deed is executed and the bungalows are put into your possession. After the sale in respect of the above bungalows is executed I will get the above bungalows transferred to your name in the office of the Brigade-Major."

As stipulated, a notice was published in a Poona newspaper. Thereupon the Cantonment Magistrate wrote to the plaintiff's pleader to inform him that the whole of the ground in compounds Nos. 27 and 28, Staff Lines, was the property of Government, and the pleader at once wrote to the first defendant on 24th October 1887, as follows.—

"I enclose for your perusal copy of a letter received from the Secretary to the Cantonment Committee and request that you will be pleased to settle the dispute raised by the Cantonment authorities as to ownership of the ground on which houses Nos. 27 and 28 stand, and which you contracted to sell to Mr. Ibrahimbhai Hasan together with the grounds, at an early date, otherwise Mr. Ibrahimbhai will hold you responsible for all damages on account of your inability to make good your title to the property you contracted to sell within a specified time."

The first defendant replied on the 26th idem:--

"I am in receipt of your letter of the 24th instant, furnishing copy of one delivered to you from the Cantonment authorities. The letter contains nothing new and does not seem to me to call for any action on my part or on yours. [846] It is merely equivalent to reminding you that the houses are in cantonment, and that in common with all others so situated their site is held from Government on the usual cantonment tenure. This of course you were well aware of before. My title is exactly the same as that of other house-owners in cantonment limits and no one is better able than yourself to advise Mr Ibrahimbhai Hasan as to its value."

A long correspondence ensued, but from the positions thus taken up neither party has ever receded. Great efforts were made to compromise the matter, and at one time these seemed likely to be successful. On several occasions the first defendant offered to pay back the sum of Rs. 5,000, not by way of admission that he was in the wrong, but simply to terminate the difficulty. The plaintiff, however, refused to accept these offers and finally brought this suit.

The question we have now to decide is whether the plaintiff is entitled to recover the earnest-money. This was the only point (other than that of costs) argued by Mr. Jardine, and it is obvious that the plaintiff cannot recover both the earnest-money by terminating the contract and the rent secured in certain eventualities by the contract. Now on this question it appears to me that, unless it can be said that the plaintiff has broken his contract in refusing to accept a conveyance such as the first defendant was in a position to offer him,

he is entitled to recover the earnest-money; for it could not, I think, be forfeited by his refusal to accept it in the course of negotiations, inasmuch as such refusal did not mean that he relinquished his claim to the money, but simply that he was endeavouring to insist on the first defendant's carrying out what he considered to be his contract. But, it seems to me impossible on the wording of the agreement to hold that the plaintiff has failed to carry out his contract. It cannot be said that the first defendant has satisfied him "that no one has any right or claim over the above-mentioned estate" and, unless it can be held that the words "no one" mean "no one (excepting Government)," it is clear that he cannot possibly satisfy him. It may be that the plaintiff's pleader is very conversant with cantonment tenures, but assuming this to be the case I do not think the fact can alter the plain meaning of the terms of the agreement. Prior to the decision in Appeal No. 103 of 1885 [847] (*The Poona Cantonment Committee by Colonel C. D. LaTouche, Secretary, and others* v. *Dhondiram valad Lakshman*, P. J. for 1888, p. 170), the subject of cantonment tenure was not so well understood as to justify us in making the assumption that when the words "no one" were used, the parties mutually intended to exclude Government from consideration. The case of *Cato* v. *Thompson*, 9 Q. B. D, 616, seems to me very much in point, where it was held that the vendor having agreed to make a good marketable title, evidence could not be adduced to prove that the purchaser knew of certain restrictions. Again, in the case of *In re Gloag and Miller's Contract*, 23 Ch. D., 20, FRY, J., explained the law as follows: —

"When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor before the execution of the contract said to the purchaser 'I cannot make out a perfect title to the property,' that notice would repel the purchaser's right to require a good title to be shown. But if the contract expressly provides that a good title shall be shown, then inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser he would still be entitled to insist on a good title."

The last sentence seems to apply to this case. Admitting that Regulation XXII of 1827 informed the purchaser that ordinarily the land in cantonment was not private property, the fact would not alter the effect of the express agreement that the first defendant was to satisfy the plaintiff that no one had any right or claim over the estate. On the most favourable view for the first defendant the case would be very like that of *Cato* v *Thompson* in which JESSEL, M. R., remarked: "Here it was known that it was improbable that the restrictive covenant could be got rid of, yet there is an express contract to make a marketable title. It comes to this 'I know that there is a serious defect in your [848] title, but I will buy if you can make it marketable'." And LINDLEY, L J., said:—

"The contract expressly stipulates that the vendor shall make a good marketable title. Now it is beyond all question that owing to the existence of the restrictive covenants the title is not marketable. Why, then, cannot the purchaser throw it up? The reason given is that he knew of the covenants when he entered into the contract. LOPES, J., said that this would be contradicting a written contract by parol evidence and that the evidence was inadmissible. In this I think that he was right. Parol evidence is admissible where you have a case of specific performance with compensation, but an express

bargain to make a good title cannot be modified by parol evidence. Such evidence would be admissible in an action to reform the contract, but is not admissible for the purpose of construing it."

Under these circumstances, in the absence of any allegation of fraud committed by the plaintiff in procuring the insertion of the words to which I have referred, I think the first defendant must be bound by them in their ordinary sense. Doubtless he signed the document incautiously without realising its full effect; for if he had considered it more carefully he would have insisted on a reservation of the claims of Government, but even though such may be the case I think he is bound to repay the earnest-money, for it seems to me that there has, on the plaintiff's part, been no breach of contract which could justify its forfeiture. Mr. Rivott-Carnac referred to various cases to show that on breach of contract being established, earnest-money advanced by a purchaser would be forfeited. This proposition need not be disputed, and, indeed, such forfeiture was expressly provided for in the agreement. But in my opinion there was no breach of contract by the plaintiff.

As to interest, I do not think the plaintiff is entitled to any beyond the date of his first refusal to accept the first defendant's offer of Rs. 5,000. There was no agreement for payment of interest; and the offer ought in ordinary prudence to have been accepted, for by that time the plaintiff must have been aware that it was not in the power of the first defendant to satisfy him as to **[849]** the title to the land. The plaintiff was then entitled to repayment, but he has not attempted to show that he has suffered any damage beyond loss of the use of his money. This loss, however, need not have been incurred by him after the date when he received the offer of repayment if he had taken a more reasonable view of his position.

The learned counsel for the first defendant urged that plaintiff could not be allowed to recover this money in the present suit as he had not claimed it and had merely tried to compel the defendants to execute a conveyance containing an indemnity clause. But I concur with Mr. Justice CANDY in thinking that the necessary amendment ought to be allowed, or considered to have been made, when the 10th issue was raised, for if the construction which I put on the agreement be correct, it would be inequitable now, when the claim for damages would be time-barred, to reject the suit without passing a decree for the money—*Mohummud Zahoor Ali Khan* v. *Musumat Thakooranee Rutta Koer and others*, 11 M. I A., 468.

I would give a decree for the plaintiff for Rs 5,000 with interest at the rate of 6 per cent. per annum from the 12th October to the 12th November 1887, and costs on the aggregate amount in both Courts recoverable from defendant No. 1, and if he fail to pay by the sale of the property which formed the subject of the contract. The first defendant should pay his own costs in both Courts on the said amount and recover from the plaintiff all his other costs. I would not interfere with the principle on which the costs of the second, third, fourth and fifth defendants have been considered by the lower Court, both because it is unusual to interfere merely on a question of costs with the discretion of a Subordinate Court and because I think they were vexatiously made parties to a suit which the plaintiff ought to have known could not affect them in any way It was out of their power to convey a good title to this property as against Government. Neither they nor the first defendant could compel Government to concur in the conveyance, and they were not bound by any agreement to execute an indemnity bond guaranteeing the plaintiff against possible loss if he persisted in taking a conveyance with a bad **[850]** title. The only claim which plaintiff could establish was one for compensation from the first

defendant But I agree with Mr Justice CANDY that defendants Nos. 4 and 5 were not entitled to separate costs, and consider that one set should be struck out As the defendants Nos 2 to 5 have not appeared in this Court, it is unnecessary to make any order about their costs of appeal

Since the above judgment was written I have had the advantage of perusing the judgment of my learned colleague and I wish to point out, in reference to his remarks on *Cato* v *Thompson* that I do not understand why it should be considered from a legal point of view more impossible to induce Government to surrender its right of resuming this land than to induce the persons entitled to the benefit of the restrictive covenants therein referred to to give them up. In the one instance as in the other the completion of the title depended on the action of third persons over whom the vendor had no control It still seems to me that the decision in *Cato* v *Thompson* is applicable to the present case

The Judges having differed, the decree of the Subordinate Judge was confirmed under section 575 of the Civil Procedure Code (Act XIV of 1882)

The plaintiff appealed under section 15 of the Amended Letters Patent, and the case was argued before a Full Bench consisting of FARRAN, C J, and JARDINE and RANADE, JJ.

*Lang* (Advocate General with *Ganasham N Nadkarni*) appeared for the Appellant (Plaintiff)

*Russell* and *Lovett Carnac* (with *Crawford*, *Burder*, *Buckland* and *Bayley*) appeared for Respondents (Defendants)

**Farran, C J** This is an appeal from the decree of the High Court, dated the 13th of June 1893, confirming the decree of the Subordinate Judge of Poona dismissing the plaintiff's suit The learned Judges who decided the original appeal having differed in opinion the present appeal is brought under clause 15 of the Amended Letters Patent of the High Court

In the suit as framed, the plaintiff sought specific performance of a contract, which had been entered into between him and the defendant Fletcher on the 12th October 1887 for the purchase of two bungalows, Nos 27 and 28, near the Sadar [851] Bazar Camp, Poona, 'including the ground and the buildings and together with the compounds rooms for servants, stables, &c, out houses, bricks and stones and earth, trees and shrubs, and together with the well which is in the compound of the bungalow No 27 and the flower pots and together with the furniture of the bungalows ' The purchase money for the whole was Rs. 44 750

The plaint did not contain any alternative prayer for damages or for a return of the earnest money (Rs 5,000) which had been paid by the plaintiff to the defendant Fletcher at the time of executing the contract or *satekhat* (Exhibit 39)

The Subordinate Judge, deeming that the plaintiff was not entitled to a decree for specific performance of the *sat khat* dismissed the suit with costs on the grounds that the defendant Fletcher could not give and had not contracted to give, an absolute title to the land and the plaintiff was not willing to accept the title which the defendant Fletcher was ready and willing to convey to him The plaintiff did not, in his memorandum of appeal contest the correctness of the decree in so far as it refused his prayer for specific performance of the contract, but appealed on the ground that the Subordinate Judge ought to have decreed to him the refund of his earnest money and awarded him damages. The claim for damages was rejected by both the Judges who heard the appeal, and there has been no objection taken to that part of the

decree. The argument of the appeal before us was confined to the question of the refund of the earnest money with interest

The 10th issue, which was raised at the request of the pleader for the defendant Fletcher, was, "Whether the agreement dated the 12th October 1887, has been cancelled by the plaintiff and whether he has forfeited his right to the earnest money" The plaintiff at a somewhat late stage in the case asked to be allowed to amend his plaint so as to embrace a claim for the refund of the earnest money which he had paid This the Subordinate Judge refused, and he also cancelled the 10th issue The learned Judges, who heard the appeal, were agreed in opinion that the amendment ought to have been allowed and [852] that the 10th issue ought to have been retained and dealt with We concur in that view It is manifestly just and proper that the right to specific performance of a contract or, in the alternative, to a return of earnest-money, should be determined in one and the same suit, and that the plaintiff failing to obtain a decree for specific performance should not be driven to a separate suit to recover back his deposit if he is entitled to relief in that form. In the High Court in England both questions are usually determined in the same proceedings and the same course of practice should, we think, prevail here—*Scott* v *Alvarez*, (1895) 2 Ch, 603 *Howe* v *Smith*, 27 Ch D, 89

Though the opinion of the Subordinate Judge was opposed to the right of the plaintiff to claim a return of his earnest money, we have not, in consequence of the course which he adopted with reference to the 10th issue, the advantage of his reasoned conclusion upon that branch of the case The matter has, however, been fully considered in the judgments now under appeal, and though we should have desired the evidence to have been more specifically directed to this aspect of the case we have, I think, sufficient upon the record to enable us to dispose of it The stipulation in the contract upon the subject of the earnest money occurs towards its close After the terms and subject-matter of the purchase are set out, and after the recital of the payment of the earnest-money, the contract proceeds —

"You (the purchaser) should put a notification regarding the above transaction in respect of the aforesaid bungalows in newspapers of Bombay or Poona and, after having satisfied yourself that nobody has right (*hak*) or claim (*waras*) over both the bungalows and other things (*saman*) mentioned above you should at my expense within one month get the deed of sale executed by me and get the same registered and pay me the remaining amount Should you fail to do so, you will have no claim whatever to the amount of earnest money which you have paid me this day but if I do not satisfy you within the aforesaid period that nobody has any right (*hak*) or claim (*sambhandha*) over the above mentioned estate, and if I object to execute to you the sale deed, I will continue to pay you proper rent for both the above mentioned bungalows until the sale deed is executed and the bungalows are put into your possession"

The latter provision and the subsequent action of the parties in asking for, and consenting to, an enlargement of the time are [853] conclusive, I think, to show that time was not regarded by the parties as of the essence of the contract

The question for determination is whether, having regard to the terms of the contract and the circumstances of the case, the plaintiff was justified in refusing to accept the title to the land under, and surrounding, the bungalows (for there is no real question about the title to the bungalows and the furniture) which the defendant Fletcher was able to give If he was justified in refusing that title, he is in my opinion entitled to a refund of his deposit If he was bound to accept it he cannot, I think, now claim to receive back that which, under the terms of the contract itself, he agreed to forfeit. The defendant Fletcher has always been willing to convey to the plaintiff such title as he

possesses to the land and bungalows. The plaintiff always has been, and when this suit was brought was, unwilling, as he now is, to accept that title. The point is concisely put by LINDLEY, L. J., in *Scott* v. *Alvarez*, (1895) 2 Ch. 603 at p. 612. If he was bound to accept the title, "the legal answer" (to a demand for the deposit) "is this: There is no breach of contract at all; you have taken your chance with respect to your deposit; and unless you show a breach by the vendor of his bargain you are not entitled to have that deposit back." It is essentially a legal question and does not depend upon equitable considerations—*Howe* v. *Smith*. "According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit" Per POLLOCK, B., in *Collins* v. *Stimson*, 11 Q B. D., 142. The circumstance, however, that a purchaser is not entitled to specific performance is by no means conclusive against his right to return of his deposit—*Howe* v. *Smith* (at p. 95).

Now the subject matters of the contract in this case are bungalows built upon land within the Poona Cantonment limits, the contract expressly including the land. For the purposes of this judgment the history of the tenure of land within cantonment limits at Poona and of the land in question may be briefly [854] stated. The limits of the Poona Cantonment were fixed on 18th March 1827. By Regulation XXII of 1827, which came into force on the 1st September 1827, it was directed that private property was not to be included within cantonment limits (S. 21), but the direction does not appear to have been practicable in all cases. Bombay Act III of 1867, section 11, recognises the existence of land, which may belong to private individuals, being included within cantonments. Section 9 gives power to Government to make rules and regulations to provide for certain matters in cantonments, which (section 11) may regulate "in cases in which the land within the limits of the cantonments is the property of Government" the conditions under which its occupation and use, where these are only permissive, shall be allowed. The rules framed under this Act appear to have prohibited the Military authorities from allowing other than permissive occupation of Government land in Poona Cantonment. However it appears from the evidence before us that private individuals still own lands there, though doubtless for the most part the land is held upon what may be concisely styled cantonment tenure.

Permission to occupy the sites and compounds of the bungalows in question was granted to Colonel Waddington by the Military authorities, as to one in 1863, and as to the other in 1871 —the permission in each case bearing a note to the effect that "permission to occupy ground in a military cantonment confers no proprietary right." Colonel Waddington erected bungalows on the sites and sold the lands and bungalows with the furniture as it stood to the defendant Fletcher in 1885 (Exhibit 89). This was the position when the contract in question was entered into, save that Fletcher had charged the property with the payment of certain sums in favour of the defendant No. 3 and of the defendants Nos. 4 and 5 respectively.

The negotiations, which resulted in the contract, took place through a broker Tatya. The evidence does not show by whom he was employed. On the morning of the day on which the contract was entered into, he came with two servants of the plaintiff to the defendant Fletcher and informed him that the plaintiff had offered Rs. 44,750 for the bungalows. This offer the defendant Fletcher expressed himself willing to accept. It [855] was then arranged that the earnest-money (10 per cent.) should be paid at the office of

the pleader Gangaram Bhau the same day and that the bargain should be closed The defendant Fletcher accordingly attended at the pleader's office, as did also the plaintiff

There can, I think be no doubt that the defendant Fletcher at this time was aware of the nature of the tenure upon which he held the land He swears that he knew it and that he did not mean to convey anything more than his rights to the land such as they were under the cantonment regulations In cross examination he stated that he had lived in the Poona Cantonment during the rains for eighteen years and that he knew about the cantonment rules from the time h commenced to live in cantonments The conveyance to Mr Fletcher (Exhibit 89) which is in the form of an agreement it is true, describes the subject of the agreement as ' the freehold bungalows compounds and land described in the schedule, but this document was drawn in England, and Fletcher (we are told) did not personally execute it Certainly he did not retain it in his possession (Exhibit 90 and Exhibit 91) In the draft mortgage, which was sent out for execution in India, and which contained a similar description of the land, the description of it as freehold was purposely struck out In his letter of 9th November (Exhibit 71) Fletcher speaks of giving a "good title," but this was written after an interview with the plaintiff's brother, at which it was handed to the latter and is explained by the letter of November 11 (Exhibit 52) in which he sets out the exact state of the title Those documents do not, I think militate against the truth of Mr Fletcher's oral evidence

It is more difficult to arrive at a conclusion as to the knowledge which the plaintiff possessed of the tenure at the time when the agreement was made Mr Fletcher did not see the plaintiff to speak to before he met him at Gangaram's office Tatya has given no evidence as to what took place during the negotiations The plaintiff himself says that he did not know that the bungalows were in cantonments or that there was a cantonment at Poona, but this is hardly credible, as the agreement itself [856] describes them as being in the ' Lascar and both Fletcher and Tatya say that the plaintiff inquired whether the bungalows could be let to a native and whether civilians could be turned out to make room for military officer which would be meaningless inquiries in the case of a bungalow not subject to cantonment regulations, but assuming that the plaintiff knew that the bungalows were in cantonments, there is no evidence to show that he knew anything about the tenure upon which they were held He is described as a Khoja carrying on agency business and residing at Bombay Fletcher assumed that the pleader Gangaram Bhau was familiar with the tenure of lands in the Poona Cantonment but *that* even if the assumption is taken to be correct is not proof that the plaintiff possessed similar knowledge The general legal knowledge upon such a subject as cantonment tenures, of a pleader employed to draw up a provisional agreement, cannot I think, be treated as the knowledge of the client, though the latter is, as a general rule, affected with notice of what comes to the knowledge of his pleader in the course of his employment At the time of drawing up the agreement it is admitted that the tenure of the land was not alluded to In accordance with the agreement, a notice (Exhibit 46) was drawn up by Gangaram Bhau for insertion in the Poona newspapers, which was so inserted after it had been approved by Fletcher It describes the property to be sold as consisting of "all that piece or parcel of land or ground with the messuage &c, thereon ' In this nothing is said as to the tenure of the land, but when it elicited a notice from the Secretary of the Cantonment Committee (Exhibit 47) that the compounds were the property of the Government, which notice was sent to the plaintiff's pleader, the latter at once called upon Fletcher to

settle the dispute as to the ownership of the ground on which the houses stood and which he, Fletcher, had contracted to sell. To this Fletcher replied (Exhibit 49) that the notice was merely equivalent to "reminding you that the houses are in cantonments and that in common with all others so situated their site is held from Government on the usual cantonment tenure This of course you were well aware of before My title is exactly the same as that of other house owners in canton [857]ment limits, and no one is better able than yourself to advise Mr Ibrahimbhai Hasan as to its value

Gangaram's reply to this (Exhibit 69) was as follows —

"In reply to your letter of the 26th instant I have to inform you that I cannot ask Mr Ibrahimbhai Hasan to accept your interpretation of tenures of land in cantonments and he never contracted to purchase the property under that understanding He agreed to pay you the large sum of Rs 44,750 for the two houses with the ground attached and not the buildings alone"

He then called on Fletcher to make a good title It is unnecessary for the point I am now considering to go through the rest of the correspondence Neither party ever receded from the position which they then took up though at one time Fletcher was willing (Exhibit 52) to give the plaintiff an indemnity against loss, should Government take up the land, and the plaintiff at one time was willing to accept that offer The fair result of the evidence and correspondence appears to me to be that the knowledge that the sites of the bungalows with their compounds were held upon cantonment tenure is not brought home to the plaintiff and there is no existing legislation upon the subject which would justify the Court in imputing such knowledge to him

We must, therefore I think ascertain what effect *the terms of the contract* would produce upon the mind of a person unversed in the peculiarities of cantonment tenure It is unnecessary to read it again Though I feel unable to construe the provision in the document as to the plaintiff satisfying himself by advertising the contract that no one had any right or claim to the bungalows as a covenant that the land was held absolutely or upon any particular tenure I think that the description of the property as I have set it out both the bungalows described above and the building and together with the compounds, &c, without any qualification as to the estate conveyed, was calculated to induce in the mind of the plaintiff the belief that Fletcher was selling and that he was purchasing, something more than a mere revocable license to occupy the land It is not like the case of *Gangadhar* v *Kashinath* 9 B L R, p 128 at p 145, where the vendor professed to sell merely ' his right title and interest ' in the land and where the Court [858] says If persons, without satisfying themselves as to the real title to the property, choose to buy at sales where the party selling professes to sell merely his ' right title and interest,' such as it is, they have no one but themselves to blame if they afterwards find they do not get such a title as they could have wished At such a sale it is before he bids, and not afterwards, that an intending purchaser should inquire into the nature of the title which the vendor can make"

In the present case, the plaintiff was I think, entitled to construe the expressions in the contract in the sense most advantageous to himself *Seaton* v *Mapp* 2 Coll, p 556, at p 562. So construing them, he was entitled to say "you agreed to sell me the land and you do not satisfy that agreement by offering me land, which is admittedly the property of Government but which you have permission to occupy" If the evidence clearly showed that the plaintiff was aware that he was purchasing merely the permission to occupy Government land, the case might be different, but in my opinion, as I have said, the evidence falls short of establishing that proposition, see as to knowledge

by the purchaser of the real state of the title, *Ellis* v. *Rogers*, 29 Ch. D., 661, where the cases relied on by FULTON, J., are referred to. It does not appear to me to make any difference whether the expressions in the contract are taken to be those of the defendant Fletcher or of the pleader Gangaram Bhau. Fletcher had and used the opportunity of reading over the contract. He agreed to sell the land and having done so, the *onus*, I think, lay upon him to show not only that he intended to sell only cantonment occupancy rights, but also that the plaintiff understood that he was purchasing the same.

I agree, therefore, in the opinion of FULTON, J., and would allow the appeal. I would, therefore, pass a decree for the plaintiff for Rs. 5,000 with interest thereon at 6 per cent. per annum from the date of the filing of the memorandum of appeal in this Court. That was the first time when the plaintiff demanded back his deposit from the defendant Fletcher. Down to that period he was insisting on the specific performance of his contract.

**[859]** The plaintiff to pay the defendant Fletcher's costs on the difference between Rs. 49,850 and Rs 5,000 in the lower Court and the defendant Fletcher to pay the costs of the plaintiff on Rs. 5,000 and the costs of the appeal on that sum The plaintiff to pay the costs of the other defendants, one set between them.

**Jardine, J.** —I concur on all points in the judgment of the Chief Justice

**Ranade, J** :—The difference of opinion between the two Judges of the Division Bench, which decided this case under clause 2 of section 575, relates solely to the question whether the appellant-plaintiff did or did not commit a breach of the contract entered into by him with respondent No. 1 on 12th October 1887. Mr Justice CANDY was of opinion that the plaintiff was not justified under the agreement of 12th October 1887, in insisting on defendant No. 1's giving him an absolute title to the land, and that throughout this transaction the default has been on plaintiff's part, while Mr. Justice FULTON thought that there was no default on plaintiff's part. The claim to the refund of the earnest-money depends mainly upon the decision of the question of responsibility for default, and this last is thus the only material question we have to consider in the present case

It is, however, to be noted that though this was an important question of mixed law and fact, the Court of First Instance recorded no finding on it either way. In several places in his judgment, the Subordinate Judge has taken particular care not to commit himself beyond what may be implied by his statement that " if anybody is guilty of a breach of contract, it is the plaintiff, and not the defendant No. 1." The suit before him was, in the first instance, brought to enforce specific performance of the contract, and to recover possession of the property, and a claim was also made for rent and costs. The defendant No. 1's pleader did indeed suggest an issue (No. 10) on the point of plaintiff's right to the refund of the earnest-money, and plaintiff's pleader at a late stage applied (Exhibit 138) for permission to claim this refund by an amendment of the plaint. Not only was this permission refused, but the Subordinate Judge refused also to decide the 10th issue, which had been raised. He seems to have thought **[860]** that this prayer could only follow a suit for the rescision of the contract He admitted that " plaintiff's was a hard case, and that in a properly framed suit, plaintiff might claim damages and recover the earnest-money, but that he could not give him this relief in the present suit." As observed by Mr. Justice CANDY, the reasons assigned for refusing this relief are not very cogent. The result, however, is that the Judges of the Division Bench had to decide the question of responsibility for default, which was the only material question

raised before them, without the help of a clear finding of the Court of First Instance on this most important point

I have noticed this point in some detail, because the judgment of the Court of First Instance shows, or rather suggests, that if it had felt itself called upon to record an express finding on the point, it might have been led to hold that this was one of those rare cases where there was no contract between the parties, or at least no contract which either party could call on the other to enforce in which case the general rule of law is that the purchaser is entitled to have the deposit returned back to him —Dart Vendors and Purchasers, 4th Ed, p 148 In *Howe* v *Smith*, 27 Ch D, 89, COTTON, L J, observed "I do not say that in all cases where this Court would refuse specific performance the vendor ought to be entitled to retain the deposit In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract" If he repudiates the contract, then according to Lord Justice JAMES —*Ex parte Barrell* Law Rep 10 Ch 512 —the purchaser has no right to recover the deposit

The mere rejection of plaintiff's claim for specific performance does not, therefore, by itself deprive him of the equitable relief of insisting on a refund of the deposit paid by him as earnest money unless it can also be shown that there was a repudiation of the contract In the present case there is indeed an express stipulation in the agreement itself which provides that plaintiff should put a notification in the newspapers, and after having [861] satisfied himself that nobody had any claim to the bungalows and other things mentioned above you should at my expense get the deed of sale executed by me and get the same registered, and pay me the remaining amount should you fail to do so, you will have no right to the amount of the earnest-money The only point to be inquired into in the present case is whether plaintiff failed to carry out his part of the contract so as to deprive him of his right to claim a refund of his earnest money

No time was fixed by the agreement within which plaintiff was to satisfy himself in regard to defendant No 1's title to the property One month's time was indeed fixed for completing the sale but it is obvious from the fact that defendant No 1 had not the title deeds with him and that he had to ask plaintiff to allow, and plaintiff allowed, him more time to bring over these deeds from England where they were in the hands of third parties, and that, as a matter of fact, defendant No 1 did not send an draft conveyance for plaintiff's approval till 15th March, *i e* nearly five months after the agreement of sale was effected, it is obvious from all this that the period of one month was not of the essence of the contract During the course of the negotiations, defendant No 1 on 11th November 1887, offered to indemnify plaintiff against loss by reason of the possible assertion by Government of their rights to the land This offer was kept open, because plaintiff did not accept it at once, till 27th April 1888, when defendant No 1 finally informed plaintiff that the negotiations were at an end, and he would resist plaintiff's claim About seven months after this plaintiff wrote to defendant No 1 that he was willing to accept the offer first made on 11th November 1887, and kept open till 27th April 1888 As defendant No 1 would not consent to re open the negotiations, the plaintiff soon after brought his present suit It has been urged that this seven months' delay was fatal to plaintiff's claim not only to insist on the specific performance of the contract, but also to claim a refund of the purchase money The English authorities on the subject of delay show that a delay of six years

(*Harrington* v. *Wheeler*, 4 Ves., 686), in another case of four years eight months (*Alley* v. *Deschamps*, 13 Ves., 225), and in a third of three years has itself not been considered a [862] sufficient defence. The shortest period was fourteen months after correspondence had ceased—*The Marquis of Hertford* v. *Boore*, 5 Ves., 719. As a general rule, equity relieves against conditions of time when they are not of the essence of the contract, and unless there is anything in the nature of the property or in the surrounding circumstances which would make it inequitable to interfere—Dart, Vendors and Purchasers, p. 384. Thus in *Howe* v. *Smith*, 27 Ch. D., 89, time was of the essence of the contract, and there was a re-sale. In the present case, time was not of the essence of the contract, and there was nothing in the circumstances of the property which justified defendant No. 1 in refusing plaintiff's offer to accept the proposal made by defendant No. 1 himself. The seven months' delay under the circumstances did not, in my opinion, disentitle plaintiff from at least claiming back his earnest money after defendant refused to abide by his own original offer

The next question is, whether, independently of the delay, there were other circumstances which justified the defendant No. 1 not only in resisting specific performance, but in retaining the earnest-money also. This brings me at once to the consideration of the correspondence between the parties. It is not necessary to go over the whole of this correspondence, as it has been fully noticed in the judgments of the Judges, who came to opposite conclusions in regard to its general effect It may, however, be stated with some confidence that that correspondence clearly brought out the fact that both the parties were not fully aware of the true nature of defendant No. 1's title to the property in so far as the land included in the compound of the bungalows was concerned. It was to some extent a case of misdescription due to mutual mistake. Defendant No. 1 in his agreement of 12th October 1887, as also in the newspaper notice, of which he initialled the draft, clearly professed to sell the land with the buildings thereon. Defendant No. 1 had purchased himself both the land and buildings only two years before in 1885, and his own purchase-deed and the mortgage-deed effected by him clearly mention the land without any reservation as belonging to defendant No. 1 and his vendor. The bungalows are described to be freehold. No mention of Government right is made in these [863] earlier documents. Exhibit 89 describes defendant No. 1's vendor as registered proprietor and owner of bungalows, compound and lands. Colonel Waddington and the Trustees in their letters of assent to the intended sale mention the same fact, and make no distinction between the land and the buildings. The draft of the conveyance, Exhibit 83, prepared for defendant No. 1 also grants bungalows together with compound, wells, &c., and the measurement of the land sold is stated to be more than two lakh square feet The agreement, Exhibit 39, and notice, Exhibit 46, must be read in connection with defendant No 1's title-deeds, and when so read it is clear that defendant No. 1 had no misgivings that he was registered proprietor of the land and of the bungalows in the same right, and it was under that impression that he agreed to sell them both as one estate.

As a matter of fact defendant No. 1 would have made nearly 50 per cent. profit in this sale-transaction, as he had purchased the properties for Rs. 30,000 and the sale was to be for nearly Rs. 45,000. In offering such a large sum, it is not at all likely that the plaintiff should have left out of consideration the value of the land. When, therefore, the Secretary to the Cantonment Committee asserted the right of Government to the land as resumable at pleasure without compensation except for the buildings, plaintiff very properly required defendant No. 1 to remove the defect of title, and the defendant No. 1 at first

admitted the justice of that demand. In his letters to the plaintiff the defendant No. 1 tried indeed to make out that the Government claim called for no action on his part and that his title was as good as of any other house-holder in the cantonment, but as a matter of fact he did take action, saw the authorities, and sought to remove the defect so unexpectedly disclosed. In his letter, dated 9th November 1887, to plaintiff, he expressly undertook to make good his title, and complete the sale. The Government Resolution, while sanctioning the sale, did not give up the right of the State to the land, and in fact required the defendant No. 1 to expressly mention the existence of this Government right in the deed. This insertion was, however, subsequently dispensed with. If defendant No. 1 had from the first thought that he had no rights of registered proprietor to the land, he would not have [864] moved Government and the Military authorities in the way he did, and he would not have written Exhibit 71 undertaking to make a good title after plaintiff had expressly asked him to get the Cantonment Secretary's notice cancelled. The official notice and the Resolution left it beyond doubt that defendant No. 1 had not the rights of a registered proprietor in the land, and that defendant No. 1 could not make out the title he himself believed he possessed.

As plaintiff was not satisfied, defendant No. 1 on 11th November 1887, offered to indemnify plaintiff against loss, if plaintiff suffered loss by reason of the exercise of its rights by Government. This offer was kept open by defendant No. 1 for several months; and if plaintiff had consented earlier to accept the defective title, defendant No. 1 would no doubt have executed the deed of which Exhibit 83 was the draft. It was his consciousness of this defect in his title to the land that made defendant No. 1 protract the negotiations, and in spite of his notices to close them, kept open the offer of indemnity for five months with an expression of his willingness to return the earnest-money and rescind the contract—Exhibits 92, 93, 100, 101, 102, 103.

The general effect of this evidence of conduct satisfies me that this was a clear case of misdescription of the property, and the defect disclosed was one which could not be easily cured. Not that it was absolutely impossible to cure it. Even the Government Resolution itself admits that the proprietary right of Gover. ment to cantonment lands is only a presumption till the contrary is shown. In regard to plaintiff's state of mind, it will not be proper to hold him bound by all that his pleader and legal adviser was supposed to know, not as his adviser, but in his private capacity. The mere fact that the bungalows were situated in cantonment and had to be transferred in the Brigade-Major's register was not sufficient by itself to bring home to the plaintiff the knowledge about the tenure of the land, and defendant's claim to sell the land as his own and that he would make out a good title might well satisfy plaintiff that he was well within his rights in insisting on the fulfilment of the original agreement. When this was found impossible, he offered to accept defendant's one alternative proposal, and in doing so, he naturally took some time to think over the matter. Under the circum- [865] stances I do not think he was so much at fault as not only to lose his right of enforcing specific performance, but also forfeiting his money, because he would not make up his mind within twenty-four hours as he was required to do by defendant No. 1's final letter after similar notices had been condoned.

The case being one of defect of title due to a mistake or misdescription, the law on the subject is clear enough. *Cato* v. *Thompson*, 9 Q. B. D., 616, might or might not be quite in point in the matter of specific performance, but so far as the refund of earnest-money is concerned I think with Mr. Justice FULTON, that it is an authority in plaintiff's favour. The misdescription was material,

and affected the contract. Plaintiff stipulated for sale of the land with the buildings both in full proprietary right, and defendant No. 1 could only give him the bungalows in full right, and the land held on a very defective title, a mere permissive occupancy at pleasure. It was not the incident of the resumption of the land which was the cause of the plaintiff's dissatisfaction, but it was the liability to resumption without payment which constituted the defect. There was thus a defect of title for which defendant No. 1 was responsible, and which he was unable to cure. Under the circumstances, the present case resembles that of *Haji Mahomed* v *Musaji*, 1 L.R., 15 Bom., 657, with the parties changed The return of the earnest-money was directed in that case as a measure of equitable relief to the defendant, and the same reasons appear to me still more strongly to justify the award of the same relief here The judgment in the case noted above referred to the earlier decision in *Petamber Sundarji* v. *Cassibai*, I. L. R., 11 Bom., 272, for a definition of good title, and held that good title must be one free from reasonable doubt, and it is this good title which a vendor is bound to make out This was certainly not made out in the case by the defendant No. 1, and he had no right to detain the earnest-money when his purchaser offered to buy the defective title that he was able to make out. Under all the circumstances of the case, I am satisfied that plaintiff is entitled to a refund of the earnest-money and also to costs as against defendant No. 1 The other defendants were made parties unnecessarily, and plaintiff should pay their costs

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**NOTES.**

[ As regards return of deposit, see also (1909) 33 Mad., 375 (1912) 17 C. W. N., 100, (1899) 23 Mad., 114 ]

THE

# INDIAN LAW REPORTS.

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BOMBAY SERIES.

VOL. XXII.

# THE INDIAN LAW REPORTS, BOMBAY SERIES, CONTAINING CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT

**BOMBAY—Vol -XXII-1898**

## ORIGINAL CIVIL

*The 7th September, 1896*

PRESENT

MR JUSTICE STRACHEY

Jugmohandas Vundrawandas .. . Plaintiff

*versus*

Pallonjee Eduljee Mobedina and Dinbai, his wife . Defendants

*Executor —Lease Power of executor to lease Acquiescence in lease granted by executor—Estoppel —Landlord and tenant —Buildings and improvements of tenant— Compensations for such improvements*

The executors of the will of a Hindu to which neither the Hindu Wills Act, 1870, nor the Probate and Administration Act 1881 apply have such authority only to deal with the estate as the terms of the will confer on them

Neither a power to "manage the estate as they may deem proper " nor a power to sell it, will authorize executors to lease any part of it for 999 years or (semble) for any period exceeding 21 years

Where the devisee of an estate for six years after coming of age and succeeding to the estate signed rent bills in respect of land which the executors of his testator had purported to lease for 999 years, and such rent bills contained a representation that the land had been given to the lessees on fazendari tenure

*Held* that in the absence of any evidence that the lessees had been deceived by or had acted upon such representation the devisee was not estopped from contesting the validity of the lease.

A man cannot be precluded from asserting his own rights by acquiescence in acts of other parties inconsistent with them unless (1) he has actual knowledge as distinguished from the means of knowledge of his rights, (2) he has knowledge that the persons acting inconsistently with them are doing so under the mistaken belief that they are exercising rights of their own (3) he has encouraged the parties so acting to spend money or do other acts either directly or by abstaining from asserting his legal rights

*Willmott* v. *Barber*, 15 Ch. D , 96, followed.

* Suit No 144 of 1895.

[2] A tenant who has erected buildings and effected improvements on the landlord's property is not entitled to be paid their value on the determination of the tenancy merely because he has acted under the mistaken belief shared by his landlord that he had a larger interest in the property than he really had

SUIT for a declaration that a lease of certain Foras land situate at Chinchpokli in Bombay made by executors for 999 years operated only as a lease from year to year and to recover possession of the premises leased

The plaintiff stated that his father Vundrawandas Jumnadas died on the 7th April 1870, leaving a will, of which Merwanji Dossabhoy and Chunilal Varjiwandas were appointed executors They obtained probate on the 16th August 1870

On the 29th January 1880, Chunilal Varjiwandas (the other executor having died in 1873) being in possession as executor of the land in suit granted to the first defendant a lease thereof for 999 years with a proviso for renewal for a similar term

The plaintiff attained his majority in 1885 and his father's property was handed over to him by the executor Chunilal in the year 1888

The plaintiff further stated that he only became aware of the terms of the said lease in 1893

He submitted that the lease only operated as a lease from year to year and that he was entitled to recover possession of the land from the defendants, and he prayed for a declaration and order accordingly

The suit was filed on the 22nd March 1895

The defendants submitted that the lease was valid and binding on the estate of the testator They alleged that, in the belief that the lease was perpetual, they had erected upon the land buildings of the value of Rs 43,000 that the plaintiff knew of their doing so, and had been aware of the terms of the lease since 1888, and had acquiesced in them They pleaded limitation and estoppel, and claimed, if ejected from the land, to recover the value of the buildings and improvements, &c

*Raikes* (with *Lang*, Advocate General, and *Russell*) for Plaintiff —The executor had no power to grant this lease His powers are only those given him by the will—Henderson on Law of Wills [3] in India, p 325 -and it does not authorize him to make such a lease To grant it was a breach of trust—*Oceanic Steam Navigation Company* v *Sutherberry*, 16 Ch D, 236, *Drohan* v *Drohan* 1 B & B, 185 *Keating* v *Keating*, Lloyd and G (Temp Sug), 133. The lease is void

*Scott* (with *Macpherson*) for Defendants —This suit is barred by limitation —Limitation Act (XV of 1877), articles 91 and 144 The plaintiff knew this was a fazendari lease and he knew what a fazendari lease was He has since 1888 acquiesced in the lease He has stood by while we expended over Rs 40,000 in building He is now estopped—*Carr* v *London and North-Western Railway Company*, L R, 10 C P, 307 If we are ejected, we must get compensation—*Yeshwadabai* v *Ramchandra Tukaram*, I L R, 18 Bom, 66, *Dattatraya* v *Shridhar*, I L R, 17 Bom, 736, *Seton* v *Lafone*, 19 Q B. D., 68, *Ramsden* v *Dyson*, L R, 1 H L, 129

*Raikes* in reply - As to estoppel and acquiescence, *La Banque Jacques-Cartier* v *La Banque D Epargne de la Cite et du District de Montreal*, 13 Ap. Cal, 111 *Willmott* v *Barber*, 15 Ch D, 96, *Naunihal* v. *Rameshar*, I L.R., 16 All, 328

On the point of limitation he was stopped by the Court.

**Strachey, J** —In this suit the plaintiff claims to recover possession of land held by the defendants under a lease for 999 years, executed in favour of the first defendant by the surviving executor of the will of the plaintiff's father. The claim is based on the contention that the lease was in excess of the powers of the executor under the will, and, therefore, void The will was made on the 9th November 1869 The testator died on the 7th April 1870 and the executor took out probate on the 16th August 1870

On the 29th January 1880, the lease was executed, and on the 12th June 1884, the first defendant assigned it to the second, who is his wife The plaintiff, who at the time of the testator's death was about three years old, attained his majority on the 9th April 1885, and on the 1st October 1888, took from the executor an assignment of all the property of the testator then in [4] the executor's hands The present suit was instituted on the 22nd March 1895

One of the pleas raised by the defendants is that the suit is barred by limitation In my opinion there is no force in this plea It depends on the double assumption that this is a suit to cancel or set aside an instrument within the meaning of article 91 of the Limitation Act, and that the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him more than three years before the institution of the suit It is settled, however, at all events in this Court, that article 91 applies only to suits brought expressly to cancel or set aside an instrument, and does not apply to suits in which substantial relief, such as the recovery of property is prayed– *Abdul Rahim* v *Kirparam Daji*, I L R, 16 Bom, 186 *Sundaram* v *Sithammal*, I L R, 16 Mad, 311 In this suit the substantial relief prayed is that the defendants may be ordered to forthwith deliver possession of the premises to the plaintiff There is no prayer that the lease may be cancelled or set aside There is a prayer that it may be declared that the lease only operates as a lease from year to year, but that is obviously ancillary to the prayer for possession What it means is that both the plaintiff and the executor before him for some years accepted from the defendants the annual rent reserved by the void lease, and that the effect of this was to make the defendants who would otherwise have been merely tenants-at will, tenants from year to year upon the terms of the lease so far as applicable to a yearly tenancy—*Martin* v *Smith* L R, 9 Ex, 50 Woodfall on Landlord and Tenant (14th Ed), p 299 Further, on the 24th October 1893, the plaintiff's solicitors wrote to the defendants giving them notice that the plaintiff had recently ascertained that the lease under which they were holding was for 999 years, that the executor had no power to grant it, that the defendants were in the position of tenants from year to year, and that they were required to give up possession on the 29th January 1895, at the end of the next complete year of the tenancy It is obvious from that letter and from the plaint that the plaintiff claims to eject the defendant on the ground that the lease was *ultra vires* of the executor and void [5] and in such a suit the setting aside of the lease is unnecessary, and the ordinary limitation of twelve years is applicable If the defendants, by reason of their occupation and payment of rent under the void lease are regarded as tenants from year to year, article 139 of the Limitation Act will apply, otherwise article 144, and in either case the suit is within time

The main issue in the case is the first, whether the lease is not valid and operative and binding upon the plaintiff ' In considering the power of the executor to grant the lease it must be remembered that, as the will was made before the 1st September 1870, neither section 179 nor any other section of the Succession Act was made applicable to it by section 2 of the Hindu Wills

Act, 1870. In making the lease of the 29th January 1880, the executor had only the powers of disposition which a Hindu executor would have independently of that Act and of the Probate and Administration Act, 1881,—that is to say, the powers, not of an English executor, but of a manager in whom the probate did not vest any title to the estate which he administered, and whose authority to deal with the estate was only such as the terms of the will conferred—*Administrator-General of Bengal* v. *Prem Lal Mullick*, L. R., 22 I. A., 107 at p. 114; I. L. R., 21 Cal., 732; *Sreemutty Dassee* v. *Tarrachurn Coondoo*, Bourke, Pt. VII, 48; *Jaykali Debi* v. *Shibnath Chatterjee*, 2 Beng. L. R., (O. C.) 1. The question, therefore, is whether the will either expressly or by necessary implication gives the executor power to make a lease of the testator's immoveable property for 999 years. There is no express power of leasing to be found in the will. The only clauses which have been referred to as impliedly giving such a power are clauses 4 and 17. To deal first with clause 17. It appears to me to give no such implied power. As shown by its own terms and those of clause 19, it provides a mode of remuneration for the executors. It directs that out of the funds of the testator, trade or business to the extent of Rs. 20,000 is to be carried on according as Merwanji Dossabhoy (an executor since deceased) may deem proper, it authorizes that executor to keep a share in that trade or business for himself and other shares for his co-executor (the lessor) and another person, [6] and the rest is to be kept for the testator's estate. Next follow provisions as to the division of profits and other details connected with the business, and as to another business which the testator and Merwanji Dossabhoy carried on in partnership, and one provision is that in the event of losses being incurred to an extent specified, the businesses are to be stopped. The clause ends with these words:—"My executors are to act only in such a way that my property may yield rent and the ready cash may yield interest." Whatever may be the exact sense in which the testator used the word "rent," it is obvious that clause 17 deals exclusively with the trades or businesses for which he was providing, and has no reference to his immoveable property or to any power of leasing. The words which I have quoted appear to me merely to emphasize the preceding direction, that if the businesses should result in a loss exceeding the specified amount, they are to be stopped. They are a warning against unprofitable speculation. In the event of the business contemplated by this clause not being carried on, clause 19 provides another mode of remuneration for the executors. If the expression about the property yielding rent could be held to imply a power of leasing, it would, in my opinion, refer only to such leases as fell within the general power of management conferred by the fourth clause, and not to a lease for 999 years. The only other clause in the will which is said to authorize a lease for 999 years is clause 4. That clause is as follows:—

*Clause 4.*—"My property is as thus described. My son Jugmohan is the heir and owner of the whole of my said property. He is now two years and a half of age. At the time when he may arrive at his proper age the whole of my property is to be made over to my son. I appoint my executors to carry on the business management of my property up to that time and I give them authority as follows.—My executors are to carry on the management of my property as they may deem proper. They are to sell my immoveable or other property, and to purchase property for me; that as to ready cash which is to be advanced at interest, they are to lend the same with great care on the mortgage of good estates and on the shares of good chartered banks and land companies and the shares of spinning companies the whole of the money appertaining to whose calls may have been paid up, and they are to lend money at interest at good parties' places."

The only expressions in this clause which could possibly be held to authorize a lease are, first, those which give a general authority [7] to the executors

to carry on the management of the property as they may deem proper, and, secondly, those which authorize them to sell and purchase immoveable property. The first authority undoubtedly includes everything which could fairly and reasonably be considered an act of management of the property not inconsistent with any express directions of the will itself. I am not prepared to hold, and Mr. Raikes did not contend, that a general power of management would not include some power to lease vacant land if necessary. Such a lease might be the only way of avoiding loss to the estate.

What, then, is the test of whether a particular lease is an act of management and as such falls within the executor's powers, or whether it is more than an act of management and so exceeds them? I think that the test is whether the lease can be shown to have been reasonably necessary for the due administration of the estate, and that whatever cannot be shown to be necessary for that purpose cannot be considered incidental to a general power of management. That was substantially the test applied by SIR GEORGE JESSEL, M. R., in *Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch. D. 236, where an administrator granted an underlease of the intestate's leasehold estate with an option of purchase to the underlessee at a future time. It was held by the Master of the Rolls that having the legal estate in the leaseholds, the administrator might in some cases underlet them, and the underlease would be supported in equity as well as in law. "But," he added, "that is an exceptional mode of dealing with the assets, and those who accept a title in that way must take it subject to the question whether it was the best way of administering the assets." *A fortiori* I think that must be the question where a lease or underlease is made by a Hindu executor who has not a legal estate in the property. By way of analogy, and provided that the analogy is applied with caution, it appears to me to be legitimate, in the absence of direct authority, to see what are the powers of leasing of English trustees of lands who have no express leasing power, but who are entrusted with the active management of the estate. The managing powers of a Hindu [8] executor not having the estate vested in him could hardly be more extensive. In India under section 36 of the Trusts Act II of 1882, a trustee has authority generally to do all acts which are reasonable and proper for the realization, protection or benefit of the trust property and for the protection or support of beneficiaries incompetent to contract, but except with the permission of a Court he cannot lease the property for a term exceeding twenty-one years. In *Fitzpatrick* v. *Waring*, L. R. 11 Ir. Eq., 35, decided in 1882, it was held by the Court of Appeal in Ireland upon a review of the authorities that a trustee in whom the legal estate is vested, and who is entrusted with the active management of the estate, may, without any express leasing power, make a yearly or other reasonable letting of tenantable lands. The principle of the decision is that it would be unreasonable to hold that such a trustee is bound to allow the land to remain vacant and unproductive, or to embark upon farming at the risk of his trust fund; and that a will imposing on him active duties of management must be held to impliedly confer on him such powers as are necessary to enable him to discharge those duties, including the power to demise vacant and untenanted lands so as to make them produce an income. But it was also held that it was for the trustee and the tenant taking under him to show, if challenged, that the demise was, under the circumstances of the case, reasonable and done in the fair management of the estate and that a reasonable letting meant one which, having regard to the whole scope of the trusts, was reasonably necessary for their due execution on behalf of the beneficiaries. In that case the letting was from year to year, and I have not found any case

in which a lease for 999 years was held to be an act in the fair management of the estate, though in *Attorney-General* v. *Green*, 6 Ves., 452, a lease for that period of charity land at an undervalue was decreed to be delivered up. Is it, then, shown by the defendants that this lease for 999 years was an act which, having regard to the scope of the executor's duties and the fact that the testator's property was to be handed over to the plaintiff in about fifteen years, was done in the fair management of the property and reasonably necessary for its due administration? [9] There is no evidence which could justify an affirmative answer. There is nothing to show that the land could not have been let profitably for a shorter period falling within the term of the executor's management. To make what is virtually a perpetual lease, at a rent of Rs. 180 a year, of land which there was every reason to expect would increase in value, and which, I understand, has in fact largely increased in value since 1880, is a transaction of which the necessity and wisdom are certainly not self-evident. No facts or arguments have been put before me to justify the lease regarded as an investment. I am, therefore, of opinion that the lease cannot be supported as falling within the general power of management conferred on the executors by the fourth clause of the will.

The question, then, is whether the power to lease is implied by or included in the express power to sell the property which is given by the same clause. In England and Ireland it has been held that a trust for sale does not *primâ facie* imply a power to grant leases, and that, except under special circumstances, trustees for sale, or executors who are *quasi* trustees for sale, would not be justified in granting a lease, for such an act is not regularly within their province, and it is incumbent on the persons taking a lease from them to show that it was called for by the interests of the parties entitled to the property—Lewin on Trusts (9th Ed.), pp. 470, 670, *Evans* v *Jackson*, 8 Sim., 217; *Hackett* v *McNamara*, Ll. & G temp. Plunkett, 283; *Keating* v. *Keating*, *ibid.* temp Sugden, 133 Under the Indian Trusts Act a trust for sale does not include an unlimited power of leasing, for trustees authorized to sell trust property, and having the powers specified in sections 37, 38, and 39, are nevertheless subject to the prohibition contained in section 36 against leasing trust property for more than twenty-one years without the permission of a Court It appears to me that the judgment of Sir BARNES PEACOCK, C. J., in *Sreemutty Dassee* v. *Tarrachurn Coondoo* is an authority for applying to a lease granted by a Hindu executor not governed by the Acts of 1870 and 1881 the analogy of the English cases to which I have just referred. That judgment applies to a mortgage, made by such a Hindu executor under a [10] will containing an express power of sale, the decision in *Haldenby* v. *Spofforth*, 1 Beav 390, that a trust for an absolute sale does not authorize a mortgage. Sir BARNES PEACOCK further held that such a Hindu executor was a manager having a qualified power of disposition, to whom the principle laid down by the Privy Council in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj*, 6 Moo. Ind. Ap., 393, and now embodied in section 38 of the Transfer of Property Act, 1882, was applicable See also *Jaykali* v. *Shibnath Chatterjee*, 2 Beng. L. R, 5. That principle extends to every kind of alienation made by a manager, including leases If it is applied here, it follows that the lessee, knowing from the terms of the lease itself that it was granted by an executor whose power to grant it depended on the will, was bound to make *bonâ fide* and proper inquiry into the circumstances justifying its execution, including the directions of the will and the exigencies of the estate. No such inquiry by the lessee is shown or even alleged. Apart from this, I do not think that in authorizing the executors to buy and sell property

the testator intended to authorize them to make a lease of this kind If he had had any such intention I think that he would have expressed it A power to buy and sell land is one thing, but a power to buy land and then tie it up on a virtually perpetual lease at a fixed rent, however the value of the property may alter, is a different thing altogether For these reasons I have come to the conclusion that the lease was *ultra vires* of the executor, and is not binding upon the plaintiff

It is, however, contended that the plaintiff is estopped from denying the validity of the lease That contention is based upon the fact that from January 1888 to January 1894, the plaintiff signed rent bills and receipts for the rent payable by the defendants beginning with the words My land situate at Chinchpokli has been given to you on fazendari tenure It is contended that this amounts to a representation by the plaintiff that the land was held by the defendants on fazendari or permanent tenure and that the defendants having been induced by that representation to spend money on buildings and other improvements on the land he is now estopped from denying that [11] the land is so held by them As to that it is sufficient to say that even assuming the rent bills to amount to a representation that the defendants were holding under a valid lease for 999 years made by the executors there is no evidence that the defendants were misled by any such representation or in any way acted upon it The only action on their part which it is suggested was the result of a belief founded on the representation was their expenditure on the land In the evidence given by the first defendant in the witness box he has not alleged that he spent money or did anything else in consequence of the statements contained in the rent bills signed by the plaintiff His evidence is inconsistent with any such supposition for the earliest of such rent bills is dated the 29th January 1888 and this defendant began filling in the low lying land apparently in preparation for building as far back as a month or two after the lease of the 29th January 1880 and he continued doing this year by year spending altogether in this way Rs 6 000 or Rs 6 250 The actual buildings, except a shed, were not begun till 1889 but it is abundantly clear that what led the lessee to build was not any statement made by the plaintiff in the rent bills or otherwise but the fact that from the date of the lease until 1893 it never occurred to the lessee or any one else to doubt that the lease had been validly granted Its validity appear to have been assumed by every one who knew of its existence The lessee's belief that it was valid dated from a time when the plaintiff neither made nor could have made any representation on the subject and it was the result of the lessee never having ascertained by inquiry the limits of the executor's powers under the will That disposes of the plea of estoppel

A further plea is that the plaintiff acquiesced in and ratified the lease Now, as to this what are the facts ? The plaintiff having attained his majority in 1885, the executor nevertheless continued to manage the property as before until 1888, when he made an assignment of it to the plaintiff and took a release from him Notwithstanding the assignment and release, however, he still continued to act as manager and to do all the plaintiff's business for him until his death, a month before the hearing of this suit As regards the property now in question he used [12] to make out the rent bills and send them to the plaintiff for signature The plaintiff says that all he knew about this property was that he was being paid rent for it regularly and that it was let on fazendari tenure, his knowledge being apparently derived exclusively from the rent bills sent to him by the executor He never before the institution of the suit saw the property, or was aware of the defendants' buildings, and he first became

aware of the existence of the lease during an illness of the executor in 1893, though it must previously have been among the papers in his possession. It was later in 1893 that a question raised in connection with the power of certain trustees, of whom he was one, to lease the trust property first suggested to him a doubt as to the validity of the lease of the 29th January 1880; which after further inquiry and after taking counsel's opinion led to the notice of the 24th October 1893, and to the institution of this suit. He produces certain account books of the estate which, with the papers, was kept by the executor in an office in the plaintiff's house, and which remained there after the assignment and release of 1888. In these books there are entries of the 31st December 1879, the 14th and 29th January 1880, and the 2nd February 1882 (Exhibits 2, 3, 4 and 5), which give the fullest particulars of the lease; and if he had ever referred to those books he would of course have become completely acquainted with the facts. He says that he did not refer to them, and it appears that although after the assignment and release he nominally took over the management of his estate he continued to leave everything to the executor, who lived in the same compound, who had looked after him during his childhood, and in whom he obviously had complete confidence. This is the substance of the plaintiff's evidence; it was not shaken in cross-examination or contradicted by other evidence, and I see no reason to doubt its truth. It shows that he was ignorant of the lease granted by the executor and of the defendant's action in building, but that if he had referred to the papers or inquired into the previous management of the estate he could have learned those facts. Does this actual ignorance with the means of knowledge constitute acquiescence in or ratification of the lease? I do not think so. In *La Banque Jacques-Carlier* v. *La Banque* [13] *D'Epargne de la Cite et Da District de Montreal*, 13 Ap. Ca., 111 at p. 118, it is laid down by the Privy Council that "acquiescence and ratification must be founded on a full knowledge of the facts." In *Willmott* v. *Barber*, 15 Ch. D., 96, FRY, J., held that the acquiescence which will deprive a man of his legal rights must amount to fraud, and that a man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. He further held that one of the elements necessary to constitute fraud of this description is that the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the person setting up the plea of acquiescence. "If he does not know of it he is in the same position as" that person, "and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights." In the present case I am satisfied that the plaintiff did not know of the existence of his own right which was inconsistent with the rights claimed by the defendants. Another condition of acquiescence stated by FRY, J., is that the possessor of the legal right must know of the other party's mistaken belief of his rights. I am satisfied that the plaintiff did not know that the defendants had any mistaken belief whatever. A further condition is that the possessor of the legal right must have encouraged the other party to spend money or do other acts, either directly or by abstaining from asserting his legal right. The only acts of encouragement which are suggested here are the plaintiff's signing the rent bills stating that the land was held on fazendari tenure, and his receiving the rent. It is argued that he must have known that the land was held by the defendants under some instrument, and that by impliedly recognizing the executor's power to grant land on fazendari tenure, he must be taken *a fortiori* to have recognized his power to grant a lease for 999 years. There is nothing to show that the plaintiff believed the grant on fazendari tenure to have been made by the executor · but apart from that point, this view of constructive or possible knowledge as equivalent to acquiescence appears to me to

be wholly inconsistent with the judgment of FRY, J. In that case the lessor's ignorance of his rights under [14] a covenant in the lease was held to be inconsistent with his acquiescence, though he might, of course, have referred to the lease and made himself acquainted with the existence of the covenant. No doubt in *Gopal Narain* v. *Muddomutty*, 14 Beng. L. R., 21, MARKBY, J., laid down the general proposition that it was the duty of a member of a Hindu family when he came of age at least to make himself acquainted with what had been done by the manager (in that case an executor) during his minority, and to express his dissent at once if he disapproved of any transaction. The facts of that case were, however, very different from those of the present; and I infer from the observations made by COUCH, C.J., and PONTIFEX, J., during the argument of the appeal that they did not accept the general proposition laid down by MARKBY, J. Thus PONTIFEX, J., observed that acquiescence subsequent to the transaction complained of would not bind the sons unless it was accompanied by ratification, and referred to section 198 of the Contract Act, which provides that "no valid ratification can be made by a person whose knowledge of the facts of the case is materially defective." COUCH, C. J., referred to *Life Association of Scotland* v. *Siddul*, 3 DeG. F. & J., 58 at p. 74, and *Bhuban Mohan* v. *Elliott*, 6 Beng. L. R., 85, as supporting the proposition that acquiescence imports full knowledge. In the present case I think that any other view would result in injustice. All that can be said against the plaintiff is that having the means of knowledge of the lease, he allowed the executor, in whom he had confidence, to go on managing the property, and so remained in ignorance. On the other hand, the defendants in taking the lease appear to have had full knowledge of the facts, but both then and afterwards when building acted under a mistake of law as to the executor's powers. For these reasons I am of opinion that the plaintiff has not ratified or acquiesced in the lease.

The plaintiff is, therefore, entitled to recover possession of the property, but it is contended that he should not be allowed to do so without paying to the defendants the full value of all the improvements and buildings effected and erected by them. In support of that contention the cases of *Ramsden* v. *Dyson*, L. R., 1 H. L, 129, *Dattatraya* [15] *Rayaji Pai* v. *Shridhar Narayan Pai*, I. L. R, 17 Bom., 736, and *Yeshwadabai* v. *Ramchandra Tukaram*, I. L. R., 18 Bom., 66, have been cited. In the view which I take of the facts, *Ramsden* v. *Dyson* is an authority not for but against the defendant's contention, for it shows that it is only under special circumstances that a tenant building on his landlord's land acquires a right to prevent the landlord from taking the land and building when the tenancy has determined, and the judgments of Lord CRANWORTH (p. 142), Lord WENSLEYDALE (p. 169), and Lord KINGSDOWN (pp. 170, 171) show that one special circumstance would be that the landlord had purposely allowed or encouraged the tenant to build knowing that the tenant was building on the mistaken notion that he had rights beyond those of a mere tenant from year to year Here, as in that case, the evidence fails to show that the landlord did anything of the kind, or even knew that the defendants were building, and no special circumstances are shown within the meaning of the rule. In *Dattatraya* v. *Shridhar* it was found that the circumstances justified a presumption that the plaintiff by his conduct sanctioned the construction of the building and well, and encouraged the defendant to believe that he would not be ejected, at all events without reasonable compensation. That is a totally different state of facts from those of the present case. In *Yeshwadabai* v. *Ramchandra Tukaram* it was found that the defendant's father had granted the land for building purposes to the plaintiff's predecessors in title, and not only received rent from the

tenant for twenty-five years, but "must have seen, and knowing what he had granted made no objection to Tricum erecting the building on the ground." As observed in *Dunia Lal Seal* v. *Gopi Nath Khetry*, I.L.R., 22 Cal., 820, at p. 826, the Court in *Yeshwadabai* v. *Ramchandra Tukaram* appears to have thought that section 2 of Act XI of 1855 would apply to tenants holding under a grant of land in perpetuity on fazendari tenure for building purposes, and a passage in the judgment of the present Chief Justice in *Shaik Husain* v. *Govardhandas*, I. L. R., 20 Bom., 1 at p 7, seems to imply that the section might be applicable to a tenant *boná fide* believing that he held the land on permanent tenure. I cannot, however hold, and it was not con-[16]tended before me, that a tenant building upon land held by him in the *boná fide* belief that he holds under a valid lease for 999 years builds in the belief that he has an "absolute estate" within the meaning of the section, or that he is "absolutely entitled" to the land within the meaning of section 51 of the Transfer of Property Act, 1882. I regret that I can see no principle upon which the defendants can be given compensation for their expenditure on the buildings, for I have no doubt that they built in the belief that they had all the rights of lessees under a valid lease for 999 years. As I have said, the validity of the lease appears to have been assumed without question till 1893, when the plaintiff discovered first that the lease existed, and afterwards almost accidentally that it was invalid. But the defendants' mistake was apparently due to the absence of inquiry or to insufficient inquiry as to the power of the executor to grant the lease. Their case is, I think, a hard one, but on the other hand I see no reason why the plaintiff should be prevented from recovering his land without paying the defendants a large sum for improvements which he did not lead them to make, and which they made through a mistake of law for which he was not responsible. In *Oceanic Steam Navigation Company* v. *Sutherberry* the hardship to the lessees was very great, for the lease itself was found to be proper and advantageous to the estate, and the administrator only exceeded his powers in inserting an option for purchase at a future time without which the property could probably not have been disposed of at all; but it was held that the mere fact of the lessees' outlay on buildings could not alter the position of the parties in a Court of Equity.

Upon the whole case, I find the first four issues in the negative, the fifth in the affirmative, and upon the sixth I give the plaintiff a decree in the terms of the first three reliefs prayed for in the plaint, with costs.

*Decree for plaintiff.*

*Note.*—In this case an appeal was filed by the defendants, but at the hearing the appellants did not appear, and the appeal was consequently dismissed.

Attorneys for the Plaintiff:—Messrs. *Little, Nicholson and Bowen.*

Attorney for the Defendants:—Mr. *K. D. Shroff.*

## NOTES.

[1. A tenant has no right to compensation for buildings erected by him but he is entitled to remove them (1903) 27 Mad., 211 at or before the termination of the tenancy (1914) 38 Mad., 710.

2. As regards estoppel, see also (1901) 5 C.W.N., 846; (1899) 21 All., 496; (1899) 27 Cal., 570; (1901) 6 C.W.N., 134; (1909) 13 C.W.N., 931; (1899) 2 O.C., 233; (1898) 19 A.W.N., 191.

3. As regards adverse possession, see also (1903) 27 Bom., 515.

4. As regards the powers of an executor, see also (1907) 9 Bom. L. R., 404; (1919) 20 M.L.J., 969 (trustee).]

[17] PRIVY COUNCIL.

*The 24th and 25th February, 3rd and 4th March, and 7th April, 1897.*

PRESENT:

LORDS WATSON, HOBHOUSE, AND DAVEY AND SIR R. COUCH.

Sala Mahomed Jafferbhai and another............Appellants

*versus*

Dame Janbai.... .......Respondent.

[On appeal from the High Court at Bombay.]

*Will—Execution of will—Codicil—Testamentary acts—Incapacity from illness—Influence not amounting to coercive influence.*

A Khoja Mahomedan resident in Bombay made his will in 1886, appointing his wife, and his eldest son by a former wife, to execute it. The testator died on the 9th February 1891, having at different times, in the interval, made four codicils. The widow applying for probate of all the above, propounded a fifth codicil, alleging it to have been made by her husband on the 6th February 1891. The son petitioned for probate to be delivered to him and to the widow, but only of the will and of the first two codicils, contesting the three later codicils as having been made under undue influence exercised by the wife. He disputed the last codicil, not only on the ground of undue influence, if the codicil had been, in fact, executed, but because at the time of the alleged execution his father was almost unconscious, and unable to understand what he was doing.

The High Court, in its original testamentary jurisdiction, refused probate of the three disputed codicils, granting probate of the will and of the first two codicils only. The appellate High Court granted probate of the will and of the five codicils, finding that no undue influence had been exercised; and that the fifth had been executed by the testator with knowledge and comprehension of its contents, and of his free volition.

The Judicial Committee affirmed the judgment of the appellate Court as to the absence of undue influence. In their opinion, if there was not evidence, and there was not, to show coercion in the special matter of the codicils, general assertions of the wife's commanding character, and of the husband's weakness, and of their differences, went for little.

But, in regard to the fifth codicil, they affirmed the judgment of the original Court, finding the evidence to have left open the inference that the testator had been, at the time when it was alleged by the widow that he had made this codicil, too exhausted and ill for such a testamentary act.

APPEAL from a decree (9th April 1894) of the appellate High Court, reversing a decree (26th January 1893) of the High Court in its original testamentary jurisdiction.

The petition filed by the respondent, widow of the late Sir Tharia Topan, on the 23rd July 1891, was for probate (Act V of 1881) of her husband's will, dated the 14th January 1886, with [18] five codicils, all being in Gujarati. The codicils were dated, respectively, 1st November 1886, 21st July 1889, 12th January 1890, 1st November 1890, and 6th February 1891.

The testator was a Khoja Mahomedan, originally from Cutch, who died in Bombay on the 9th February 1891. He had been residing there since 1884. By trading in produce in Zanzibar and in Bombay, where he left property, moveable and immoveable, he had acquired a large fortune. The branch in Bombay was managed by his two sons by a former wife, and he superintended the Bombay business. He had daughters also by a former wife, and sons and daughters by Lady Janbai, his third wife.

The state of the family and all the relevant facts appear in their Lordships' judgment.

The appellants were the representatives of the testator's eldest son, Moosa Tharia Bhai, deceased in 1893, who by the will was appointed executor jointly with his step-mother Janbai. Moosa filed a counter petition on the 5th August 1891, contesting the third, fourth and fifth codicils on the ground of their having been made under undue influence exercised by Janbai over her husband. Moosa disputed the fifth condicil on another ground also, that it had not in fact been executed, by reason that his father was at the time at which the proponent had alleged it to have been executed, incapable of such an act, having been so reduced by illness as to have been almost unconscious; and the petition alleged that he was unable to understand what he was doing. Undue influence was also alleged as to this codicil. Moosa's petition was that probate of the will and of the first two codicils only might be granted to him jointly with Janbai, or to him alone as to the Court might seem fit. The question on this appeal was whether the three later codicils, or any of them, should have been admitted to probate. This involved whether there had been undue influence exercised by the wife in regard to these three codicils, or any, and which of them. As to the fifth, the question also was raised whether the testator had been capable of making the codicil with a sound and disposing mind at the time when he, according to his widow s statement, had made it. The general scheme of the testamentary papers was this:

[19] At the time of the testator's making his will in 1886, Janbai's sons were all minors, and the youngest, Mahomed Husein, was not yet born. The will appointed Moosa and Janbai to be executors and trustees, Janbai to be guardian of the minor sons; and all powers—to maintain and educate the children, to see to their marriages, the administration of their property, and to carry on trade on their behalf--were entrusted to the discretion of Janbai. Pieces of land and house property were devised to the four daughters. Moosa was appointed trustee for his full sister, while Janbai was trustee for her own daughters with power to appoint new trustees. Benefactions were to be disbursed by Janbai after consulting Moosa and his brother Jafferbhai; and Janbai had a discretion to give presents to servants of the firm, in addition to those specially bequeathed. She was appointed trustee of property given to a niece of the testator, with full powers. She was also appointed joint trustee with Moosa of certain property left for a hospital, and for a school, at Zanzibar, and sole trustee of other properties left *for charities* in the name of a deceased daughter of the testator. Regarding Janbai herself he confirmed her right to all presents to her, and to the account of her dealings standing in his books. He gave to her a life estate in a bungalow, twelve shops, and a large dwelling-house, in Zanzibar, with remainder to her own sons, then and afterwards to be born. The business in Bombay and Zanzibar was to be carried on by Moosa for the benefit of all four sons equally, and, in the event of Moosa's death, by Janbai and Jafferbhai. He gave the residue of his estate equally to his four sons, and any son that might thereafter be born.

The first codicil was executed after the birth of another son, Husein. It provided that he should share equally with the other sons, and directed that for seven years Moosa should administer Husein's property and trade on his behalf, after which time, or in the event of Moosa's death before, the same authority was given to Janbai. The authority given to her to administer, and to trade, was to be with the consent of Moosa and Jaffer in certain cases. Yearly accounts were to be submitted to Janbai, and all mistakes pointed out by her were to be rectified. The sons were always to conduct themselves so that

"their mother, my wife, may [20] remain pleased." A house in Zanzibar, worth Rs. 25,000, was given to Moosa.

The second codicil cancelled some bequests owing to the legatees having ceased to be connected with the firm or having died, and made other bequests. Moosa was associated with Janbai in some trusts, in which, by the will, an uncontrolled discretion had been given to her. A recommendation to Janbai, and the two elder sons, to live in harmony followed.

The third codicil related to the personal property of Janbai at Zanzibar and Bombay. It directed that after his death all such property should be given to her upon her own statement or made good to her.

The fourth codicil related to the houses and lands conferred by the will upon Janbai for a life estate, with remainder to her own sons. This estate was now made absolute.

The fifth conferred upon Husein a house in Bombay. To Janbai the codicil gave Rs. 50,000, including Rs. 20,000 which had been already paid to her. The testator confirmed her right to her own separate property in Zanzibar and Bombay, and the account in his books of money due to her.

The judgment of the original Court (BAYLEY, J.) after finding the fact that the codicil alleged to have been made on the 6th February 1891, had not been executed with disposing mind, referred to the question of undue influence as follows:—

"In the case of the *Earl of Sefton* v. *Hopwood*, 1 F. and F., 578, tried at Liverpool in 1855, Mr. Justice CRESSWELL in directing the jury as to the law said: 'The subject of wills procured by influence has been a good deal discussed of late years, and I think that the law, as at present understood, has somewhat modified the earlier opinions on the subject. I take it that in order to invalidate a will on the score of influence, it is not sufficient that you should think the testator has been persuaded into making a will of a particular kind, that he has been persuaded to benefit this or that person to a certain extent. It must be an influence depriving the party of the exercise of his judgment and his free action; it must be such an influence as induces you to think that the will when executed is not the will he desires to execute, that he does not benefit the parties whom he would wish to benefit, but that he is doing that which is not his desire, and, therefore, not his will.'

[21] "In a case tried before Mr. Justice (afterwards Lord Chief Justice) ERLE in 1857, *Lovett* v. *Lovett*, 1 F. and F., 581, he said: 'The law bearing on this subject is uncontested: . . . . undue influence is the control of another will over a person whose faculties have been so impaired as to submit to the control of such other person, so that the party making the will has ceased to be a free agent, and has adopted the will of the controlling party.'

"In *Hall* v. *Hall*, L. R., 1 P. and D., 481, which came before the Court of Probate in 1868, Sir J. P. WILD (now Lord PENZANCE) directed the jury on the question of undue influence thus: 'To make a good will a man must be a free agent. All influences are not unlawful . . . . But pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. The importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven, and his will must be the offspring of his own volition and not the record of some one else's.'

"*Wingrove* v. *Wingrove*, 11 P. D., 81, was decided in the Court of Probate in 1885 Sir JAMES HANNEN, the President, in addressing the jury, said: 'I must ask your particular attention to the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this Court, that there is no subject

upon which there is a greater misapprehension.' Then after giving several illustrations he said: 'To be undue influence in the eye of the law there must be, to sum it up in a word, coercion. . . . . It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence.'

"A similar rule was embodied in the 'Indian Succession Act' (X, 1865), section 48 of which enacted that 'a will or any part of a will the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator is void.' And see Illustrations [(E), (F) and (G)]. It is admitted, however; that the Succession Act does not apply to the will or codicils of Sir Tharia Topan who was a Khoja Mahomedan, section 331 of that Act stating that the provisions of that Act shall not apply to intestate or testamentary succession to the property of any Hindu or Mahomedan.

"It was enacted by the Indian Evidence Act (I of 1872), section 9, Illustration A, adopting the English law on the subject, that where the ques-[22]tion is whether a given document is the will of A (the same rule would be applicable to a codicil) the state of A's property and of his family at the date of the alleged will may be relevent facts.

"Such facts are in the present inquiry in my opinion relevant and material, as likewise are the testamentary disposition which Sir Tharia had already made by his will and his first two codicils the genuineness and perfect fairness of which were not questioned."

The Judge's conclusion, after considering the evidence, was that the third and fourth codicils had been made under the undue influence of Janbai; and of these, as well as of the fifth, probate was refused.

From the decree of the first Court Janbai appealed, with the result that the above decision was reversed. The appellate Court (Sir C. SARGENT, C. J., and FARRAN, J.) found that the testator knew and understood the contents of the fifth codicil, which he executed on the 6th February 1891. And they found that all the three codicils, no less than the two that were undisputed, had been made by the testator of his own volition, free from any undue influence.

FARRAN, J., observed that as to the last codicil he had not come to the opinion of its having been duly executed without considerable doubt and hesitation. As to this codicil, and its execution, he gave weight to the testimony of Merwanji, the medical man in attendance on the testator. All the testamentary papers were, therefore, admitted to probate.

Moosa Tharia Bhai, the eldest son of the testator, died in 1893. An order was made for the admission of this appeal on the 8th August 1894, and his representatives were the appellants on this record.

Sir *Robert Reid*, Q. C., Mr. *J. Jardine*, Q. C., and Mr. *Bargrave Deane*, Q. C., appeared for the Appellants.

For the appellants it was argued that the decree of the first Court was right, and should be restored. The two main points, on which the evidence was referred to, were the state of the testator at the time when, on the 6th February 1891, according to the respondent's case, he executed the codicil of that date, and the question of the exercise of undue influence over him by his [23] wife, in regard to the third, fourth, and fifth codicils It was submitted that, on the balance of the evidence, the greater weight should be given to the finding of the Judge who had had the witnesses before him; and the following were some of the points in the argument. Neither of the judgments in the appellate Court adverted to the sum of Rs. 50,000 having been given by the last codicil, and to the evidence as to the way in which Janbai obtained Rs. 20,000 from the firm. Yet that transaction threw considerable light as to the terms on which the husband and wife were. Stress was laid on the testator's letters to his son Moosa, complaining of the conduct of his wife towards him, especially of the letters of the 16th January 1890, and of the 10th August 1890. The letters written by or by the direction of Sir Tharia to his son

Moosa, stating how he was treated by his wife, were cogent evidence to prove that his wife carried her influence to the extent of coercing him, and that he was not a free agent in the matter of the three later codicils. The testimony of witnesses as to his condition on the evening of the 6th February 1891, showed that he was then too ill to have been of sound and disposing mind or to be capable. And it was improbable that in his weak state he should have undertaken, of free volition, to carry out an alteration, the evidence having shown that his previously expressed intention was not to leave the house to Husein.

Sir *Edward Clarke*, Q C., and Mr. *J. D. Mayne*, for the Respondent, argued that the judgment of the appellate Court should be affirmed. No evidence had gone the length of showing that any one of the three contested codicils had been obtained from the testator against his own judgment and inclination by the coercive influence of Janbai. The argument that there had been undue influence rested mainly upon two views: the first was that the wife was of a resolute character, capable of influencing her husband whenever she chose, and that this power she had exercised; the second was that the codicils themselves could only be accounted for by taking it that this influence had been brought to bear, inasmuch as the dispositions were just what the wife had wished to have made. Against these views must be set the fact that the previous testamentary documents, which [24] were undisputed, tended the same way; yet it could not be doubted that they spoke the free and uninfluenced mind of the testator. The will itself showed not only the strong affection of the husband for his wife, but the confidence which he reposed in her judgment and integrity.

And so late as the 21st July 1889, it was clear that her influence did not prevent her husband from making, independently of her wish, provisions that he thought proper. Taking the codicils separately, there was nothing in his providing in the third codicil that the wife's statement should be accepted as to what was, or was not, to be taken to be her property of the articles left at Zanzibar. Nor in the fourth codicil, which only converted her life estate, in two pieces of property with remainder to her own children, into an absolute estate Nor in the fifth codicil, devising a house to Husein, was there anything to show undue interference or coercion Nor was there any improbability in the testator's having given, of his free volition, in the fifth codicil a further legacy of Rs. 50,000 to Janbai, when his sons were to take everything that was not otherwise bequeathed. As to the evidence afforded by the letters to Moosa, there was the possibility that the testator was endeavouring to make the least of his intention to favour his wife, without there being any real reason why he should so write. For more than one reason little weight should be attributed to the statement by Sir Tharia in the letters of the 16th January 1890, and of the 10th August 1890, as to his wife's conduct towards him. In regard to the testator's state on the 6th February 1891, and the codicil propounded by the widow as executed on that day, the evidence had established that the testator was of sound and disposing mind at, and before, its preparation and execution, and that he understood and assented to its contents. Upon this point the appellate Court believed the evidence of the medical attendant, who had not been in any way discredited.

Afterwards, on the 7th April following, their Lordships' **judgment** was delivered by **Lord Hobhouse.**

Sir Tharia Topan was a native of Zanzibar and the owner of a large mercantile business carried on in that island and in the city [25] of Bombay. He resided in Bombay for some years and managed the business there, while his

eldest son Moosa managed the business in Zanzibar. He belonged to the sect called Khojas, being Mahomedan in religion but observing Hindu customs as regards their property. In the year 1886 he made his will. He had then a wife named Janbai, who is the present respondent, and who apparently belongs to a family of Shiya Mahomedans. He had also eight living children, three of whom were born of a former marriage and were of middle age. The other five were children of Janbai, and were much younger. Later in the same year, when another son had been born to him, he made a codicil to his will, and in the year 1889 a second codicil On the 12th January 1890, he made a third codicil. On the 1st November 1890, he made a fourth codicil. On the 6th February 1891, a document was prepared which is propounded as a fifth codicil. On the 9th February 1891, he died. His executors were the respondent Dame Janbai and his eldest son Moosa.

On 23rd of July 1891, the widow Janbai petitioned the High Court of Bombay claiming probate of the will and the five codicils. Moosa opposed her. As regards the will and two first codicils there was and is no dispute; but Moosa contends that the third and fourth codicils were obtained from the testator by the undue influence or coercion of Janbai, and that the fifth codicil if signed at all by the testator was signed when he was unconscious. Those are the issues now before their Lordships. They were decided in favour of Moosa by Mr. Justice BAYLEY at the trial, and against him by the Court of Appeal. He is now dead, and his executors are the present appellants.

As regards the third and fourth codicils, their Lordships cannot say that the case when once cleared of a multitude of rather unimportant details presents much difficulty. Moosa's contention is that in the course of the year 1889 the testator became very infirm in health, and that in particular his eyesight was so much impaired as to make him very dependent on others; that Janbai was a woman of superior abilities and great force of character; that she acquired constantly increasing dominion over the testator's mind; and that she used it to obtain from him a constantly [26] increasing amount of benefit for herself, which it is extremely improbable that he would have given her of his own accord. To support this case there are produced letters written by the testator to Moosa containing some bitter complaints about his wife and lamentations over his own weakness.

The most emphatic of these letters is dated the 16th January 1890, four days after the date of the third codicil. It is written in Gujarati and is translated as follows:—

"To the chiranjiv (long lived) Moosabhai Tharia—to wit.

"Your bhabhi has been exercising great zulum (oppression). I have been much distressed (at it); what can I do? There is nothing I can do: papers (or writings) are prepared and brought (to me) and (she) forcibly takes my signatures (to them). A paper about the (household) things and articles at Zanzibar having now been prepared and brought (she) has forcibly obtained my signature (to it). Consider that paper as null. And if I should not give (my) signature, I feel danger to my person (or life), and as to whatever money she draws, if I should speak (and raise an objection) thereto she creates a noise (or bustle). I have been made very miserable by your bhabhi. If God should call me over, I shall be freed from her persecution. I write and leave this letter, but I cannot read it. I cannot now endure the disgust (any longer). Your right is great, but there is great persecution from her. The 16th January 1890."

A second letter is dated the 10th August 1890. It is of great length referring mostly to the affairs of the firm and showing no lack of capacity for the business in the testator. The most important passage is as follows:—

"And the inward reason of (her) giving the annoyance to me is that she wanted me for the benefit of my youngest son (by her) to give (*i.e.*, convey) to my (said) son the two large

immoveable properties which are situated in Bombay and the one (or) two large immoveable properties which are situated in Zanzibar. I did not care for her and did not give (*i.e.* convey) my said properties in writing (to her) and shall not give (the same) in writing either. On the contrary I told her that I have not even privately given in writing anything to the eldest son who is entitled to a greater (share). She then remained silent; never spoke about it again."

Another letter is dated the 5th November 1890, four days after the date of the fourth codicil. It does not mention that codicil, but it refers apparently to the same incident mentioned in the letter of August on which that codicil has a bearing.

[27] Taking first the suggestion of violent improbability, it is necessary to see what the codicils actually do or purport to do. The third codicil is confined to chattels belonging to Janbai, who appears to have had considerable property of her own. This is acknowledged briefly in the will. The codicil appears to do exactly the same thing, only with more specific reference to places of deposit, and with an express acknowledgment that the testator is bound to restore the articles to her or to make good any loss. The codicil then goes on to say that his executors shall be bound likewise, and that Janbai's assertions shall be conclusive on the subject without any evidence or proof. Such a provision is no doubt, if literally applied, calculated to confer a power open to great abuse. But it is clear from the will and otherwise that the testator had a very high opinion of his wife; probably the idea of her making a dishonest use of her powers would not occur to him, or if it did he may very conceivably have thought that such a risk was less in amount and less dangerous to his estate than the risk of quarrels over a number of detached articles.

The fourth codicil deals with property given by the will to Janbai for life and afterwards to her sons. It is not quite easy to understand it, either with regard to the property it comprises or to the interests it confers, and it is not necessary to give any opinion on those points. The most adverse construction to Janbai for the present purpose is that which ascribes the greatest amount of increased benefit to her On that construction the codicil gives to her an absolute interest in a block of buildings and adjacent ground at Zanzibar which the will gave to her and her sons; and it also adds to the gift another building lately joined on to the block. This addition is valued by Moosa at Rs. 65,000. It may be observed here that the estate is valued at 29 lakhs at the lowest, and another account makes it of much greater value—somewhere about 40 lakhs.

The result is that in the third codicil their Lordships cannot find any such improbability as should induce a Court of Justice to lean favourably towards the other evidence brought to show undue influence. In the fourth codicil they cannot find any [28] improbability at all; indeed the gift of the added building seems a highly probable one for the testator to make.

The general evidence brought to show Janbai's dominion over her husband is loose and vague. He was in failing health; he was nearly blind; she was a woman of great force of character and will, apt to show temper when thwarted; very constantly with the testator, and conversant with his property and with the affairs of the firm. The testator was of parsimonious habits, his wife was fond of what he thought undue display, and by her expenditure goaded him sometimes into expressions of anger and complaint. It is hardly worth while to pursue this class of evidence into further detail. If there is not evidence to show coercion in the special matter of the codicils, general assertions of the wife's commanding character and the husband's weakness and of wrangling about expenses, go for little.

If indeed it could be shown that the statements in the letter of 16th January 1890, were true, Moosa's case would be carried a long way On that account a serious attack is made on the genuineness of the letter There are certainly some considerations relating to its writer's infirmities, to its contents, and to its production by Moosa, which are calculated to raise doubts, and the Court of Appeal on these grounds came to the conclusion that it would not be safe to rely upon it On the other hand Mr Justice BAYLEY, who presided at the trial thought that the external evidence placed the genuineness of the letter beyond dispute Moosa received it by post, and of his truthfulness the learned Judge had no doubt Fazul saw it before it was sent, and posted it He was a confidential man of business in the service of the testator for twenty four years, and was munim or head manager of the Bombay branch for ten years He was not shaken in cross-examination and he impressed the presiding Judge very favourably as a witness The legal adviser of the sons in Zanzibar thought he saw it in the summer of 1890 Several persons familiar with the testator's handwriting deposed to it and the Judge was quite satisfied on that point

Their Lordships would hesitate much before overruling a conclusion so formed on account of difficulties more or less [29] conjectural the more especially as the contrary conclusion implies an accusation of elaborate conspiracy perjury and forgery against Moosa and Fazul two persons of high commercial position and of otherwise unblemished character all for a most inadequate temptation considering the magnitude of the estate and the small amount of gain which could be effected in Moosa's share of it by such a letter They may, however content themselves with assuming the genuineness of the letter, because it does not affect the result of their judgment

The third codicil was prepared by Mr Sayani, a solicitor of the first rank in Bombay and the testator's confidential legal adviser It was prepared as early as August 1889 on the testator's own instructions , and a declaration of trust to the same effect was prepared at the same time There was delay in its execution because the testator was expecting the knighthood actually conferred upon him at the beginning of 1890 and he wished not to execute the documents before that time, saying that his sons might not like it, and might do something to prejudice him Janbai was opposed to the delay, but his will and not hers carried the day The execution of the documents was effected in the regular way of business by Sayani at his own office Janbai though with her husband, took no part in the instructions or during the execution

Sayani's evidence must be taken as giving the exact truth of the case so far as he saw it, and there is nothing beyond the intrinsic nature of the disposition (which has been before observed on) to suggest any other conclusion than his The testator's statement that his wife came and forcibly obtained his signature is not true It may be that his brain was clouded for the moment , it may be, as the High Court suggests, that he wished to excuse himself to his sons it may be, and is perhaps more probable, that something had occurred to throw him into a state of irritation not uncommon with strong men whose powers are decaying, and that he vented it in exaggerated and unjust complaints against his wife Whatever the cause, his letter is clearly contrary to the proved facts of the case

The two later letters have reference to the dispositions of the fourth codicil Sayani indeed was not employed in that business, [30] but Fazul, who has in the main given evidence against the codicils, shows how it was executed By order of the testator he prepared a draft dictated by Janbai. The draft was copied by Mohunlal, the cashier of the firm. He is a witness

who has in the main given evidence against the codicils, and he is a witness commended by Mr Justice BAYLEY It was read over to the testator, signed by him, and attested by Fazul There is no evidence of any pressure, and no improbability (as before observed) in the dispositions Even if the two letters had contained allegations of coercion by Janbai, it is seen by the previous letter of January with what caution they should be received But the effect of the letters is rather to show that the testator held his own against some importunities of his wife According to that of August, she wanted a conveyance "in writing" (apparently by deed *inter vivos*) to her youngest son. According to that of November, she wanted a Mahomedan wife's share "in writing" The testator refused in both cases, saying in the first case that he had not even given anything in writing to Moosa himself, upon which she remained silent, and in the second case that what she asked was not the custom among the Khojas, and that he had made his dispositions by will

The result is that their Lordships agree with the Court of Appeal that there has been no undue influence, and that the third and fourth codicils should be admitted to proof.

The fifth codicil presents questions of much greater difficulty It bears date the 6th February 1891 It consists of five clauses The effect of the first is to give to Janbai's youngest son Mahomed Husein, a boy of six years, a property of considerable value in Bombay, probably one of the properties referred to in the letter of August 1890 The effect of the second clause is to recognise a draft of Rs 20 000, recently made by Janbai from the funds of the firm, and to give her Rs 30,000 in addition The other three clauses relate to her separate property, and their effect need not be considered The codicil is attested by Fazul, by Dr Merwanji, who was in habitual attendance upon the testator, and by Abdula, a Bombay merchant whose daughter was then betrothed to Janbai's son

[31] It must be admitted that there is much improbability in these dispositions, as to both of which the evidence leads to the belief that they were contrary to recently expressed wishes of the testator But their Lordships do not follow this point into detail, because the validity of the codicil depends not upon probabilities but upon the circumstances attending its execution

Four witnesses, being members of or connected with the family, give evidence to support it, *viz*, Janbai herself, her two daughters Katzibai and Fatmabai, and Abdula, the attesting witness Janbai's account is that on the 6th February between 10 and 11 A M the testator told Fazul to make a draft and gave him instructions The draft was fair copied by Mohunlal and read over to the testator, he was then assisted to sit up, and so signed the codicil, only when his hand was shaky, Fazul put his hand on the pen There were present, besides herself, Fazul, Bandi Ali, Dr Merwanji and Abdula. She had never asked the testator for the Bombay property, or for the money. She did not take any part in giving instructions for the codicil To that denial she firmly adhered Katzibai tells the same story, only adding that the signature took place about a quarter or half past four Fatmabai substantially agrees Abdula says that he attested the codicil between 2 and 1 P M Earlier in the morning, between 8 and 11, the testator told him that he was giving his bungalow to Mahomed Husein As to the exact mode of signature he agrees substantially with the others About the instructions and reading to the testator he knows nothing

So far the history is plain enough But the statements of the family witnesses are at variance on important points not only with those of the testator's servants including the attesting witness Fazul, but with those of the third

attesting witness Dr. Merwanji. This gentleman is so important a witness that Mr. Justice FARRAN says the whole case for the codicil rests on his testimony. That learned Judge entirely disbelieves, as did Mr. Justice BAYLEY, the evidence of the family witnesses; and at this bar the respondent's counsel treated that evidence not a support but as a hindrance to his case. In estimating the effect of Merwanji's evidence it must be borne in mind that the hour of signature is very important, because the testator's [32] strength steadily deteriorated throughout the day. Dr. Bhalchandra, a medical man of good position who was called in on the 5th, tells us that on the 6th he paid five visits. On that day he believed the testator would die His temperature was 102° on the 5th, rose to 103° at 3 o'clock on the 6th, and may have gone to 104°. Merwanji tells us that his temperature was 102° in the early morning of the 6th, in the afternoon (about 5 o'clock) 103°, and between 7 and 8, after Bhalchandra's visit, 104° *minus* 2 points

Merwanji went away to his dispensary in the afternoon, and after his return was called into the room where the testator was. Then he gives the following evidence as to the codicil:—

"I see my attestation. I saw the testator execute it. After my return at ½ past 6 I was called into the room where Sir Tharia Topan was.

"This document was being dictated by Sir Tharia. A Gujrati mehta was writing. It was dictated by Sir Tharia to Fazulbhai, who was making a rough draft. Only the first clause was dictated by Sir Tharia Topan. Then Sir Tharia Topan, who was in fever and exhausted, told his servants to let him lie down on his bed.

"Then Lady Janbai dictated the last four clauses. Sir Tharia heard her do so. I did not hear him make any objection. A fair copy was made from the rough draft. It took about an hour to write a fair copy. When the fair copy was made, Sir Tharia Topan was made to sit up in his bed and sign the fair copy. I don't remember if the fair copy was read over to him before it was signed.

"He was told that it was. He only held out his hand for a pen.

"He was blind and so very weak and his hand was very shaky. The pen was put into his hand, but he was not able to sign. Fazul Mahomed caught hold of his hand along with the pen and signed. After he had signed it was attested.

"At the time this was done the testator was in a conscious state; at the same time he had a little high fever. A little above 103°.

'As long as he dictated the first clause I thought he understood it. I noticed no change for the worse from the time he ceased dictating to the time he executed the fair copy.

"Seeing he tried to get a pen I think he seemed to understand what he was doing when he executed the document.

"After the first clause was dictated he fell back exhausted. He did not speak from that time till after the document was executed and attested."

[33] In cross-examination he says: "I asked him how he felt off and on during the day. That is all I asked him. Sometimes he would say 'So so,' sometimes he would only nod. That is all I heard him say during the day except dictating the codicil. Except when at my dispensary, I was in his room the whole day and evening."

Dr. Bhalchandra says he spoke to the testator on the evening of the 6th. "His answers were rational and connected. I believe he was at that time in a fit condition to make his will." But in cross-examination it appears that his only conversations with the testator were to ask him, "How are you?" when he said "I am not feeling well"; and to ask about his appetite, his sleep, and his cough; and "it was from these conversations that I say I believe he was fit to make his will." Now it is obvious that a sick man may well be able to

answer simple questions about the state of his body and yet be quite unequal to the effort of making new dispositions of his property.

Yet another doctor gave evidence, one of high standing in Bombay, not specifically as to the codicil, but generally as to the testator's health. Doctor Bahadurji says that he in company with Bhalchandra visited the testator on the 5th, and again visited him on the 6th, when he describes him as being in a state of semistupor. But this gentleman does not keep memoranda, and reasons are given for thinking that he may be mistaken as to the days of his visits. The other two medical men say that he did not come before the 7th and it is admitted on all hands that after the 6th the testator was quite incapable of attention to business. The first Court expresses doubts on the disputed point, and their Lordships think it safer not to rest weight on Bahadurji's evidence. They would pass it over without further remark, but for an incidental result of the view taken by the Court of Appeal. The learned Judges there think it so clear that Bahadurji was not present on the 6th, and that everybody must remember the day on which he first came, that they have wholly discredited the testator's servants, three witnesses strongly relied on by Mr. Justice BAYLEY, mainly on the ground (which as regards Fazul does not exist) that they ascribe Bahadurji's visit to the 6th Nobody imputes anything worse than mistake [34] to Dr. Bahadurji, and it seems to their Lordships that even if the other witnesses are wrong in their dates, there is no ground for ascribing to them deliberate perjury so as to vitiate their evidence in every point.

The first of these witnesses is Fazul, the munim. His story is to the following effect. Between 4 and 5 in the evening of 6th, Janbai told him that the testator wanted to give the bungalow to her younger son, and a sum of money to herself. He made a draft from her instructions, and dictated it to Mohunlal. The fair copy was executed between 7-30 and 8. While it was being executed, Merwanji came in. The draft was not read to the testator, but Mohunlal read the fair copy to him. As to the testator's sitting up, his inability to sign, and the guidance of his hand, he gives much the same account as that of Merwanji. The testator, he says, was held up by Janbai on one side and Bandi Ali on the other. Then he says again that when the signature was being made, Merwanji came in, and adds that at Janbai's request he put his attestation. He was asked no questions on his statement about the arrival of Merwanji. He says nothing about the visit of Bahadurji.

The next servant witness is Mohunlal the cashier. On the 6th he went to the bungalow in the forenoon with Fazul and waited till between four and five, doing nothing. Then Janbai gave him a draft in Fazul's handwriting, which at her request he copied. At 7 30 or 8 he with the others went into the testator's room. As to the circumstances of the signature he gives an account not materially different from the other witnesses, except that he says the document was not read over before the signature. Merwanji, he says, came into the hall after Fazul had attested, and was not in the testator's room while the codicil was being signed. "When I went out of the room, I saw Merwanji; he had just come. The lady asked him to sign, he said nothing, took the pen and signed at once." He was not asked any further questions on these points. He mentions the visit of Bahadurji about 6 o'clock ; this was stated in cross-examination, apparently without remark on either side

The third servant witness is Bandi Ali, who had been employed upwards of twelve years in one of the sale departments of [35] the business. In the morning of the 6th he by Janbai's order telephoned for Fazul and Mohunlal to come with the cash-book. He took no part in preparing the codicil, but saw

the others—Janbai, Fazul and Mohunlal—consulting and writing. The part he took in the signature was to help Janbai in making the testator sit up. His account of that act is much the same as the other accounts, he thinks the document was not read over to the testator, because he was not in a state to understand it. He saw Merwanji when Fazul was making his attestation. He speaks to visits of Bahadurji on the 5th and 6th. On neither of these points was he asked any further questions.

Mr Justice BAYLEY says of those three witnesses "they impressed me very favourably by the manner in which they gave their evidence," and that "their evidence was not in the least shaken on cross examination, though differing in details as truthful witnesses sometimes do. Indeed on a careful examination of the record their Lordships cannot find any matter of importance in which these witnesses contradict one another except as to the reading of the codicil before signature an important matter no doubt, but one on which it is quite conceivable that the memory might get confused in recalling transactions which from first to last occupied some hours. Even Dr Merwanji, who says he was present from the beginning of the instructions for the codicil down to its execution, cannot recollect whether it was read over or not. In fact this contradiction, though it has been much dwelt on in argument here was evidently thought little of at the time. Not one of the witnesses was pressed about it, and it is treated by the Judge as one of those discrepancies which tell rather in favour of than against the veracity of witnesses. Nor is it assigned by the Court of Appeal as a reason for discrediting the witnesses. They dwell slightly on the position of the witnesses as servants of the firm and, therefore presumably favourable to Moosa, but mainly on the statements of Mohunlal and Bundi Ali with respect to Bahadurji's visits. Now, assuming in Janbai's favour that these statements were not according to the fact, there is nothing to show that they were made with any intention to deceive, or that any particular importance was attached to them at the time. They [36] come into the narrative quite casually, as it would seem, and they were not tested by any questioning. If Bahadurji himself might innocently fall into error about the date of his visit, much more easily might those who only professed to have seen him in the house. In their Lordships' judgment no ground has been shown for throwing the evidence of these three witnesses out of the case.

If the evidence in question is held to be an accurate account of the events, there can be but one conclusion, *viz*, that when the testator's hand was made to sign the codicil he was hopelessly incompetent. If it is taken only on a level with other evidence, as coming from men intending to speak the truth, but liable to error and subject to correction from other quarters then the evidence must be balanced. What is the evidence for the codicil? That of the family witnesses, seeing how it was treated by the Courts below and by the respondent's counsel here, may be put out of the question for this purpose. The slight value of Dr Bhalchandra's evidence has been shown before. There remains Dr Merwanji and their Lordships agree with Mr Justice FARRAN that if the codicil is to be supported at all, it must be on his evidence alone.

Dr Merwanji is a man in good position and with no apparent cause of bias except the fact that he attested the codicil. Though there are some inexplicable contradictions between him and other witnesses on more points than one, no one has imputed falsehood to him. Supposing him to be right on each of the disputed points, the case amounts to this that the testator was in a state of high fever and of extreme and increasing weakness, that he was strong enough to dictate a clause, that he was then exhausted, fell back,

and never spoke again till after the signature; that his wife dictated the rest, he making no objection; that some time (an hour or so) afterwards a fair copy was brought to him to sign; whether it was read over to him or not the witness cannot say; that he held out his hand for a pen as the witness thought; that he was not able to write; that he was made to sit up and his hand was guided; that his holding out a hand for a pen when invited to sign made the witness think that he understood what he was doing at the time when he [37] executed the document; that the witness had no communication with the testator all day except to ask him off and on how he felt: and to receive for answer a nod, or the expression "so, so;" and that the testator said nothing else the whole day except to dictate the codicil.

Now the great importance of Merwanji's evidence consists in his statement that the testator dictated the first clause of the codicil. If that is left out, his account is that of a man who had all day been declining in power and had become at length wholly incapable, too exhausted to speak, to sit up, or to write; this too being his last effort, for it is not suggested that he was afterwards of capacity to act, and it is that circumstance which caused so acute a controversy over the dates of Bahadurji's visits. Supposing that the testator's dictation is accepted as clearly established, there is still the interval of an hour between that act and the signature, during which he did nothing but hold out his hand; and the evidence, to put it at the highest, still leaves open the inference that after he sank back exhausted he was not capable of a testamentary act.

If then Merwanji's evidence stood absolutely unimpeached, it would hardly support the respondent's obligation to prove that the testator was capable. But so far from being unimpeached, on this point Dr. Merwanji is in flat contradiction to every one of the seven other persons who have given evidence bearing on it. The evidence of the family witnesses may be untrustworthy. But it is impossible to shut our eyes to the fact that Janbai herself, supported by her daughters and her intended son-in-law, flatly denies all participation in the instructions for the codicil, and gives an account of its preparation in a different way and at a different time of day. And it is very difficult indeed to believe that so intelligent a lady would have committed herself to such statements, if all the time she had in her mind the consciousness that, in the presence of Dr. Merwanji and (as he says) of Abdula and of two out of three servants, she had taken the prominent part, equally impossible to mistake or to forget, of dictating the greater part of the codicil out of her own head. Then comes the evidence of the three servants, as to which their Lordships have already given reasons why they cannot acquiesce in its [38] summary rejection by the Court of Appeal. That evidence leaves it very doubtful at what point of the proceedings Merwanji came upon the scene; but except in one respect, *viz.*, whether the fair copy was read to the testator, it is quite clear and consistent as to the mode in which the codicil was prepared and signed. Dr. Merwanji was, with intervals of visits to his dispensary, about the house all day; and it may be that, having heard much conversation he has not kept his memory clear about that anxious time. But whatever may be the explanation of his evidence, it is quite unequal to bear the weight of proving a due execution of the codicil. Their Lordships cannot accept it as giving a correct account of what happened; and they do not see their way to depart from the decision of Mr. Justice BAYLEY in accepting the account of the three servants as substantially consistent and correct.

The first Court decreed probate of the will and first two codicils and ordered the plaintiff (Janbai) to pay costs of suit. The Court of Appeal varied that decree by pronouncing in favour of all five codicils, and by ordering all costs to be paid out of the testator's estate. Their Lordships hold that the decree of

the appellate Court should be varied by ordering that the fifth codicil should not be admitted to probate, and *quoad ultra* affirmed. They will humbly advise Her Majesty to this effect. As to the costs of this appeal, each party has succeeded on a substantial point, and has failed on a substantial point; and their Lordships follow the usual course by directing that they shall bear their own costs.

*Appeal allowed: decree varied.*

Solicitors for the Appellants:—Messrs *Brown, Ringrose and Lightbody.*

Solicitors for the Respondent:—Messrs. *Payne and Lattey.*

**NOTES.**

[See also (1907) 11 O. C., 102; (1908) 11 O.C., 295 ]

## [39] APPELLATE CIVIL.

*The 10th March, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE AND MR. JUSTICE PARSONS.

Tulaji Fatesing Raje Bhosle............(Original Judgment-debtor) Appellant

*versus*

Balabhai Lakhmichand...... .....(Original Decree-holder) Respondent.*

*Execution—Attachment—Allowance payable through post office—Attachment of money in hands of public officer—Anticipatory attachment—Civil Procedure Code (Act XIV of 1882), Sec. 272, Sch. 4, Form 142.*

Section 272 of the Civil Procedure Code (Act XIV of 1882) does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands.

SECOND APPEAL from the decision of W. H. Crowe, District Judge of Poona, confirming the order of Rao Bahadur N N. Nanavati, First Class Subordinate Judge, in an execution proceeding.

The appellant Tulaji Fatesing was in receipt of a monthly allowance of Rs. 500 from the Akalkot State. It was paid to him at Poona through the post office there. The respondent (plaintiff) obtained a decree against Tulaji in the Court of the First Class Subordinate Judge of Poona, and in execution attached, by a prohibitory order directed to the Post Master, Rs. 300 out of the allowance. The prohibitory order was issued on the 6th April 1895, and was received by the Post Master on the 8th April. He received the money order on the 13th April.

Tulaji applied to the Court to remove the attachment. The Subordinate Judge rejected the application, holding that the allowance was liable to attachment and exempted from the operation of section 266 of the Civil Procedure Code Act XIV of 1882, as it was neither a political pension nor a grant by the British Government.

On appeal by the judgment-debtor the Judge confirmed the order.

Tulaji thereupon preferred a second appeal to the High Court.

[40] *Branson* with *Ghanasham N. Nadkarni* appeared for the Appellant (Tulaji):—The attachment purported to be made under section 272 of the Civil Procedure Code (Act XIV of 1882). Under that section the property to be

* Second Appeal, No. 902 of 1895.

attached must be in the hands of the public officer. But in the present case the Post Master had no money in his hands when he received the order of attachment. We contend that section 272 is not applicable. Arrears of maintenance can be attached under that section, but not the right to future maintenance.

Next we contend that an allowance of this kind cannot be attached under section 266 of the Civil Procedure Code (Act XIV of 1882). This allowance was granted to the appellant by the Akalkot State for his maintenance and, therefore, cannot be attached. It may be stopped at any time by the State. The test is, what would a purchaser get if the right to the allowance be put up to sale. It is merely a personal allowance and the purchaser would get nothing if the State stopped the allowance—*Ghamshamlal* v. *Bhausali*, I. L. R., 5 Bom., 249; *Diwali* v. *Apaji Ganesh*, I. L. R., 10 Bom., 342, *Gulab Kuar* v. *Bansidhar*, I. L. R., 15 All., 371; *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho*, 5 W. R., 111.

*Nagindas T. Marphatia* appeared for the Respondent (Judgment-Creditor):—We do not ask for the attachment of the allowance that may become due in future. Here we have attached the sum of Rs. 300 which has become due. As soon as the money was paid to the forwarding post office at Akalkot for despatch to Poona it ceased to be an allowance, and it became money belonging to the appellant-debtor.

[PARSONS, J.—Can you levy attachment in anticipation ?]

We submit we can, because the money had already become the judgment-debtor's property at Akalkot. The prohibitory order was in force when the money reached Poona, and it came into full operation when the money was received by the Post Master at Poona—*Narasimhulu* v. *Adiappa*, I. L. R., 13 Mad., 242; *Lallumal* v. *Mahomed Sherdil Khan*, 12 Punjab Record, p. 233.

**[41]** The money is not payable by the British Government and, therefore, it is not a pension under section 266 of the Civil Procedure Code (Act XIV of 1882).

**Farran, C. J.**:—It is not disputed by Mr. Nagindas for the respondent that the allowance payable to the defendant in this case was not attachable until the sums payable in respect of it were received by the post office for his benefit and on his behalf The attachment order cannot, therefore, be supported on the ground of its being an attachment of the defendant's right to receive the sum in question. The attachment can only be supported as an attachment of moneys in the hands of a public officer within the meaning of section 272 of the Civil Procedure Code.

It is admitted, however, that at the date of the attachment (6th April 1895) there was no money in the hands of the Post Master at Poona. The money sought to be attached did not reach his hands until the 13th April, and so could not be attached on the 6th. Section 272 does not, in my opinion, allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands.

The Court reverses the order of attachment with costs throughout on respondent.

**Parsons, J.**:—I concur. Section 272 of the Code of Civil Procedure provides for the attachment of property which is deposited in or is in the custody of a Court or public officer. The form (No. 142, Schedule 4) recites an application for the "attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed*)." Thus it is clear both from the words of the section and the form that the property sought to be attached must be actually in the possession of the Court or officer to

enable it to be attached under section 272. It cannot be attached in anticipation of receipt The District Judge thinks that such a construction of the section would operate to prevent the attachment of salaries, but there is a special provision for them made in section 268 which he has apparently overlooked.

*Order reversed*

NOTES

[This was followed in (1911) 14 C L J, 127, (1913) 26 M. L. J., 364.]

## [42] APPELLATE CIVIL.

*The 10th March, 1896.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Varajlal Mulchand and others ..........(Original Plaintiffs) Appellants

*versus*

Kastur Dharamchand. ..........(Original Defendant) Respondent.*

*Decree—Execution—Attachment in execution—Suit to declare property attached not liable in execution—Injunction against sale of property pending decision of suit on plaintiff giving security for interest on the sum representing value of attached property—Subsequent dismissal of suit with costs—Application by defendant in execution of decree for the interest for which security ordered by injunction—Application disallowed—Remedy under section 497, Civil Procedure Code—Civil Procedure Code (Act XIV of 1882), Secs. 278, 283, 492, 497*

Kastur having obtained a decree against one Vanmali attached a house in execution Varajlal intervened under section 278 of the Civil Procedure Code (Act XIV of 1882), and applied that the house, if sold, should be sold subject to his mortgage. His application was dismissed and he thereupon brought a suit (No 648 of 1887) for a declaration that the house was not liable in execution of Kastur's decree That suit was dismissed by the lower Court, and Varajlal appealed Pending the hearing of the appeal he applied for and obtained under section 492 of the Civil Procedure Code an injunction restraining the sale until the result of the appeal on his giving security for interest at six per cent. on Rs. 2,000, the acknowledged value of the house The appeal was heard in due course and was dismissed with costs, and thereupon Kastur in execution of the decree in this last mentioned suit (No. 648 of 1887) applied to recover the interest for which security was ordered to be given by the District Court

*Held*, that he was not entitled to recover it. A Court of execution cannot award interest when the decree is silent The respondent (Kastur) had his remedy under section 497 of the Civil Procedure Code, and that remedy was obtainable on application, not to the Court of execution, but to the Court which issued the injunction.

SECOND APPEAL from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

One Kastur Dharamchand having obtained a decree against Vanmali and others attached a house in execution.

Thereupon Varajlal Mulchand intervened under section 278 of the Civil Procedure Code (Act XIV of 1882) claiming a mortgage lien on the attached house. His application was dismissed [43] and he then filed a suit (No. 648 of

* Second Appeal, No. 831 of 1895.

1887) praying for a declaration that Kastur was not entitled to sell the said house in execution except subject to his mortgage. This suit was dismissed with costs by the lower Court.

He thereupon filed an appeal in the District Court and at the same time applied for an *interim* injunction against Kastur restraining him from selling the house pending the disposal of the appeal This application was made under section 492 of the Civil Procedure Code (Act XIV of 1882), and not under section 545. The District Court on this application granted the injunction if Varajlal give a security for interest at 6 per cent. on the value of the property. The order of injunction was in the following terms:—

"If the applicant gives security for interest at 6 per cent on Rs. 2,000 which is acknowledged to be the value of the property by both parties should he fail to establish his mortgage claim and for fulfilling the orders of the Appellate Court, I make the order absolute."

The appeal to the District Court in Suit No. 648 of 1887 failed, and the decree of the lower Court dismissing the suit was confirmed, and subsequently a second appeal to the High Court was also dismissed with costs

Thereupon Kastur applied in execution of the decree in this latter suit (No. 648 of 1887) to recover from Varajlal Rs. 236, the interest at 6 per cent. on Rs. 2,000 for which security was ordered to be given by the District Court.

Varajlal contended that the order as to the giving of security did not entitle Kastur to recover interest in execution, and that no interest could be recovered in execution of the decree in Suit No 648 of 1887, as that decree contained no order to pay interest.

The Subordinate Judge refused execution of the decree in respect of the interest claimed.

In appeal the District Judge allowed the interest. In giving his decision he said:—

"The principal reason why the Subordinate Judge refused execution is that the decree sought to be executed does not direct any interest to be paid to the defendant by plaintiff.

"When an appellant obtains a stay of execution pending an appeal and gives a security bond to decree of the Appellate Court, the usual [44] way of enforcing such security bond when necessary is by ordinary execution proceedings *vide Venkapa Naik* v. *Bassalingappa bin Kotribasappa*, I. L. R., 12 Bom., 411 Nor is it usual in the decretal orders of the Appellate Court to make any reference to the security bond or its conditions. It is quite true, as stated by the Subordinate Judge, that the suit was one for a declaratory decree, and no interest could be awarded. It was, however, competent to the Court to have granted compensation to the defendant under section 497 of the Civil Procedure Code, and the probability is that no demand was made for compensation, because the defendant felt that under the security bond he could recover his full compensation. There does not, therefore, appear to me any objection to grant execution in respect of the interest The Subordinate Judge also remarks that the appellant in his original decree has obtained an order awarding him interest on the decretal amount, and that he cannot recover double interest on it. As, however, the appellant does not seek to recover double interest from the same person, this does not appear an insurmountable difficulty What the appellant really seeks to recover is the consideration which respondents undertook to pay on account of the grant of the temporary injunction. I do not see that it was necessary to make any reference to this security bond in the decree of the first Appellate Court. Looking to all the equitable circumstances of the case, the respondents are clearly liable to pay the interest promised in the security bond. That bond was not merely to make good the value of the property should any accident occur by which it became injured or ceased to exist, *e.g.* a fire. A regular suit is not the proper procedure to enforce a security bond given in proceedings for a stay of execution, and unless the appellant is to completely lose his equitable rights, he must be able to recover them in execution."

The District Judge, therefore, directed execution to issue for the interest claimed. Varajlal filed a second appeal in the High Court.

*Ganpat Sadashiv Rao*, for the Appellant Varajlal:—The injunction granted by the District Court staying the sale if security was given was not made under section 545 of the Civil Procedure Code. It was an injunction made under section 492. That being so, Kastur should have claimed compensation as provided in section 497, but he has not done so. The District Judge has not distinguished between sections 545 and 492. No interest can be awarded in execution of the decree in this case, because the decree itself does not award it—*Sadasiva* v. *Ramalinga*, L. R., 2 I. A., 219, 228; *Hurro Doorga* v. *Maharani Surut Soondari*, L. R., 9 I. A., 1; *Forester* v. *The Secretary of State for India*, I. L. R., 3 Cal., 169.

[45] *Goverdhanram M. Tripatti*, for Respondent:—The order of injunction was no doubt made under section 492. The respondent (Kastur) might have applied for compensation under section 497, but he is not precluded from enforcing in execution the security ordered by the District Judge. See section 253, Civil Procedure Code. The injunction refers to the then pending litigation. Although the decree is silent as to the interest, the Court can enforce the injunction order.

**Jardine, J.**:—The present respondent in 1886 attached a house in execution of a decree against some one who is not a party in the present litigation. The present appellants intervened under section 278 for a declaration of their mortgage lien, and were unsuccessful. Then they sued for the same reliefs, but were unsuccessful in the suit and both appeals. That suit was No. 648 of 1887. In the appeal therein to the District Court, that Court granted an injunction to restrain the present respondent from selling the house. Both the learned pleaders before us say the injunction was under section 492. The injunction imposed on the present appellants an obligation to pay interest at 6 per cent. on the occurrence of certain future contingencies, on the value of the property settled to be Rs. 2,000.

The present respondent claimed in the Court of the Subordinate Judge to recover this interest by way of execution of the decree in Suit No. 648. That decree is silent on the subject. No order was made upon the injunction by the Court that granted it. The Subordinate Judge held that as the decree was silent regarding this interest he could not award it as a Court of execution. The District Judge has reversed the part of the order which rejects the interest claimed in the darkhast. He conceded, as has been conceded in the full argument here, that the respondents had a procedure provided under section 497 of the Civil Procedure Code before the District Court. This raises the question whether the law allows by implication that the respondent may also present a darkhast like this to the Subordinate Judge. The case cited by the District Judge—*Venkapa* v. *Baslingappa*, I. L. R., 12 Bom., 411,—relates to a surety and is an interpretation of sections 253 and 583, and arose out of a matter under section 545 of the Code. We do not think it relevant to the present question.

[46] The settled doctrine is that a Court of execution cannot award interest where the decree is silent—*Sadasiva Pillai* v. *Ramalinga Pillai*, L. R., 2 I. A., 219, 228; *Hurro Doorga Chowdhrani* v. *Maharani Surut Soondari Debi*, L. R., 9 I. A., 1; and *Forester* v. *The Secretary of State for India in Council*, I. L. R., 3 Cal., 169. *A fortiori* this doctrine must apply where, as under section 497, a special procedure is provided in a different forum. We think section 497 applies, and that the relief which the District Judge might award upon the application would be pursuant to an adjudication under the section. To

hold that the executing Court can adjudicate would be contrary to section 497, which assigns the duty to the Court which issued the injunction. To hold that no adjudication is necessary would also be contrary to section 497, which further provides for the result being embodied in the decree. If, then, the respondents had wished to get relief in the matter of interest from the Court of execution, they should have first applied under section 497, and got provision made in the decree of the District Court.

For these reasons we reverse the order of the District Judge and restore that of the Subordinate Judge: the respondent to pay the costs of both appeals

*Decree reversed.*

**NOTES.**

[ See also (1907) 17 M. L. J., 310 ]

**[ 22 Bom. 46 ]**

## APPELLATE CIVIL.

*The 11th March, 1896.*

PRESENT.

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Ramchandra Ganesh Purandhare............(Original Plaintiff) Appellant

*versus*

Ramchandra Kondaji Kate and another............(Original Defendants) Respondents*

*Vendor and purchaser—Specific performance—Suit by purchaser against vendor for specific performance of contract of sale. Covenant by purchaser to build a temple—Specific performance refused—Specific Relief Act (I of 1877), Sec. 21.*

On the 16th November 1893, the first defendant agreed to sell a house to the plaintiff The contract contained a covenant on the part of the plaintiff to build a temple and to secure an annuity to the vendor and his wife On the [47] 21st of the same month the first defendant sold and conveyed the same house to the second defendant and put him in possession In the suit brought by plaintiff against defendants Nos. 1 and 2 for specific performance of the contract of the 16th November,

*Held* (1) that the second defendant was a proper party to the suit

(2) That specific performance could not be granted, the covenants contained in the agreement being such as the Court could not enforce.

APPEAL from the decision of Rao Bahadur N N. Nanavati, First Class Subordinate Judge of Poona.

The plaintiff sued for specific performance of an agreement of sale (*satekhat*) passed to him by the first defendant on the 16th November 1893. By that agreement the first defendant agreed to sell a certain house to the plaintiff for Rs. 4,000 and Rs. 100 was paid by the plaintiff as earnest-money. Two deeds of conveyance were to be executed conveying different parts of the property. The agreement of sale contained a clause under which the plaintiff (the purchaser) agreed to build a temple and to secure the payment of an annuity to the first defendant and his wife. The following clauses in the document set forth this part of the agreement:—

"(3) You are to erect a temple of the deity Datt in the place to be entered in the gift deed and to raise in front thereof a sabha-mandap for Katha and Kirtan. You are to build the aforesaid temple and the sabha-mandap within six years from this day. If you do not

* Appeal No. 123 of 1895.

do so within the aforesaid time you are to pay Rs. 2,000 (two thousand) for the expenses for the said devasthan (temple institution). Within that sum either I or any body else will erect the temple and the mandap. You, your sons and grandsons, &c., from generation to generation should use the said temple institution, the place and the building and perform the *puja*, &c., of the deity. All the right to receive the income and carry on every kind of management, &c., belongs to you. I shall have nothing to do with the same.

"(4) Besides (doing what is stipulated above with regard to) the above-mentioned property, so long as myself and my wife are alive you are to pay me or in my absence to my wife Rs. 5 every month from this day. After my and my wife's death you are to spend the said Rs. 5 every month towards the said temple. Should you fail to pay the fixed sum every month, you are to deposit a sum of Rs. 1,000 (one thousand) at 8 annas per cent. per month with any banking firm that we may name, so that we may get the above sum without obstruction. So long as we both are alive we will draw the interest on the abovementioned amount. After the death of both of us, you should take the [48] interest on the said amount or the principal amount itself and do as mentioned above.

On the 21st November 1893, the first defendant sold the same property to the second defendant by a deed which was duly registered, and the second defendant was put into possession.

The plaintiff sued both defendants, praying for specific performance of the above contract of sale.

The second defendant pleaded that he purchased *bonâ fide* and without notice of the prior sale to the plaintiff.

The Subordinate Judge held that the second defendant had notice of the prior sale to the plaintiff, but that the contract of sale to the plaintiff could not be specifically enforced having regard to section 21 (clauses *b* and *g*) of the Specific Relief Act I of 1877. He, therefore, dismissed the plaintiff's claim

The plaintiff appealed.

*Lang* (Advocate-General with *Manekshah J. Taleyarkhan*) appeared for the Appellant (Plaintiff):—We merely desire that documents should be executed according to the *satekhat* and nothing more. Such a suit does not in any way contravene the provisions of section 21 of the Specific Relief Act (I of 1877) *Blackett* v. *Bates*, L. R., 1 Ch. App., 117. The Judge has decided on all the issues in our favour.

*Macpherson* (with *Inverarity* and *Narayan G. Chandavarkar*) appeared for the second Defendant:—We rely on section 21 of the Specific Relief Act (I of 1877). Supposing that specific performance could be granted, still it cannot be enforced against us, as we have not joined in passing the *satekhat*—*Luckumsey Ookerda* v. *Fazulla Cassumbhoy*, I. L. R., 5 Bom., 177.

[PARSONS, J., referred to *Chunder Kant Roy* v. *Krishna Sunder Roy*, I. L. R., 10 Cal., 710].

That decision is against us; still the decision of this Court should be followed.

[49] We have bought the property for valuable consideration and are in possession. The plaintiff's remedy is to sue us for possession.

**Farran, C. J.**:—The first defendant in this case on the 16th November 1893, agreed to sell the house, the subject-matter of the suit, to the plaintiff; and the plaintiff on the same day paid him Rs. 100 as earnest-money. The sale contract or *satekhat* (Exhibit 43) was to be carried out by two documents conveying different parts of the same premises, the first being styled a deed of gift. The second was to be in form an ordinary deed of purchase. The plaintiff was to pay Rs. 4,000 as the price of the house. The contract also contained

a covenant on the part of the plaintiff to build a temple and to secure a small annuity to the vendor and his wife.

On the 21st of the same month the first defendant sold and conveyed the same house to the defendant No. 2 for Rs 8,000 and put the second defendant in possession of it on the same day (Exhibit 35).

The plaintiff has filed the present suit for specific performance of his contract of the 16th November against both the defendants. It has been objected that the suit is not maintainable in that form, but we consider that there is no force in that objection. *Chunder Kant* v. *Krishna Sunder*, I. L. R., 10 Cal., 710, is a case exactly similar to the present, where the original vendor and his alienee with notice were made parties to the suit. See, too, Fry on Specific Performance, p. 18.

The important question to be determined at the threshold of the case is whether the second defendant when he purchased was a transferee for value who had paid his money in good faith and without notice of the plaintiff's original contract within the meaning of clause (*b*) to section 27 of the Specific Relief Act.

We agree with the Subordinate Judge in his finding that the second defendant was a transferee for value. The evidence that he actually paid the purchase-money is overwhelming. There was a particular reason, too, for his purchase of the house derived from the circumstance that it adjoined his own: and from the [50] connection between him and the first defendant there is no ground for assuming that the whole transaction was a sham to get rid of the plaintiff's purchase and that he is now holding merely as a trustee for the first defendant. We think that he clearly purchased on his own account and to suit his own object. After a careful perusal of the evidence we do not feel disposed to differ from the Subordinate Judge in his finding that the plaintiff has not proved the four specific instances of direct notice of his contract to the second defendant which his witnesses depose to. The Subordinate Judge saw those witnesses and was in a position to judge of the credit to be given to them, and the reasons which he has given for distrusting their testimony appear to us to be of considerable cogency.

The Subordinate Judge has, however, come to the conclusion, from the facts elicited in the examination of the second defendant himself, that he did not pay his money in good faith and without notice of the plaintiff's contract The correctness of that conclusion from the facts deposed to has been assailed before us in the argument of counsel for the respondent. (His Lordship referred to the evidence and continued .- ) We have read over the evidence more than once, and the conclusion to which it inevitably leads us is that the defendant No. 2 is not a purchaser in good faith and without notice within the meaning of the section, and we, therefore, agree with the finding of the Subordinate Judge on the fourth issue.

The Subordinate Judge has refused to decree specific performance of the plaintiff's contract on the ground that the covenants which the plaintiff has entered into are not such as the Court can specifically enforce. We agree with the Subordinate Judge that they are of that nature. The Advocate-General, however, for the appellant contends that the plaintiff has not directly entered into these covenants, but has only agreed that the deeds to be executed to carry out the contract shall contain such covenants on his part. The law on this part of the case is expressed with great clearness by CRANWORTH, L. C., in *Blackett* v. *Bates*, L. R., 1 Ch. Ap., 117, cited by the Advocate-General. "If the arbitrator instead of award-[51]ing that the plaintiff should do certain acts had awarded that the lease to be executed should contain covenants by the plaintiffs to do them, the case would have stood on an entirely different footing. The

Court would not then have been called on to enforce either directly or indirectly the doing of these acts, but merely to decree the execution of a lease containing certain covenants, a kind of relief which is clearly within the jurisdiction of the Court and open to no objection." These observations apply exactly to the contract in the present case. We must read it carefully, therefore, to see whether it provides that the deeds to be executed shall contain these covenants or whether the plaintiff has directly covenanted by the contract to perform them. Having done so we find no agreement expressed in it that the deeds to be executed shall contain any stipulations whatever. One is to be in form a deed of gift and the other a deed of sale. The first defendant is to get these prepared, stamped, and registered. There is not a word said as to their containing any covenant whatever. The agreement that the plaintiff is to erect a temple within six years, as well as that to secure an annuity to the first defendant and his wife, are direct obligations imposed on the plaintiff by the agreement and so fall within the general rule laid down in *Blackett* v. *Bates* and not within the exception which the passage we have cited from the judgment lays down. In decreeing specific performance of the contract as a whole we should be decreeing the plaintiff to perform his part of the agreement as well as directing the defendant to execute the conveyance. The Advocate-General at the hearing of the appeal treated the case as though the contract was that the plaintiff should join in the sale-deeds for the purpose of covenanting to perform these acts, and on the supposition that such was its nature we were at the time misled by his argument. The plaintiff is entitled to recover the Rs. 100 earnest-money from defendant No. 1.

We confirm the decree with costs as against defendant No. 2. Decree as against defendant No. 1 varied by awarding the plaintiff Rs. 100 against him.

*Decree confirmed and partially varied.*

## [52] APPELLATE CIVIL.

*The 16th March, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Godavaribai............(Original Plaintiff) Appellant

*versus*

Sagunabai and another............(Original Defendants) Respondents.*

*Hindu law--Widow--Maintenance—Separate maintenance and residence—Family property too small to admit of allotment of separate maintenance.*

Where the family income was too small to admit of an allotment to a widow of a separate maintenance, and there was no family house, but a small portion of land which was the site of a house,

*Held*, that the widow was not entitled to a separate maintenance, but might be allowed, if she so desired, to occupy during her life-time a portion of the land, not exceeding one-third.

SECOND APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Thana, with appellate powers.

The plaintiff sued to recover from the defendants, who were the widows of her husband's brother, Rs. 72 for three years' maintenance and a third share in a piece of vacant ground for residence, alleging that defendant No. 1 was in

* Second Appeal No. 619 of 1894.

possession of the family property which had belonged formerly to the father of her (plaintiff's) husband and of the defendants' husband and that she refused to maintain the plaintiff.

Defendant No. 1 answered (*inter alia*) that the claim was time-barred and that the net profits of the family property amounted to fifteen maunds of paddy only, which were insufficient to maintain her and two unmarried young daughters.

Defendant No. 2 did not appear.

The Subordinate Judge found that the defendant was not personally liable, but that her liability depended upon the possession of sufficient ancestral property, that the claim was not barred by the law of limitation, that the net annual income of the family property was not more than Rs. 40-4-0, and that no surplus remained for plaintiff's maintenance, and that the plaintiff was not entitled to recover one-third share of the land. He, therefore, rejected the claim.

**[53]** On appeal by the plaintiff the Judge confirmed the decree. The plaintiff preferred a second appeal.

*Narayan V. Gokhale*, appeared for Appellant (Plaintiff):—The plaintiff is the widow of a co-parcener. The income of the family property may be small, still provision must be made for the maintenance of a widow in the family—Strange's Hindu Law, pp. 67 and 68. Some arrangement should be made for the plaintiff's residence.

*Sadashiv R. Bakhle*, appeared for the Respondents (Defendants):—As to maintenance we rely on *Savitribai* v. *Luximibai*, I.L.R., 2 Bom.. 573; *Kasturbai* v. *Shivajiram*, I. L. R., 3 Bom.. 372; *Ramchandra* v. *Sagunabai*, I. L. R., 4 Bom., 261 at p. 263, and West and Bühler, p. 757. Both the lower Courts have concurred in holding that the family property is insufficient to allot separate maintenance to plaintiff. This is a finding of fact.

As to residence, there is only a vacant space and no house. Defendant No. 1 herself is living with her father.

**Farran, C.J.**:—The present falls, we think, within the principle enunciated in the cases "that a widow cannot claim separate maintenance where the family property is so small as not reasonably to admit of an allotment to her of a separate maintenance"—*Savitribai* v. *Luximibai*, I. L. R., 2 Bom., 573, *Kasturbai* v. *Shivajiram*, I. L. R., 3 Bom., 372, and *Ramchandra* v. *Sagunabai*, I. L. R., 4 Bom., 261 at p. 263. The income of defendant No. 1, who is the widow of the last holder, derived from the family property is only Rs. 40 per annum or little more than Rs. 3 per month, and out of that she has to support herself and her daughters. There is no house in which we can assign a residence to the plaintiff, but there is the site of a house. She may be allowed, if she so desires, to occupy during her life-time a portion of that site not exceeding one-third of it. Such portion can be determined in execution if necessary. Decree varied accordingly.

*Decree varied.*

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## [54] CRIMINAL REFERENCE.

*The 17th March, 1896.*

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Imperatrix
*versus*
Juma bin Fakir and Urzee bin Sulleman.*

*Uganda—Consular Court—Jurisdiction—Jurisdiction of Consular Court over persons not resident within a British Protectorate—Aiding the waging of war against a friendly power—Africa Orders in Council, 1889, 1892, 1893.*

Two natives of a German Protectorate were convicted by the English Consular Court of Uganda of aiding and abetting the King of Unyoro in waging war against the King of Uganda and the Queen-Empress under sections 48 and 50 of the Africa Order in Council of 1889 as supplemented by the Order of Council of 1892 and 1893. One of them was also convicted of slave-dealing.

*Held* that the English Consular Court had no jurisdiction inasmuch as the accused, even if subjects of a Signatory Power † were not resident and their offences were not committed within a British Protectorate.

*Held*, also, that the alleged fact that the '*locus in quo*' was in British military occupation gave no jurisdiction to the Consular Court.

REFERENCE from the Consular Court for the district of Uganda (in Africa) held at Kampala under the Africa Order in Council, 1889 ‡ clause 75.

The accused were convicted of taking part in operations of war by aiding and abetting Kabarega (King of Unyoro) in carrying on war, insurrection or revolution against the Kingdom of Uganda and the Protecting Power, and the first accused was further convicted of slave-trading.

The charges against the accused were framed under clauses 48 and 50 of the Africa Order in Council, 1889, which were as follows:—

"48. If any British subject does any of the following things without Her Majesty's authority, that is to say :—

[55] "Levies war or takes any part in any operation of war against, or aids or abets any person in carrying on war, insurrection, or rebellion against any king, chief, tribe or power, every person so offending shall be guilty of an offence against this order, and on conviction hereof shall be liable (in the discretion of the Court before which he is convicted) to be punished by imprisonment for any term not exceeding two years, with or without hard labour, and with or without a fine not exceeding £1,000, or by a fine not exceeding £1,000 without imprisonment.

* Criminal Reference No. 27 of 1896.

† Signatory Power, *i.e.*, a Power who was a party to the General Act of the Conference of Berlin, 1885. See Recital to Africa Orders in Council, 1892 (*London Gazette*, July 1, 1892).

‡ See the *London Gazette* for Tuesday, October 22, 1889. By clause 21 of this Order in Council, the High Court of Bombay is the Court of Appeal for the Courts in Africa, acting under the said Order in Council, and by clause 75 where a Consular Court sentences a person to imprisonment exceeding twelve months, the sentence should be submitted for review to the prescribed Court of Appeal.

See also Africa Order in Council, 1892 *London Gazette*, July 1, 1892 and Africa Order in Council 1893 (*London Gazette* July 21, 1893.)

"In addition to such punishment every such conviction shall, of itself, and without further proceedings, make the person convicted liable to deportation, and the Court, before which he is convicted, may order that he be deported to such place as the Court directs."

"50. A person shall be deemed guilty of an offence against this order—

"Who smuggles or imports into or exports from any place any goods with intent to avoid payment of any duty payable thereon to any recognised chief, or king, government, tribe, or people, or any goods the importation or exportation whereof (as the case may be) into such place is prohibited by any such chief, king, government, tribe, or people of such place.

"A person convicted of an offence against this article shall be liable to imprisonment for any term not exceeding three months, or fine not exceeding £50, or both of those punishments; and any goods smuggled or imported in contravention of this article may, on conviction of the offender, or, if he absconds or evades trial, be declared forfeited to Her Majesty together with any ship, boat, cask, case, or receptacle wholly or partly belonging to the offender, and containing such goods."

The accused were sentenced by Mr. Ernest Berkeley, Her Majesty's Commissioner and Consul-General for Uganda, to imprisonment and hard labour for three years and two years respectively.

The sentence now came before the High Court of Bombay for review under the aforesaid clause 75 of the Africa Order in Council of 1889, with the following explanatory observations by Mr. Berkeley :—

"Under the provisions of articles 74 and 75 of the Africa Order in Council, 1889, Her Majesty's Commissioner and Consul-General for Uganda, &c., has the honour to submit the accompanying sentence for review by the Supreme Court of Bombay, together with the following explanatory observations regarding the case ·

"In the early part of this year, information came to hand that certain Arab caravans were passing up from the south-west of Uganda, between Uganda and Lakes Albert Edward and Albert, into Unyoro with arms and ammunition for trade against ivory and slaves with Kabarega, King of Unyoro, then at war with [56] Uganda and with Her Majesty the Queen. There were various parties all working under an Arab named Khalfan.

"Steps were at once taken to intercept them. On the 20th of May, a patrol came across one of the parties, who opened fire on them and got away, wounding several men of the patrol. In June, Lieutenant Vandeleur, Scots Guards, surprised the main camp of these parties in Unyoro itself. He captured a quantity of gunpowder and blew up some more; he also delivered a number of slaves (women and children) that had been bought by these traders. All the traders, however, got away, securing at the same time a certain number of slaves, but a party of them were shortly afterwards intercepted and captured by Captain Pulteney, Scots Guards, in charge of a Government station further south.

"The two accused were in command of this party, and as will be observed from their evidence, although they at first pleaded 'not guilty,' they subsequently admitted having been concerned in powder-removing and slave-trading.

"It may be added that ample further evidence could have been adduced as to these facts, but the accused were in reality only concerned to prove that they were not with the party that fired on the Government patrol on May 20th."

The reference was heard by a Division Bench of the High Court (JARDINE and RANADE, JJ.).

*Young* (*amicus curiæ*), for the Accused (with him *Maneksha J. Taleyarkhan*) :—The evidence on the record does not prove that the offence was committed by the accused. There is no proof that there were hostilities going on between Kabarega and the Protectorate of Uganda and Her Majesty the Queen. Without such proof the conviction is illegal and ought not to be confirmed in revision.

With regard to the question of jurisdiction, there is no doubt that Unyoro is within the British sphere of influence: but there is nothing on record, or in

the books that have been written upon Africa, to show that the country of Unyoro was at any time brought within the Protectorate of Uganda.

On the contrary, it appears from the information given in the public press that Unyoro is a kingdom with which the Queen is at present waging war, and an official despatch that appeared in the *Times* of the 20th February 1896, shows that a force of 20,000 men is at present employed against it. Unyoro being thus wholly outside the British Protectorate of Uganda, the conviction of the accused for acts done within Unyoro are illegal. [57] See Hall on the Foreign Powers and Jurisdiction of the British Crown, p. 217.

As no declaration has been produced or even alleged to have been made by the Queen bringing Unyoro within Her Majesty's protection, clause 3 of the preamble of the Order of 1892 does not apply.

The accused are not British subjects, they are natives of a territory which has been occupied by Germany. No evidence to contradict this fact has been produced by the prosecution, and there is nothing whatever on the record to show that either of them is a resident either in the Protectorate of Uganda or in the British sphere of influence outside. They are, therefore, foreigners. No British Court has ever assumed jurisdiction in a Protectorate over non-British subjects, except under circumstances showing consent, &c. The Treaty of Berlin in 1885 for the first time recognised the principle of giving jurisdiction over non-British subjects; but this, too, was by consent. The accused being German subjects have no power to consent to British jurisdiction. That power was taken away from them by the Africa Order in Council, 1892. The only course open to the prosecution was to bring the case within the Africa Order in Council, 1889. But that order does not make them British subjects, and so article 48 of that order, which in terms applies only to British subjects, does not apply to them. Under the Africa Orders in Council of 1889, 1892 and 1893 a person who is not a British subject or resident in a British Protectorate is not liable for a crime committed outside a British Protectorate even though committed within a British "sphere of influence." The lower Court did not treat them as British subjects. This appears from the fact that no charge of treason or misprision of treason was framed against them. British subjects supplying arms to a hostile power, even if in the enemy's country, are guilty of treason: see 1 East P. C., pp. 52-53, and 2 Stephen's History of Criminal Law, 14.

No doubt the Africa Order in Council of 1892 renders subjects of the Signatory Powers justiciable in like manner as British subjects, but we contend (1) that these men are not subjects but [58] only under the protection of a Signatory Power, *viz.*, Germany, and that though under the Order in Council of 1889 a British subject is declared to include a person under British protection, there is no proof that German law is the same. See Hall on Foreign Jurisdiction, p. 288.

(2) Even if they are German subjects the extension of the jurisdiction given by the Africa Order in Council of 1892 is clearly confined to such subjects as are residents within a British Protectorate or commit a crime within a British Protectorate. See Africa Order in Council of 1892—preamble and section 2.

The jurisdiction does not extend to such persons committing a crime in a mere "sphere of influence."

The charge of slave-dealing must also fall to the ground, as non-British subjects are only justiciable for such offences if they are committed within the jurisdiction of the Admiral, and these were not so committed—Stat. 5 Geo. IV, c. 113, s. 9; Stephen's History of Criminal Law, Vol. 2, p. 27.

The only cognizable offence that the accused committed is that they are said to have imported contraband of war. Assuming that they did, the only rightful penalty for that is confiscation. See Hall's International Law, p. 691; Phillimore, Vol. 3, pp. 387, 404, 410—460.

*Lang* (Advocate-General) (with him Rao Saheb *Vasudev J. Kirtikar*, Government Pleader), for the Crown :—The Order of Council, 1889, extends over the Continent of Africa, and the British sphere includes the whole of East Africa. From the map given in the Rise of our East African Empire by Captain F. D. Lugard it will be seen that the British sphere of influence extends over that portion of Africa which is to the east of the 30th degree of longitude. And Unyoro is to the east of that degree of longitude. The maps given by Captain Lugard show that various portions of Unyoro are, as a matter of fact, actually occupied by British forts. The red dots on the maps show the positions of these forts. The forts extend almost up to Lake Albert, the place where the accused were arrested or seen passing with the contraband goods. And the evidence shows that a British patrol was at the river Msizi.

[59] It is admitted that Uganda is a Protected State. The effect of the Order in Council of 1889 is to make any offender of Uganda punishable by the British Courts. Looking at the territorial description given there, Unyoro is included. Moreover, that Order makes offences against Uganda punishable without reference to the place where they are committed.

By the Treaty of 30th March 1892, the King of Uganda acknowledged the suzerainty of the British Government– Lugard, Vol. II, pp. 436-437.

Article 48 of the Order of Council, 1889, makes every offence against the Protected State of Uganda and the Protecting Power punishable, even when such an offence is committed beyond the limits of the Protectorate, but within the British sphere of influence and the local jurisdiction of the Consular Court, that article still applies. An abetment of such an offence is likewise punishable, although the place is outside the Protected State.

Accused admit that they knew there was war between the King of Unyoro and the Protecting Power. They also partially admit trading in gunpowder. The circumstances show that the importation of gunpowder was for State purposes and for the use of Kabarega, who was at war with the Protecting Power. It is impossible to contend that so large a quantity of gunpowder was merely for sporting purposes. Supplying arms and ammunition to the enemy would be an offence under the Penal Code. If the accused were British subjects, they would be guilty of high treason—Forster on Cr. Cases, 217, Hawkin's Pleas of the Crown, Vol. I, Section 28. A British subject would be punishable under article 48 of the Order of 1889 for supplying arms and ammunition to the King of Unyoro. Article 50 prohibits the importation of gunpowder, &c. The Order is in force in any part of Africa.

As regards the conviction for trading in slaves, it should be remembered that the British Courts are bound to put it down. Accused were found carrying two women, not as slaves whom they had purchased for their own use, but for the purpose of selling them as slaves against their will. Slave-trading is pro-[60]hibited in Uganda: see Lugard, Vol. II, p. 436. Illegal detaining of slave women is prohibited—*Ibid.*, p. 574.

*Per Curiam* :—1. Until this record came from Uganda, this Court had no notice of its jurisdiction in such cases, as it is not supplied with the *London Gazette* in which the Africa Orders in Council appear. A copy of those Orders of 1892 and 1893 was procured and placed with the record at the disposal of the learned-Advocate-General, who, at our suggestion to the Government of Bombay, appeared for the Crown, and of Mr. Young, who, at the invitation of

the Bench, appeared as *amicus curiæ*, using his learning and industry on behalf of the convicted persons. We have thus had the advantage of a full argument. The Bench has been much aided by the learned counsel and by the industry of the learned pleaders, who have procured such information about the Uganda region as the libraries of this city afford.

2. The two prisoners were convicted and sentenced on the 15th October 1895, at Kampala by Mr. Earnest Berkeley, H. M.'s Commissioner and Counsul-General for Uganda.

For the purposes of the Africa Order in Council, 1889, Lord Salisbury constituted, by instructions dated the 31st July 1891, a local jurisdiction as follows:—*viz.*, the British sphere on the East Coast of Africa, exclusive of the dominions of His Highness the Sultan of Zanzibar.

Those instructions also give effect to article 21 of the Order of 1889, by constituting this High Court the Court of Appeal from that local jurisdiction.

H. M.'s Commissioner and Consul-General has submitted the case to this Court for review under articles 74 and 75 of the Order, which are as follows:—

"74. A Secretary of State may remit or commute, in whole or in part, any sentence of a Consular Court.

"In every case of sentence of death the minutes of the trial shall be transmitted to a Secretary of State, and the sentence shall not be carried into effect until confirmed by him.

"When a Consular Court sentences a person to imprisonment exceeding twelve months or fine exceeding £100, or in any other case, if a Secretary of State by any general or particular instruction so directs, the sentence shall be submitted to [61] the prescribed Court of Appeal for review in the manner hereafter in this order prescribed.

"75. When a sentence is under the order submitted for review, the Consular Court shall transmit the minutes of the case, with such observations as the Consul thinks necessary, and the Court of Appeal shall return the minutes with such instructions as they think fit to give, either as to findings of fact, or as to law, or as to mitigation of sentence; and the Consular Court shall give effect to such instructions.

"Pending the review of a sentence the Consular Court may suspend the execution of the sentence, but is not obliged so to do unless so directed by the Court to whom the case is submitted, or by a Secretary of State. In either case the Consular Court may (unless otherwise directed) take such security by way of bail or otherwise, and if necessary by commitment to prison for safe custody, as it thinks necessary for submission to the ultimate sentence."

3. The statement made by so high an officer as H. M.'s Commissioner and Consul-General is sufficient for our taking judicial notice, under section 57 of the Indian Evidence Act, of the existence of hostilities between Kabarega, the King of Unyoro, and Her Majesty the Queen, and the protected State of Uganda. This was not seriously contested, and we follow the spirit of English decisions—*The King* v. *De Berenger*, 3 M. and S., 67; *Thelluson* v. *Cosling*, 4 Esp., 269; *Bradley* v. *Arthur*, 4 B. and C., 292, 304. The Court also takes notice that Uganda is a Protectorate under Great Britain, and that the country called Unyoro is within the British sphere, being east of the 30th degree of longitude. The Court has referred for the history and geography of the region to such works as the learned counsel and pleaders have produced, *viz.*, the Rise of our East African Empire, by Captain F. D. Lugard; The Mission to Uganda, by Sir G. Portal; In Darkest Africa, by H. M. Stanley; *The Nineteenth Century*, July 1894, for the Partition of Africa, by A. Silva White. The various maps in these works have been consulted.

4. The Commissioner and Consul-General finds on the facts that "both accused were engaged in running powder to Unyoro, knowing the trade in powder to be illegal, and further knowing that Kabarega was in open warfare with Uganda and the Protecting Power." On this finding both were convicted

under [62] articles 48 and 50 of the Orders of 1889. The judgment goes on: "Urzee bin Suleiman has, moreover, confessed to buying slaves in Unyoro." This prisoner is convicted of slave-trading. We are not inclined to differ with the findings on facts as above quoted. But with regard to article 48, we think it necessary to obtain from the Court below a further statement whether it considered that the importation of gunpowder was for the purpose of aiding the King or people of Unyoro in making war against Uganda and Her Majesty, or for pacific purposes of trade. This further statement should be accompanied by reasons. As regards article 50, the Court also desires further information as to the form of the prohibition of import or smuggling of gunpowder and the authority which prohibited.

5. As to the conviction for slave-trading, we notice that no Act of Parliament or other enactment or article of Order in Council or Treaty is quoted as the law which has been broken. As article 13 of the Africa Order in Council, 1889,* applies the procedure of the Justices of the Peace and the Superior Courts of England and section 54 of Part C of the schedule annexed to the Order in Council† refers to the law, we are of opinion that the Statute, Order, Regulation, or Treaty should be specified in the charge and the judgment. By Africa Order in Council, 1892, a Secretary of State may introduce Indian laws; and we do not know whether he has done so or not, or into what parts of the local jurisdiction. Mr. Young has contended that the facts found do not justify a conviction under either the Indian Penal Code (Act XLV of 1860), sections 370 and 371, or the Acts of Parliament, 5 Geo. 4, c. 113, and 9 and 10 Vict., c. 4. See, too, 39 and 40 Vict., c. 46. We are unable, until we know what laws are in force, to apply them to the facts found. We must, [63] therefore, ask the Court below to certify under what Statute, Act, Regulation, or Order the conviction was passed: and whether it had been applied to Unyoro, where the purchase of the slaves is found to have occurred.

6. An important question of jurisdiction has been raised by Mr. Young, who contends that the only recorded evidence on the point, *i.e.*, the statements of the prisoners themselves, treated as testimony under section 72 of Part C of the Schedule to the Order in Council 1889,‡ shows that they are both subjects of Germany which was one of the Signatory Powers to the Conference of Berlin signed in 1885, and, therefore, not British subjects as that phrase is used in the Order of 1889, nor such foreigners as are made liable to the local jurisdiction in article 10, clauses 3 and 4. He contended that the Africa Order in Council, 1892, although it makes "foreigners to whom this Order applies," like the prisoners, justiciable under the Orders in like manner as British subjects, extends only to the area of the Protectorate, *viz.*, that of Uganda, and not to another area like Unyoro outside that Protectorate, although within the British sphere. This, he says, appears from the terms of article 2 of the Order of

* "13. Subject to the other provisions of this Order, the Civil and Criminal Jurisdiction aforesaid shall, so far as circumstances admit, be exercised upon the principles of and in conformity with the substance of the law for the time being in force in and for England, and with the powers vested in and according to the course of procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdiction and authorities."

† "54. The description of an offence in the words of any Act of Parliament under which the offence arises, or if the offence charged is one against the Africa Order, then in the words of that order or in either case in similar words, is sufficient."

‡ "(72) (1) In all criminal proceedings, including preliminary examinations, the accused and the husband or the wife of the accused are competent, but not compellable, to give evidence.

"(2) When the accused, or the husband or wife of the accused, offer themselves as witnesses they take the oath or declaration required of witnesses, and are examined and subject to be cross examined in the same way as ordinary witnesses"

1892, on which Order he commented as follows :—As regards clause 1 of the Preamble, Unyoro is not under the Queen's protection, but is a kingdom with which we are waging war and employing against it a force of 20,000 men—*vide* an official despatch in the *Times* newspaper of the 20th February 1896. The books already referred to show that Kabarega is a powerful king. The convictions for acts done in Unyoro are bad, as Unyoro is outside the British Protectorate, and the same question is raised as in the case appealed for decision of the Secretary of State from the Niger Territories, mentioned by Mr. Hall in his Treatise on the Foreign Powers and Jurisdiction of the British Crown, p. 217. As to clause 3 of the Preamble, Mr. Young urged that it deals [64] only with territories that Her Majesty has declared to be under her protection ; and no such declaration by the Queen is produced or alleged ever to have been made as to Unyoro. There is nothing whatever to show that either of the prisoners is a resident either in the Protectorate of Uganda or in the British sphere outside; and they being foreigners, not brought under the Order of 1892, their case must be dealt with under the Order of 1889, which does not make them British subjects within its meaning. Hence article 48, which in terms applies only to British subjects, does not apply to them. If they are justiciable in like manner as British subjects, the supply of arms to an enemy power might be treason or misprision of treason, even if done in the enemy's country (1 East Pleas of the Crown, pages 52-53 ; 2 Stephen's History of Criminal Law, p. 14.) The fact that the Court below framed no such charge shows that it did not hold the prisoners to be under the same obligations as British subjects. This is Mr. Young's argument.

7. The Advocate-General argues that to British subjects the English law of treason may apply if they furnish arms to the enemy (Foster's Crown Law, 217 ; 1 Hawkin's Pleas of the Crown, p. 12) ; but that article 48 of the Order in Council, 1889, also applies. He meets Mr. Young's argument with a suggestion that the offence defined by article 48 of the Order in Council, 1889, being one against the Protected State of Uganda and the Protecting Power must be treated as one of which an abetment is legally possible, when the act of abetment is done outside the Protectorate but within the British sphere and the local jurisdiction of the Consular Court. A similar question on the Indian Penal Code arose in *Queen-Empress* v. *Ganpatrao Ramchandra*, I. L. R., 19 Bom., 113. The Advocate-General has also brought to notice that one of the maps in Captain Lugard's book shows that the part of Unyoro where the acts occurred, and which, we believe, is the region of the River Msizi, south of Lake Albert Nyanza, is under a somewhat permanent British military occupation, as the existence of British forts shows: and that the present record discloses that the region is held by bodies of troops under the orders of military officers holding Her Majesty's Commission, and acting [65] under her commands. The fact of this occupation may be relevant to the present case ; but as this Court has no clear knowledge of either the nature of the occupation, its territorial extent, its permanency, or the recognition given to it by Her Majesty's Commissioner and Consul-General, or Her Majesty's Secretary of State, it is not at present necessary to deal with the perplexing questions on which jurists differ and on which we find little judicial authority, questions discussed by Mr. Hall in the Chapter on Military Occupation in his Treatise on International Law.

8. This Court is in ignorance of the treaties or conventions which may exist between Her Majesty and Unyoro or between Her Majesty and other sovereigns about Unyoro. We have not been able to procure any copy of the Act of the Conference of Berlin of 1885, or of the Act of the Brussels Confer-

ence of 1891. We have referred to extracts from these Acts in Hall on Foreign Jurisdiction and in Captain Lugard's second volume, page 574. Both the learned counsel have framed their arguments with reference to what is said in Hall's Foreign Jurisdiction as to the difference of Her Majesty's exercise of jurisdiction in what is merely a "sphere of influence" and what has been formally made a Protectorate.

9. We think that before we determine this question of jurisdiction, the Court ought to be more fully informed by Her Majesty's Commissioner and Consul-General on several points. His judgment records shortly as follows:—"Both accused are amenable to the jurisdiction of this Court in virtue of the Africa Order in Council, 1892." But as this is the point which awaits our judicial decision, we desire to know what territory the prisoners belong to, and whether they are subjects of any Signatory or other Power, or subjects of Her Majesty or of any territory under Her Majesty's protection or influence. It has been contended that neither of them is even a denizen in the British sphere.

10. As no declaration of Her Majesty has been shown us, and none is suggested in the proceedings of the Court below, erecting the country of Unyoro, where the offences are laid, into a Protectorate, or including it within the Protectorate of Uganda [66] declared by Her Majesty on the 19th June 1894, we feel it necessary to ask information from Her Majesty's Commissioner and Consul-General as to whether this country of Unyoro has been included in a Protectorate and, if so, when and how? There are some indications to the contrary; and it may be surmised that the military occupation evidenced by forts and soldiers is not only for the purposes of the actual war, but also for the purposes of Her Majesty fulfilling the obligations of the Conferences of Berlin, 1885, and of Brussels, 1891. The country being within the British sphere is within the local jurisdiction of the Consular Court. But it being apparently outside the Protectorate so often mentioned in the Africa Order in Council of 1892, it is necessary for this Court to be informed whether Her Majesty has, and by what means, made foreigners, to whom that order applies, justiciable by the Consular Court for acts done in Unyoro. It is conceivable that Her Majesty may have refrained from using that jurisdiction as a means of enforcing good order upon foreigners not denizens in the Protectorate or the sphere of influence. The authority conferred on the Crown of exercising its foreign jurisdiction by means of Courts of Justice does not necessarily exclude the prerogative of the Crown to administer territories in military occupation for the purpose of good order, by means of the military commander himself or the military commander under the lawful orders for such purposes of a civil officer. See *Barwis* v. *Keppel*, 2 Wils., 314; *Buron* v. *Denman*, 2 Exch., 167. Under some circumstances, the two means of order may lawfully exist at the same time in the same territory, the Court using judicial procedure and applying established law, the commander or civil officer in authority over him using military force. See Forsyth's Constitutional Law, 201. Thus municipal law and act of State may lawfully be exercised. The authorities are few, and there are none about spheres of influence, but we may refer by way of analogy regarding our occupation of Unyoro to the fully argued case of *Elphinstone* v. *Bedrachund*, decided by His Majesty in Council and reported in 1 Knapp P. C., 316. It arose during the last Maratha war, but after the expulsion of the Peshwa and the con- [67] quest of the Deccan and the establishment of a provisional government under a Commissioner with Courts of Justice under his superintendence. Some public treasure of the late Government was seized by Captain Robertson, the Collector and Magistrate of Poona. No hostilities were then going on in the immediate neighbourhood; but they did continue in Khandesh, and the garrisons

were maintained on a war footing and in readiness for active service. It was held by His Majesty in Council that the seizure of the treasure was not an act that could be contested in a civil Court. Their Lordships doubtless knew that after a conquest, and even after civil tribunals are erected, it takes some time for a territory to quiet down and there continues to be need of military operations. Therefore they held the proper character of the transaction to be that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and that if anything had been done amiss, recourse could only be had to the Government for redress, not to the Court. The case arose in the Deccan, then apparently by conquest part of the dominions of the Crown. But Unyoro appears to be only a sphere of influence: and *a fortiori* the reasons may apply, and it is easily conceivable that in dealings with foreigners, not denizens of British Territories or Protectorates, Her Majesty may not have extended the jurisdiction of the Consular Court to them. We wish, however, to be made certain of what has been done.

11. This being the first case arising in a new jurisdiction of great magnitude and importance, it behoves this Court not to pass decision at once and thus make a precedent without full information. Although the facts of the particular case have to be placed on record in the Courts below, as they would by Justices of the Peace and the Superior Courts of England, by the depositions of witnesses and the statements made by the accused, and have to be dealt with in the judgment recorded, it is obvious that, when this Court deals with events arising in the heart of Africa, it stands in need of information about local history, geography and diplomatic transactions. The Court has to take notice of treaties and will consider conventions, decisions and usages that have sprung up in the interpretation of them [68] and which have been recognized by Her Majesty and Her Ministers. We are of opinion that the peculiar provision in article 75 of the Order in Council, 1889, which empowers the Consular Court to submit such information as it thinks necessary, along with the minutes of the case, is intended to supply the Court of Appeal with information on authority to which it can give respectful attention and thus promote a common understanding between the Court in Africa and the Court in Bombay, and enable the latter especially to know what diplomatic transactions have occurred, the existence of war, and other matters of judicial notice and events of which there is no available history. It is also a means of avoiding delay in criminal appeal and review. The observations sent up with this record have been of value. In the *Queen-Empress* v. *Rego Montopoulo*, I. L. R., 19 Bom., 741, we found the statement in the Zanzibar Consul-General's observations about diplomatic transactions essential in the decision of the case; and were aided in extending the principles of the common law about local allegiance and *alien amy* to protected foreigners by the observations recorded in that case by Mr. Berkeley. We accordingly avail ourselves as fully as possible of that appointed means of information by calling for it from H. M.'s Commissioner and Consul-General for Uganda on the perplexing points argued. We think our views as to the scope of the "observations" and their use by this Court are supported by the fact, that the Foreign Jurisdiction Act, 1890, 53 and 54 Vict., c. 37, section 4, contemplates the submission by this Court of cases of perplexing jurisdiction for the decision of Her Majesty's Secretary of State which, as to the Orders in Council, makes it clear that this Court should be fully informed on such facts as nationality and the effect of diplomatic arrangements.

12. The presumption in favour of the jurisdiction is not yet displaced; and looking at the acts done by the prisoners as found below, and that the case comes on review, not appeal, we do not think it desirable to suspend the

sentences. But we will adjourn the hearing for the return of the record from Uganda with the supplemental observations this Court now calls for.

[69] 13. As other cases may in the interval come to the High Court on review or appeal, we will, in order to save future delay, request the good offices of the Governor in Council to procure, for the use of the Judges, a compilation of the Orders in Council, Instructions, Queen's Regulations and Notifications introducing laws and declaring Protectorates; as also of the treaties and conventions applicable among the Powers, Chiefs and Governments in the parts of Africa to which the jurisdiction of this High Court extends. Among these are, we think, important the transactions of the Conferences of Berlin, 1885, and of Brussels, 1891, and any Acts subsidiary thereto or explanatory thereof.

14. This Court orders that the record be retransmitted to Her Majesty's Commissioner and Consul-General for Uganda in order that it may be returned to this Court on or before the 17th November 1896, with further observations under article 75 of the Africa Order in Council, 1889, on the matters indicated in this judgment.

As intimated in the above judgment, further information was called for from the Uganda Court, and in erply the following was received from Mr. Berkeley :—

I have the honour to acknowledge the receipt of copy of the judgment recorded by the High Court of Bombay in the above case, referred to as in Criminal Reference No. 27 of 1896, and in obedience to the instructions of that Court, I beg to submit the following further information in the case. The questions to which I understand I am directed to reply are—

1. Did the Court here consider that the importation of gunpowder was for the purpose of aiding the king or people of Unyoro in making war against Uganda and Her Majesty, or for pacific purposes of trade, and what is the form of prohibition of import or smuggling of gunpowder and the authority which prohibited ?

2. Under what Statute, Act, Regulation or order the conviction (of Urzee bin Suliman, for slave-trading) was passed, and whether it had been applied to Unyoro, where the purchase of slaves is found to have occurred ?

3. Is Unyoro, which is recognized to be within the British sphere of influence in East Africa, included in any way in a British Protectorate, and if not, how, the accused being both foreigners, subjects of a Signatory Power to the General Act of the Conference of Berlin of 1885 and as such only amenable to jurisdiction under the Africa Order in Council, 1889, within a Protectorate of Her Majesty (Africa [70] Order in Council, 1892), did this Court come to try them under that Order for an offence committed outside such Protectorate ?

I have the honour to reply as follows :—

1. The Court could not possibly hesitate in considering that the gunpowder was imported for the purpose of aiding the king and people of Unyoro (in return for ivory or slaves or both) to make war against Uganda and Her Majesty. Hostilities had broken out in December 1893; military posts and patrols had been established since more than a year for the express purposes of checking the trade in munitions of war. the latter had been repeatedly proclaimed by every possible local means to be illegal : it was notorious throughout the country since two years at least that the trade in arms, powder, &c., was prohibited and could not possibly be prosecuted as a lawful or pacific trade: all trading caravans were well aware (and as regards those coming from the south of Uganda had been repeatedly warned by the German authorities, as officially stated by the latter more than once) that on entering the British sphere they should report themselves and the purpose and nature of their trade to the British authorities: so far from doing so the accused had avoided all British stations, and they or others connected with them under the general direction of one Khalfan had fired on the patrol, from Nakabimba Station, who endeavoured to stop them near the Misisi River. And finally, both accused admitted that they knew trading in arms, powder, &c., and slaves to be illegal. The form of the prohibition of these trades has been by repeated notices carried far and wide by the British authorities and their agents and by the chiefs of the different

districts in the British sphere. The authority, who prohibited, is, I presume, Her Majesty the Queen.

2. The Statute, Act, Regulation or order in the matter of slave-trading would be, I presume, the obligation undertaken by Her Majesty in Chapter II, article 9 of the General Act of the Berlin Conference of 1885, and the Treaty obligations there undertaken by Her Majesty are applicable in Unyoro under the provisions of article No. 3 of the Africa Order in Council, 1893.

3. Unyoro had not been declared to be within a British Protectorate, and I must express my regret that in my original judgment I did not explain the circumstances in which I judged nevertheless, that I was justified in trying the accused under the Africa Order in Council, 1889. In the first place, the accused stating themselves to be German subjects, I had to consider whether I should deliver them to the nearest German authorities for trial on a charge to be formulated by this administration. The mere fact that German authorities did exist at no very great distance did not appear to me to touch the question. If established, the principle would equally apply to subjects of Austria, Denmark, France Russia, &c. &c., and other Powers Signatory to the General Act of the Berlin Conference of 1885. Apart from this, therefore, I decided that I should not hand the accused over to the neighbouring German authorities, because I knew of no circumstances in which a British administration would surrender to foreign jurisdiction an accused arrested by themselves, except in deference to [71] some well-established custom or usage, or in deference to a legitimate demand addressed to them by a duly appointed and accredited representative of such foreign jurisdiction. No such custom or usage exists to my knowledge. German subjects have no ex-territorial rights in any part of these territories. Nor has Germany any accredited representative anywhere within them. I could see, therefore, no ground for handing the accused over to the German authorities. It remained, then, either to let them go, or to try them locally. The former, course appeared to me to be quite inadmissible, and I consequently decided upon the latter. As regards the form adopted I would venture to make the following observations. Were a "German subject" to commit a crime and be arrested for it, say in Toru, a peaceful "kingdom," lying like Unyoro within the British sphere but outside the Protectorate, one of two courses would, I presume, have to be followed. Either I should permit the "King" of Toru to try him and punish him according to Toru laws, whatever these might be, or I should (technically) exercise my "influence" over the king in order to arrange that he should delegate his jurisdiction to this administration and thereupon try the accused according to the procedure laid down for British subjects. In the case of Unyoro, however, the king and all local authorities or jurisdiction had disappeared in consequence of the war and, therefore, what could be done in Toru could not be done in Unyoro. Meanwhile in June 1894, the Earl of Kimberley, then Her Majesty's Secretary of State for Foreign Affairs had (though under strict limitations, see Blue Book, Africa, No.7. 1895, page 50) recognised the possible necessity for some "temporary and partial occupation of Unyoro." It was in these circumstances and with that sanction that portions of Southern Unyoro have been held by the British authorities in Uganda, and it seemed to me that, since the king and his judicial authorities had disappeared, we must necessarily assume, however temporarily, jurisdiction in their place; in other words, that in those portions of Unyoro which we occupied, in the terms of Lord Kimberley's despatch "for purely defensive purposes with the object of protecting Uganda against aggression," we must assume the responsibilities and exercise the rights which we do in Uganda itself. Our temporary presence in these portions of Unyoro must, in practice, mean the temporary extension over them of the British Protectorate over Uganda. In these circumstances I decided to try the accused as though the offence with which they were charged had been committed in Uganda itself.

The case came on again before the High Court (JARDINE and RANADE, JJ.) on the day of 14th January 1897.

*Young* (*amicus curiæ*), for the Prisoners, with him *Maneksha J. Taleyarkhan* :—The only point remaining to be discussed is whether the alleged military

occupation would render the accused justiciable But even assuming the fact, an occupation would introduce neither the Orders in Council nor English law but only martial law —c p Manual of Military Law, p 315, Hall's International [74] Law, pp 184, 485, 488, 489 and as it is quite clear that the accused were not tried under martial law but under Orders in Council they must be released

*Lang*, Advocate General with Rao Saheb *Vasudev J Kirtikar*, Government Pleader, for the Crown

**Jardine J**.—Before dealing with the questions of law, it is convenient to state our view of some of the matters of fact on which those questions depend

Mr Young argued for the prisoners that they are not subjects of a Signatory Power, but only dwellers in some region under the protection or influence of Germany But, as this Court has already pointed out, the only evidence, namely, their own statements is that they are German subjects and in his report pursuant to the order of this Court Her Majesty's Commissioner and Consul General clearly assumes this to be the fact This Court must therefore, deal with them as subjects of Germany

The acts for which the prisoners have been convicted, occurred in the country of Unyoro and Her Majesty's Commissioner and Consul General has in reply to the question of this Court, in para 10 of our Order of the 17th March 1896 stated that Unyoro has not been declared to be within a British Protectorate He had also submitted the following information —

As regard the form adopted I would venture to make the following observations Were a German subject to commit a crime and be arrested for it say in Toru a peaceful kingdom lying like Unyoro within the British sphere but outside the Protectorate one of two courses would I presume have to be followed Either I should permit the king of Toru to try him and punish him according to Toru laws whatever these might be or I should (technically) exercise my influence over the king in order to arrange that he should delegate his jurisdiction to this administration and thereupon try the accused according to the procedure laid down for British subjects In the case of Unyoro however the king and all local authorities or jurisdiction had disappeared in consequence of the war and therefore what could be done in Toru could not be done in Unyoro Meanwhile in June 1894 the Earl of Kimberley, then Her Majesty's Secretary of State for Foreign Affairs had though under strict limitations (see Blue Book Africa No [illegible] page 50) recognized the possible necessity for some temporary and partial occupation of Unyoro It was in these circumstances and with that sanction that portions of Southern Unyoro have been held by the British authorities in Uganda, and it seemed to me that since the [73] king and his judicial authorities had disappeared we must necessarily assume however temporarily jurisdiction in their place in other words that in these portions of Unyoro which we occupied in the terms of Lord KIMBERLEY'S despatch for purely defensive purposes with the object of protecting Uganda against aggression we must assume the responsibilities and exercise the rights which we do in Uganda itself Our temporary presence in these portions of Unyoro must in practice, mean the temporary extension over them of the British Protectorate over Uganda In these circumstances I decided to try the accused as though the offence with which they were charged had been committed in Uganda itself

These remarks of the Commissioner and Consul General confirm the surmise of this Court that the territory in Unyoro was at the time held by military occupation under the superintendence of Her Majesty's Commissioner and Consul General by command of the Crown

The learned Advocate General has argued that if Unyoro was under military occupation, this *occupatio bellica* transferred the sovereign power to the Crown, and that it had to be exercised by Her Majesty's Commissioner and Consul-General as a Commander in Chief, and that as he might, in Unyoro, have tried and punished these prisoners by the law of war, the convictions

passed at Kampala in Uganda long afterwards in the Court established by the Orders in Council may justly be treated as valid. But no case has been shown us authorizing the trial by the laws of war at a place and time both distant from the warlike operations. Moreover, the Court of the Commissioner and Consul-General is by various articles of the Order in Council of 1889, *e.g.*, articles 12 and 22, limited in its powers: it is by article 22 to exercise Her Majesty's jurisdiction "to the extent and in the manner provided by this Order." Therefore if the offices of Judge of the Consular Court and of a Commander-in-Chief happen in a sphere of influence to be held by the same person, who in both capacities is under the control of the Crown, the directions in the Orders in Council are binding on him as Consular Judge. Article 105 of this Order recognizes and preserves the powers of Consular Officers in performing acts not judicial, acts such as they "might by law or by virtue of usage or sufferance or otherwise have performed if this order had not been made." The Commissioner and Consul-General has avowedly and in terms assumed jurisdiction in this **[74]** case under the Order in Council and submitted it to this Court under articles 74 and 75. It would be wrong, therefore, to impute what has been done to powers lawfully used by the head of a military occupation, such as are discussed in Forsyth's Constitutional Law, p. 210, and by Mayne in his Criminal Law of India, Chapter 3, sections 97 to 106.

The Advocate-General further suggested that the record and statements submitted showed that this part of Unyoro had become annexed to the dominions of the Crown, but the Commissioner and Consul-General does not aver anything more than a military occupation, which however complete, is not necessarily the same thing as an annexation. I find a case where the Judicial Committee of the Privy Council distinguished the temporary occupation of Moldavia by Russia in 1853 from a change of dominion—*Cremidi* v. *Powell*, 11 Moo. P. C., 88, 101. See also other cases cited by Forsyth at p. 21. We must, therefore, hold that there was no annexation. There was a military occupation, more complete because the King of Unyoro and his officers had disappeared. But before then Her Majesty appears to have acted on the obligation of article 1 of the General Act of the Brussels Conference of 1890, which provides not only by clause, for the government of places under sovereignty or protectorate, but also for "the gradual establishment in the interior, by the responsible Power in each territory, of strongly occupied stations, for roads, steam-boats, telegraphs, expeditions, any flying columns, and the interdiction of arms and ammunition where the slave trade prevails."

We are agreed that the responsibilities here assumed are international duties, arising from mutual undertakings of the Signatory Powers: and thus differ from the obligations undertaken by the Sovereign to protect her subjects and others bound to her by allegiance.

The sole question remaining for disposal is whether the Court of the Commissioner and Consul-General had jurisdiction under the Order-in-Council. The Advocate General has not seriously contested the arguments of Mr. Young already set forth in our former order in paragraph 6. The prisoners are "foreigners," and being German subjects are "foreigners to whom this Order (*i.e.*, **[75]** of 1892) applies," and if the acts of which they have been found guilty had occurred in Uganda or other Protectorate of Her Majesty, they would have been liable to the jurisdiction under the Order in-Council of 1889 "under the same conditions as British subjects and to the extent of the jurisdiction vested by law in those Courts." These words are found in article 2 of the Order-in-Council of 1892. But that article and the preamble, as also the later Order-in-Council of 1893, show that Her Majesty has drawn a plain distinction

about the criminal liability of subjects of the Signatory Powers, a distinction based evidently on the difference of the responsibility which the Crown is advised to assume in territories solemnly declared to be under the Queen's protection and those merely placed, *qua* the other Signatory Powers, in a British sphere of influence. Mr. Hall in his International Law, Part III, Chapter 3, section 93 *et seq.*, shows how Germany and France have thought proper to assume fuller jurisdiction over persons, not originally their subjects, than the Crown of England has done, the last having, as these orders in Council show, acted more gradually. It may be that the restrictions of jurisdiction have been ordained in order not to offend the susceptibilities of other Powers or in order not to burden the Queen's administrative and judicial services with cases arising in regions merely in a sphere of influence, where as yet the word "allegiance" has hardly been heard, and where the Queen has not solemnly declared her prerogative of protection. But it is not the duty of this Court to find reasons for the acts of the Queen's Ministers when the language used by her Council is, as we think, clear.

For the above reasons the Court holds that as article 48 of the Order-in-Council applies in terms only to British subjects, and as these prisoners have not, as regards acts done outside the Queen's Protectorates, been brought into the position of British subjects, the convictions and sentences under article 48 are on their face without jurisdiction.

The conviction for slave-trading would, if the prisoners were British subjects, probably have been legal under article 45, which applies the English Statutes. But these foreigners are not of any class included in article 10: nor do the later Orders in [76] Council, as already mentioned, include them for acts done outside of the British dominions or Protectorates.

The convictions under article 50 are for the same reasons bad, as upon a true construction the wide phrase of that article "a person" must be treated as limited by article 10 and the general scope of this Order of 1889 and the later Orders in Council. Another reason for distrusting the validity of the convictions under article 50 is that there is no record of any prohibition of importing arms and ammunition. The Commissioner and Consul-General presumes that the authority who prohibited is Her Majesty the Queen. But it has not been suggested that Her Majesty has done this by applying any Act of Parliament, or any Indian Statute on the subject of prohibited or contraband goods; or that her Secretary of State has sanctioned any Queen's Regulation under article 99 on the subject.

The Court holds the convictions and sentences of the Consular Court to have been passed without jurisdiction, and instructs Her Majesty's Commissioner and Consul-General to cancel them and to set the prisoners at liberty.

The Court will renew its request for a complete collection of such official papers, Queen's Regulations and Orders in Council as are mentioned in paragraph 13 of our former Order. To avoid delays of justice we seek for authoritative information as regards any new Protectorates declared or other important Orders passed.

**Ranade, J.**:—I concur. As this is a case of some importance, being the first of its kind under the extended Appellate Jurisdiction of this Court over East Africa, I deem it necessary to record a separate judgment.

Her Majesty's Commissioner and Consul-General for Uganda convicted the two prisoners Juma and Urzee of offences described in articles 48 and 50 of the Africa Order in Council, 1889, and Urzee was further convicted of slave-dealing, and they were sentenced respectively to two and three years'

rigorous imprisonment. These sentences were submitted to this Court for review under articles 74 and 75 of the Order.

In the course of the first hearing, which took place on 17th March 1896, we took judicial notice of the fact that Uganda was [77] a Protectorate of Great Britain, and that Unyoro, the territory where the offence was admittedly committed, was within the British sphere of influence. Judicial notice was also taken of the fact that the King of Unyoro had commenced hostilities in December 1893, and was at the time when the offence was committed at war with Uganda and the protecting British Power. We also intimated at the time that we saw no reason to differ from the findings of fact on which the conviction was based, namely, that the prisoners were engaged in carrying gunpowder to Unyoro, knowing the trade in powder to be illegal, and knowing further that the King of Unyoro was in open warfare with Uganda and the protecting Power, and, lastly, that prisoner Urzee was further engaged in slave-trading. We felt it necessary, however, to obtain fuller information (1) as to whether the gunpowder was imported by the prisoners for the purpose of aiding the King of Unyoro in his war operations; (2) whether there was any express authoritative prohibition of the import or smuggling of gunpowder ; (3) as no particular Statute or Act was quoted or referred to in the judgment, we wished also to know the particular Act, Statute or Order on which the conviction for slave-dealing was based. Besides fuller information on these points, we inquired, in reference chiefly to the question of jurisdiction raised before us by Mr. Young , (4) what territory the prisoners belonged to, and whether they were subjects of any Signatory or other Power or subjects of Her Majesty or of a territory under Her Majesty's protection or influence ; (5) and further whether the Unyoro country was included in any protectorate, and, if so, when and how ; and (6) whether Her Majesty had made foreigners to whom the Order in Council of 1892 applied, justiciable by the Consular Court for acts done in Unyoro.

The Consul-General has now supplied the information asked for in the interlocutory observations. On the first point noted above, his reply shows that the importation of gunpowder was made by the prisoners not for pacific purposes, but for aiding and abetting the King of Unyoro in his war operations. On the second point it is stated that the prohibition of the import of gunpowder had been duly notified, and the prisoners themselves knew that the trade was illegal. In regard to the third point, [78] about the prohibitions of slave-trading, the Consul-General referred to Chapter II, article 9, of the General Act of the Berlin Conference of 1885, and he stated that the treaty obligations there undertaken were applicable to Unyoro under article No. 3 of the Africa Order in Council of 1893. As regards the points which had reference to the question of jurisdiction, the Consul-General stated that Unyoro had not been included within a British Protectorate, but it was within the British sphere of influence. We gather further from the reply that the plea of the prisoners that they were German subjects urged by them in the course of the trial is substantially correct, as it is not traversed in the reply. The Consul-General states the prisoners, as soon as they raised this plea, were not made over for trial to the nearest German authorities, because in the absence of any established usage or custom, or of a legitimate demand made by a duly accredited representative of a foreign jurisdiction, it is not usual for British administrations to surrender offenders arrested by themselves. There was no such usage established, and there was no demand made in this case, and German subjects had no ex-territorial rights, and the German Government had no representatives in those parts. As the King of Unyoro was at war with Uganda and the

Protecting Power, and Unyoro was temporarily occupied by a military force, the Consul-General held that he felt himself justified in assuming the same responsibilities and exercising the same rights as regards the part of Unyoro in military occupation as his Court exercised in protected Uganda. In other words, though Unyoro had never been formally included within the Protectorate, the fact of military occupation justified the extension of British jurisdiction over that part of it which was so temporarily occupied.

It seems clear to me, from the first set of replies, that there is not sufficient reason shown which renders it necessary to suggest any modification of the decision of the Consular Court on questions of fact. The question of jurisdiction stands, however, on a different footing. The question here is, had the Consul-General jurisdiction to try the prisoners, or was he bound, as he admits it was open to him to do, to hand them over for trial to the German authorities in East Africa. For the purpose of the [79] inquiry into this question of jurisdiction, I may take it as proved that the prisoners are admittedly German subjects and that the offences with which they were charged were committed by them in Unyoro, which territory, though within the British sphere of influence in East Africa, was not included in the Protectorate of Uganda, and the King of Unyoro was at the time engaged in a war which necessitated a partial occupation of his territory by military posts.

I have now to consider whether, under any of the Africa Orders in Council, the Court of the Consul-General and Commissioner of Uganda was vested with a jurisdiction to try German subjects arrested in Unyoro territory. The principal Africa Order in Council, dated 22nd October 1889, expressly defines the words "British subjects," "foreigners" and "natives" separately. British subjects include persons enjoying British protection, and the subjects of the Princes and States in India resident in the parts of Africa to which the Order relates. Foreigners mean persons who, whether natives or subjects of Africa or not, are not British subjects, and natives are defined as being persons who are not British subjects nor the subjects of any non-African Power. It is clear from this that, so far as this Order goes, the prisoners being German subjects fall within the category of "foreigners." The Consular Courts created by the Order under articles 5 and 19 and instructions on article 21 have under article 10 jurisdiction over the person and property of British subjects as defined above, and in regard to foreigners, they have jurisdiction only over them first when they submit themselves of their own accord to such jurisdiction, or secondly when they are subjects of States which have entered into treaty arrangements with Her Majesty permitting the exercise of this jurisdiction. In the case of natives as well as foreigners, consent is necessary to give jurisdiction to treat them as British subjects (article 17). So far, therefore, as this Order is concerned, the Consul-General's jurisdiction could only arise on proof that the prisoners submitted to it, or that the German Government had entered into an understanding with Her Majesty's Government permitting this exercise of jurisdiction over them. The Consular Courts though Courts of Record (article 24) have no plenary authority, but are bound to exercise [80] their jurisdiction to the extent and in the manner provided by this Order (Article 22). The Criminal Side of these Courts was constituted principally with the object of maintaining order among British subjects and for the repression of crimes or offences committed by British subjects (article 12), and the jurisdiction over foreigners comes in only under the exceptions noted above. Part VI, which relates more particularly to the criminal jurisdiction, defines in article 45 offences as acts or omissions which are held to be offences under English law, and this is also the purport of articles 13, 45 and 65 in regard to

procedure and punishments. Article 48, under which the accused were charged in the present case, is expressly limited to British subjects as defined by the Order. Article 50 does not contain a similar limitation, but the general scope of the Order also limits its application. The restricted character of the civil jurisdiction of these Courts supports the same inference. Foreigners must expressly consent to civil jurisdiction (article 100). The existence of native and foreign tribunals side by side with these Courts is expressly contemplated in article 101. It is not necessary to elaborate this point more fully, because the Consul-General himself rests his jurisdiction to try the prisoners in this case not under the Africa Order of 1889, but under the addition made to it by the Order of Council of 1892.

I have next to see what was the nature of the change effected by the Order of 1892, dated 28th June 1892. It appears from Mr. Hall's great work on this subject that the Order of 1889 strictly followed the principles and traditions which have guided the policy of British Settlements in foreign parts by which consular jurisdiction is confined to British subjects only. The French and German Governments, however, in their African Protectorates claimed higher powers, and in the new Order of 1892 there was a distinct departure in that direction in regard to British Protected States. The Order in its preamble recites that for the due fulfilment of the obligations undertaken by Her Majesty under the General Act of the Conference of Berlin, signed in 1885, the subjects of the Signatory Powers should be justiciable in like manner as British subjects within the limits of the territories which Her Majesty may have declared to be under [81] her protection. The order then enacts that the words "foreigners to whom this Order applies, shall mean subjects of Signatory Powers or any other Powers which have consented that their subjects shall be justiciable under the Order of 1889, and it further enacts that when Her Majesty has declared any territory to be a Protectorate of Her Majesty, the provisions of the Order of 1889 having reference to British subjects shall apply to the foreigners to whom this Order applies; and the requisition of the express previous consent of the foreigner or of his State shall have no effect in regard to such Protectorate, and in respect of such foreigners. Germany is one of the Signatory Powers. Uganda was declared a Protectorate on 19th June 1894, and it is clear that if the offences with which the prisoners were charged had been committed in Uganda, this order would have given jurisdiction to the Consul-General to try the prisoners, notwithstanding their plea that they were German subjects. As it is, the Order has no application to Unyoro, which admittedly has not been declared to be a Protectorate.

Mr. Young made some point of the distinction between German subjects proper and subjects of German Protected States. It is not necessary to consider this point, as the distinction would have been material only if the offences had been committed in Uganda. As it is, the prisoners are admittedly not residents either of Uganda or of the territories under British influence.

The Advocate-General contended that as the offences were committed against Uganda and within a part of Unyoro under military occupation by a British force, this part of Unyoro might be considered as annexed to Uganda over which the Consular Court had jurisdiction to try foreigners, who were subjects of Signatory Powers. I think this contention is opposed to the general principles of law and that it is also against the express terms of the Order of 1892, which declares clearly that the Order of 1889 shall be void and of no effect only as regards territories declared to be protected in so far as foreigners to whom the Order of 1892 applies, are concerned. Beyond these local and personal limits the old order must be regarded as still in full force. If the

contention of the Advocate-General were sound, no express [82] declaration of a Protectorate would be necessary, as all territory under British influence and occupied by military force would be, for the purposes of the Order of 1892, Protected territory. The Order of Council, dated 17th July 1893, expressly enacts that "natives," as defined by the Order of 1889, of any Protectorate of Her Majesty outside the local jurisdiction of Consular Courts shall be triable by such Courts as British subjects when they happen to be within such local limits. This extension of the first Order brings out clearly the distinction between the local and the Protectorate jurisdiction of such Courts. It, however, does not support the view that these Courts have any jurisdiction over either natives or foreigners in respect of offences committed by them outside local or Protectorate limits, solely on account of the fact that such territories came within what is called the sphere of influence. The phrase "British sphere of influence" is obviously intended to mark out African territories within which other European Powers are by mutual understanding not to extend their conquests to the disadvantage of the British Power in East Africa, whose sphere is marked out by 30 Meridian East Longitude. It has no significance for purposes of jurisdiction. It is, in fact, the outer circle beyond the Protected States, and is for purposes of internal jurisdiction independent territory, where the Consular Court has no direct authority, and cannot control the actions of its native rulers, as it might do in Protected territory. No delegation of power from the native ruler was possible, as the king was at war.

As regards the question whether jurisdiction was given to the Consular Court by reason of a part of Unyoro being at the time under military occupation, or as the Advocate-General puts it, by reason of the temporary annexation of Unyoro in part to Uganda, I do not think it is necessary here to consider the point. Lord KIMBERLEY'S order is not among the papers sent to us. A temporary and partial occupation of the sort indicated could confer no jurisdiction on the Consular Court, whose powers are strictly limited by the various orders in Council. The military authorities might have, on the strength of the forcible occupation of the territory of a king at war with Her Majesty's Government, disposed of the prisoners summarily on the spot under martial [83] law applicable to such conditions. Occupation for purposes of war does not change the law of the country invaded, and such occupation cannot confer jurisdiction on the Consular Courts to try foreigners to whom the Order of 1892 did not apply as if they were British subjects. The distinction between spheres of influence and Protected territory is a well-recognized distinction and cannot be got over by such temporary and partial occupation. At any rate this Court in appeal can have no jurisdiction to deal with acts committed under such circumstances.

On the whole, therefore, I feel satisfied that the Commissioner and Consul-General of Uganda had no jurisdiction under any of the Orders in Council to try the prisoners, who were German subjects, for offences committed by them outside the Protectorate of Uganda. We must, therefore, instruct him under article 75 to cancel the sentences passed by him on the prisoners, and to set them at liberty.

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[22 Bom. 83]

## APPELLATE CIVIL.

*The 18th March, 1896.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Bhagwan Jethiram............(Original Defendant) Appellant

*versus*

Dhondi and others............(Original Plaintiffs) Respondents.*

*Limitation—Limitation Act (XV of 1877), Sch. II, Art. 179—Application for execution of decree.*

An application for execution of decree was made in 1885, and the second in 1891. The latter was at first allowed, but subsequently struck off for some default of the applicant. The third application was made in 1893.

*Held*, that the second application having been made at a time when it was barred by reason of the three years' period having been exceeded, the third was barred though presented within three years of the second.

The phrase "in accordance with law" in article 179 of the Limitation Act is adjectival not only to the words "to the proper Court for execution," but also to the words "to take some step in execution."

SECOND APPEAL from the decision of A. Steward, District Judge of Poona.

Redemption suit. In this suit a decree was passed on the 13th February 1883, for redemption of a mortgage on payment by the [84] plaintiffs (mortgagors) to the defendant (mortgagee) of Rs. 1,600 in eight yearly instalments of Rs. 200 each, with a proviso that the whole should be recovered at once by the sale of the mortgaged land on failure to pay any one of the instalments, the first of which was to be paid on the 31st March 1884.

The plaintiffs having failed to pay the first instalment, the defendant applied for execution of the decree on the 19th November 1885, praying for payment of the whole amount. This application was disposed of on the 25th of that month. On the 19th November 1891, the defendant made a second application for execution which was admitted, and notices were issued under section 248 of the Civil Procedure Code (Act XIV of 1882). The application was, however, subsequently struck off on account of some default on the defendant's part.

In 1893 the defendant made a third application for execution. The plaintiffs contended that this application was barred by limitation; that, in fact, the previous application of 1891 was barred and ought not to have been admitted, having been made more than three years from the date of the first application.

The Subordinate Judge of Junnar rejected the application on the ground of limitation and the District Judge confirmed this order.

The defendant appealed to the High Court.

*Daji Abaji Khare* for the Appellant (Defendant):—The present application is made within three years of the one made in 1891. That one was admitted. It is true it was not adjudicated upon, but that is not required by the Limitation Act. That application was a step in aid of execution in accordance with law and, therefore, the present application is not barred.

* Second Appeal No. 849 of 1895.

*Shivram Vithal Bhandarkar*, for the Respondents (Plaintiffs):—The application of 1891 was struck off for default and there was no decision on the merits. The question of limitation was not raised. The disposal of that application was favourable to the plaintiffs, who of course did not appeal. That circumstance distinguishes this case from *Mungul* v. *Grija*, L. R., 8 Ind. Ap., 123 at p. 130: S. C., I. L. R., 8 Cal., 51. He cited *Raj-* [86] *kumar Banerji* v. *Rajlakhi Dabi*, I. L. R., 12 Cal., 441; *Nilmoney* v. *Ramjeebun*, 8 Cal. L. R., 335; *Sheikh Budan* v. *Ramchandra*, I.L. R., 11 Bom., 537.

**Jardine, J.**:—The second application made by the defendant, *i. e.*, the one of the 19th January 1891, was admittedly beyond the limitation of three years. But the Court, probably acting under section 5 of the Limitation Act, admitted it, and issued notices under section 248 of the Code of Civil Procedure. The application was, however, struck off for some default of the defendant. It is admitted by Mr. Khare that there was no adjudication—*Sheikh Budan* v. *Ramchandra*, I. L. R., 11 Bom., 537,—and it is clear that the plaintiffs could not have appealed from the order striking off, as that was altogether in their favour. The chief circumstance, therefore, on which *Mungul* v. *Grija*, L. R., 8 Ind. Ap., 123 at p. 130: S. C., I. L. R., 8 Cal., 51, was decided is absent here.

We proceed, therefore, to consider the pure question of construction of article 179, clause 4, of the Limitation Act, *viz.*, whether the second application having been made at a time when it was barred by reason of the three years' period having been exceeded, the present application of the plaintiffs is to be held not barred because it is made within three years of the second application. It has been urged by Mr. Khare that the phrase "in accordance with law" is not adjectival to the words "to take some step in aid of execution," but only to the words "to the proper Court for execution." Thus he would distinguish *Nilmoney* v. *Ramjeebun*, 8 Cal. L R., 335. We think, however, that ordinary syntax would treat the phrase as adjectival to both: and that the reason of the law would acquiesce in this view of the meaning We, therefore, hold that the second application did not create a fresh starting point and that the case is almost on all fours with the Calcutta case. The Court, therefore, confirms the decree with costs.

*Decree confirmed.*

**NOTES.**

[ The following decisions are similar:—(1909) 11 C. L. J., 83; (1912) 37 Bom., 42. See also (1909) 11 C. L. J., 357; (1907) P. R., 116; (1910) 13 O. C., 303. ]

## [86] APPELLATE CIVIL.

*The 18th March, 1896.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Dhondshet............(Original Defendant) Appellant

*versus*

Ravji and others............(Original Plaintiffs) Respondents.*

*Interest—Damdupat—Mortgage—Liability to account—Decree on mortgage—Further interest from date of suit to decree ordered by the Court—Discretion of Court—Civil Procedure Code (Act XIV of 1882), Sec. 209.*

Where under the terms of a mortgage there is a liability to account, the rule of *damdupat* does not apply.

* Appeal No. 152 of 1895.

The law as laid down in *Gopal* v. *Gangaram*, I.L.R., 20 Bom., 721, is not limited only to cases in which at date of suit an account between the mortgagor and mortgagee is actually kept.

In a suit brought by a mortgagee against his mortgagor (both parties being Hindus) the decree ordered the defendant to pay interest from the date of suit to decree upon the total found due after applying the rule of *damdupat* at the date of suit. It was objected that this order of further interest violated the rule of *damdupat*.

*Held*, that the discretionary power as to awarding interest conferred on the Courts by section 209 of the Civil Procedure Code (Act XIV of 1882) may be exercised without reference to the law of *damdupat*

APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in Suit No. 368 of 1892.

Suit on a mortgage. The plaintiffs (mortgagees) claimed to recover Rs. 2,999 as principal and Rs. 2,999 as interest due under the mortgage. By the deed it was provided that the mortgagees should have possession of the mortgaged property and that the rents and profits should go towards the satisfaction of the mortgaged debt. The plaintiffs gave credit for the sums so received by them and now claimed for the balance. They also claimed further interest on the total sum (Rs. 5,988) from the date of suit to decree.

The First Class Subordinate Judge passed a decree for the plaintiffs for the whole amount claimed.

The defendants appealed to the High Court.

*Lang* (Advocate-General) and *Shivram Vithal Bhandarkar*, for the Appellants (Defendants): —The rule of *damdupat* applies and [87] the plaintiffs cannot recover more than the amount of principal (Rs. 2,999) and an equal amount as interest. Further interest cannot be given. The case of *Gopal* v. *Gangaram*, I. L. R., 20 Bom., 721, does not apply, as there was no account current between the parties.

*Branson* and Rao Saheb *Vasudeo J. Kirtikar*, for the Respondents (Plaintiffs) :—*Gopal* v. *Gangaram*, I. L. R., 20 Bom., 721, decides that when under the terms of a mortgage there is a liability to account, the rule of *damdupat* does not apply. The plaintiffs are entitled to the additional interest.

**Jardine**, **J**.:—The question about the rule of *damdupat* was not raised below. In the absence of any finding to the contrary we are of opinion that there was a liability to account under the terms of the mortgage: and we do not treat the judgment of the Full Bench in *Gopal* v. *Gangaram*, I. L. R., 20 Bom., 721, as confined to cases in which at the date of suit an account between the mortgagor and mortgagee was actually being kept. We think the fact that an account may be taken between the parties of interest on the one side and rents and profits on the other is sufficient to exclude the law of *damdupat* according to that judgment.

But in this case its application relates only to the part of the Subordinate Judge's decree, which orders the mortgagor to pay interest from the date of suit to that of decree upon the total found due after applying the rule of *damdupat* at the date of suit. That total was found to be Rs. 2,999 principal *plus* an equal sum as interest. We think that the discretionary powers conferred on the Courts by section 209 of the Code of Civil Procedure, of which this is one, may be exercised without reference to the law of *damdupat*.

The Court confirms the decree with costs.

*Decree confirmed.*

**NOTES.**

[ See also (1909) 11 Bom. L. R., 318. ]

[88] APPELLATE CIVIL.

*The 19th March, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Abdul Karim............(Original Defendant No. 2) Appellant
*versus*
Thakordas Tribhovandas............(Original Plaintiff) Respondent.*

*Civil Procedure Code (Act XIV of 1882), Sec. 285—Execution—Sale—Attachment of same property by different Courts—Sale by both Courts—Titles of the respective purchasers at such sales*

*A* and *B* obtained decrees against *C*. *A*'s decree was obtained in the Court of the Subordinate Judge at Surat. *B*'s decree was obtained in the Small Cause Court at Surat. In execution of their respective decrees both *A* and *B* obtained orders of attachment on the same day of a certain debt due to *C* by the Municipality of Surat. Notice of the attachment was given by the Subordinate Judge to the Small Cause Court, under section 285 of the Civil Procedure Code (Act XIV of 1882). On the 16th November 1893, the Subordinate Judge issued an order for sale of the attached debt, and on the 18th December the Small Cause Court issued a similar order. Both Courts sold the debt on the 6th January 1894, the Small Cause Court selling first in point of time. At the sale by the Subordinate Judge the plaintiff bought the debt and the defendant was the purchaser at the sale by the Small Cause Court. The defendant after his purchase sued the Municipality for the debt making the plaintiff a party defendant, and he obtained a decree against the Municipality. The plaintiff also sued the Municipality making the defendant a party, and he also obtained a decree which was confirmed by the District Court. Against this decree the defendant appealed to the High Court.

*Held*, that the plaintiff had the better title. The defendant had bought at the sale held by the Small Cause Court. The sale by that Court after it had received notice of the attachment proceedings in the Court of the Subordinate Judge was in direct contravention of the provisions of section 285 of the Civil Procedure Code (Act XIV of 1882). The Small Cause Court had full notice of the proceedings in the Subordinate Judge s Court and there was no reason to suppose that the defendant himself had not similar knowledge. The defendant did not set up the plea that he was a *boná-fide* purchaser without notice.

*Per* FARRAN, C.J.:—The sale by the Small Cause Court was an act done in the irregular exercise of admitted jurisdiction. But when property is attached by more Courts than one, although each has jurisdiction to sell, that jurisdiction should be exercised by the Court of the highest grade (section 285). If by a mistake of law or in ignorance of an earlier attachment in a Court of a higher grade, a Court of lower grade proceeds to sell, it is not deprived of jurisdiction to do so by section 285. The jurisdiction of a Court cannot depend upon its knowledge of facts. If an attachment in a higher Court deprives a [89] Court of lower grade of jurisdiction to sell, the sale must be, I apprehend, invalid, whether the Court of lower grade knows of it or not. If the sale is held to be in such cases only irregular, the purchaser will take an indefeasible or defeasible title according to whether he knows or does not know of the irregularity. If he buys *boná fide* and without notice, his title would be perfect and he will not be affected by the irregularity of the proceedings in the sale—*Rewa Mahton* v. *Ram Kishen*, L. R., 13 I. A., 106. If he purchases with notice, he runs the risk of his purchase being set aside.

SECOND APPEAL from the decree of T. Hamilton, District Judge of Surat. Venilal Bhagwan held a decree against Abdulali and Ismail Karimbhai which he obtained in the Court of the First Class Subordinate Judge at Surat. Mahomed

* Second Appeal No. 549 of 1895.

Ali held a Small Cause Court decree against these same persons. On 30th September 1893, Venilal in execution of his decree applied to the First Class Subordinate Judge for the attachment of a debt due to his judgment-debtors by the Surat City Municipality, and on the same day Mahomed Ali in execution of his decree made a similar application to the Small Cause Court for the attachment of the same debt, and both the Courts made orders for attachment on the same day. The Small Cause Court attachment was levied on the 30th September 1893, and that of the Subordinate Judge's Court on the 2nd October. Notice of the latter was duly given to the Small Cause Court. The attachments were thus concurrent attachments and the provisions of section 285, Civil Procedure Code (Act XIV of 1882), became applicable.

The Subordinate Judge made an order for sale on the 16th November 1893, and the Small Cause Court made an order for sale on the 18th December. Both Courts sold the debt on the 6th January 1894, the Small Cause Court selling first in point of time on that day. At the execution-sale by the Subordinate Judge the plaintiff bought the debt; the defendant bought it at the sale by the Small Cause Court. The defendant after his purchase sued the Surat Municipality in the Small Cause Court for the debt which he had bought and he made the plaintiff a party-defendant, and obtained a decree against the Municipality. The plaintiff at the same time sued the Municipality in the Subordinate Judge's Court for the debt and made the defendant (Abdul [90] Karim) a defendant, and he also obtained a decree which on appeal was confirmed by the District Court. The defendant appealed to the High Court.

*Kalabhai Lallubhai* appeared for the Appellant (Defendant No. 2).

*Motilal M. Munshi* appeared for the Respondent (Plaintiff).

**Farran, C. J.**:—The facts and the dates of the several proceedings which give rise to the question which has been argued upon this appeal are these.

Venilal Bhagwan held a decree obtained in the Court of the First Class Subordinate Judge at Surat against Abdulali and Ismail Karimbhai.

Mahomed Ali Abdul held a decree obtained in the Court of Small Causes at Surat against the same defendants. The Surat City Municipality was indebted to Abdul Ali and Ismail Karimbhai in the sum of Rs. 200 or thereabouts.

On the 30th September 1893, Venilal and Mahomed Ali respectively applied in the Courts of which they held decrees for the attachment of the debt due by the Municipality to their common judgment-debtors. An order for attachment was made by both Courts on the same day. The Small Cause Court attachment was levied on the 30th September 1893, and that of the Subordinate Judge's Court on the 2nd October following. Venilal on effecting his attachment gave notice of it to the Small Cause Court. The attachments thus were concurrent attachments, and the provisions of section 285 of the Code of Civil Procedure (Act XIV of 1882) became applicable to them.

The Subordinate Judge made an order for sale on the 16th November 1893. A similar order was made by the Small Cause Court on the 18th December following. Both Courts sold the debt on the 6th January 1894, the sale by the Small Cause Court having been (it is said) in point of time first made.

The plaintiff purchased the debt at the sale held by the Subordinate Judge. The defendant Abdul Karim was the purchaser at the sale held by the Small Cause Court. After his purchase [91] the defendant Abdul Karim sued the Surat City Municipality in the Small Cause Court for the debt due by them to the judgment-debtors, making the present plaintiff a party-defendant to the suit, and obtained a decree against the Municipality. Concurrently the plaintiff sued the Municipality and Abdul Karim in the Subordinate Judge's Court,

and also obtained a decree, which was confirmed in appeal by the District Judge. This is an appeal from that decision.

There can, I think, be no doubt that the proper Court to realize the debt by sale was the Court of the Subordinate Judge, First Class, that Court being the higher in grade—*Turmuklal* v. *Kalyandas*, I. L. R., 19 Bom., 127, and the action of the Small Cause Court Judge in proceeding with the sale after he had received notice of the attachment proceedings in the Court of the Subordinate Judge, First Class, was in direct contravention of the provisions of section 285 of the Civil Procedure Code. This is a contest, however, between the two purchasers, and we have to determine which has the better title. This question has, as pointed out in *Patel Naranji* v. *Haridas*, I. L. R., 18 Bom., 458, given rise to a conflict of decision between the Calcutta High Court on the one side and the Madras and Allahabad High Courts on the other. In the Calcutta cases the objections (which were overruled) to the first sale rested on the ground that they were not ordered by the Courts respectively under whose decree the properties had been first attached, but were made under a subsequent attachment by another Court—*Dwarka Nath* v. *Banku Behari*, I. L. R., 19 Cal., 651, *Kashy Nath* v. *Surbanand*, I. L. R., 12 Cal., 317,—while in the Madras and Allahabad cases the objections (which were allowed) to the original sale were based upon their having been made by a Court of inferior grade while the respective properties were under attachment by Courts of higher grade —*Muttukaruppan* v. *Mutturamalinga*, I L. R., 7 Mad., 47; *Badri Prasad* v. *Saran Lal*, I. L. R., 4 All., 359; *Aghore Nath* v. *Shama Sundari*, I. L. R., 5 All., 615. The distinction does not appear to be important. The provisions of section 285 apply equally to both classes of objection, and in *Dwarka Nath* v. *Banku* [92] *Behari*, I. L. R., 19 Cal., 651, the Court recognised that its ruling was opposed to the decisions in the Madras and Allahabad cases which I have mentioned.

The facts in *Patel Naranji* v. *Haridas*, I. L. R., 18 Bom., 458, and in *Turmuklal* v. *Kalyandas*, I. L. R., 19 Bom., 127, brought those cases within the wording of section 285, though the Court considered that they were not within its spirit. In them sales by a Court of lower grade were not treated as void while the property sold was under attachment by a Court of higher grade. The proceedings in both cases had, however, reached a very late stage in the Court of inferior grade before the attachment was levied in the Court of higher grade.

The decision of the present case appears to me to rest upon the well-known distinction between the acts of a Court done without jurisdiction or authority and those done in the irregular exercise of an admitted jurisdiction or authority. I think that the sale by the Small Cause Court falls within the latter category. When property is attached by more Courts than one, each of them has, I think, jurisdiction or authority to sell, but section 285 declares by which of such Courts that jurisdiction should be exercised. If by mistake of law or in ignorance of an earlier attachment or of an attachment in a Court of higher grade a Court of lower grade proceeds to sell, it is not, I think, deprived of jurisdiction to do so by the provision of section 285. I have advisedly coupled mistake and ignorance, as the jurisdiction of a Court cannot, it seems to me, depend upon its knowledge or ignorance of facts. If an attachment in a higher Court deprives a Court of lower grade of jurisdiction to sell, the sale must be, I apprehend, invalid, whether the Court of lower grade knows of it or not. If the sale is held to be in such cases only irregular, the purchaser will take an indefeasible or a defeasible title according to whether he knows or does not know of the irregularity. If he buys *bonâ fide* and without notice, his title

will be perfect and he will not be affected by the irregularity of the proceedings resulting in the sale—*Rewa Mahton* v. *Ram Kishen Singh*, L. R., 13 I. A., 111. If he purchases with notice he runs the risk of his purchase being set aside.

**[93]** This view, which is in accordance with that held by the Calcutta High Court, seems to me to be attended with less momentous consequences than that adopted by the Allahabad High Court. The title to a valuable estate might otherwise be rendered invalid by the existence of an unknown attachment prior in date to that under which it was sold. There is nothing in section 285 which compels us to hold that a sale is null and void if held in contravention of its terms. Those terms are, I think, fully satisfied by ruling that its provisions are directory as to which of two or more Courts shall exercise what would otherwise be concurrent jurisdiction, without holding that they annul the jurisdiction of the Court of lower grade when it comes into competition with the jurisdiction of a superior Court.

The defendant in this case did not set up the plea that he was a *bonâ fide* purchaser without notice. The Court which sold had full knowledge of the proceedings in the Subordinate Judge's Court, and there is no reason to suppose that the defendant had not similar knowledge. His purchase was, in such a case, liable to be defeated by the purchase of the plaintiff. I am of opinion, therefore, that the latter acquired title to the debt due by the Municipality.

The Small Cause Court had not, I think, jurisdiction to decide between these competing titles, and the question raised by this appeal is not, therefore, *res judicata* by its decree.

Decree confirmed with costs.

**Candy, J.**:—There is no doubt that section 285, Civil Procedure Code, is applicable to the facts of the present case. But I think that in applying the provisions of that section we should follow the former decisions of this Court in *Patel Naranji* v. *Haridas*, I. L. R., 18 Bom., 458, and *Turmuklal* v. *Kalyandas*, I. L. R., 19 Bom., 127, which in effect held that neither the language of the section, nor the object with which it may be supposed to have been introduced, required or made it convenient to hold that the effect of the section rendered the sale by the inferior Court null and void. Thus in the former of the two cases above noted "under the circumstances of the case," the order of sale and proclamation having been made by the **[94]** inferior Court before application for execution was made in the superior Court, it was held that the applicant for execution in the superior Court had no right to ask the Judge of the inferior Court to set aside the sale as made without jurisdiction, although possibly he might have applied to the District Judge to transfer the proceeds realized by the sale to the superior Court. Similarly in the latter case this Court relied on the circumstance that the inferior Court had issued the proclamation for sale before application for execution was made in the superior Court.

The same view of the section has been taken by the Calcutta High Court in *Bykant Nath Shaha* v. *Rajendro Narain Rai*, I. L. R., 12 Cal., 333. In that case certain property of a judgment-debtor had been attached in 1880 by a Subordinate Judge. For certain reasons, however, there was delay in holding the sale. In 1882 the same property was attached and put up for sale by a Munsif who was subordinate to the Subordinate Judge, and the sale was duly confirmed. The High Court held (pp. 338—339): "The object of section 285 no doubt is......to prevent confusion in the execution of decrees by providing for certain proceedings to be held by the superior Court where the Courts of execution are of different grades, or by the first attaching Court where both Courts have equal jurisdiction. Strictly speaking, therefore, no such proceeding

should be taken except under the direction of one of these two Courts; but where an execution sale has been held by an inferior Court at the instance of the decree-holder (*the Court itself, the decree-holder and the auction-purchaser being without any information* of any objection to the exercise of a jurisdiction which that Court would ordinarily be competent to exercise); and that sale has been confirmed without any objection raised, we are not prepared to say that a title so obtained is not a valid title. * * We are not prepared to hold *under the circumstances stated* that no valid title was conferred by the sale in the Munsif's Court which was regularly held and duly confirmed. * * * We are unable to hold that the sale by the Munsif was null and void, as it was perfectly regular *so far as the facts were known to the parties concerned and the Munsif himself*."

**[96]** Now here what are the circumstances of the case? The rival decree-holders applied for execution *on the same day* to the First Class Subordinate Court and the Small Cause Court respectively. An order for attachment was made on the same day by both Courts, express notice being given to the Judge of the inferior Court of the proceedings in the superior Court. Though attachment was actually made by the inferior Court two days before it was made by the superior Court, the order for sale was made by the superior Court about a month before the order for sale was made by the inferior Court. The sale by both the Courts was held on the same day, and it was alleged, and apparently not denied, that the sale by the inferior Court took place about two hours before the sale by the superior Court. I cannot find a trace of any suggestion that the rival proceedings were not perfectly well known to all parties, or that the purchaser in the Small Cause Court sale has ever contended that he is a *bonâ fide* purchaser *without notice*. He has obtained a decree in the Small Cause Court simply on the ground that the attachment in that Court was actually made two days before the attachment was made in the First Class Subordinate Court—an attachment, as shown above, made with express notice of the proceedings in the superior Court.

Under these circumstances I am of opinion that the purchaser in the Small Cause Court has not got a good title. On the other points I concur with the learned Chief Justice.

*Decree confirmed.*

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**NOTES.**

[The sale, in similar circumstances, likewise held to be valid:—(1898) 22 Mad., 295; (1907) 34 Cal., 836; (1900) 13 C. P. L. R., 145.]

[ 22 Bom. 95 ]

## APPELLATE CIVIL

*The 20th March, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE CANDY.

Vithal Atmaram and others............(Original Plaintiffs) Appellants

*versus*

Yesa............(Original Defendant) Respondent.*

*Khoti Act (Bom. Act I of 1880), Secs. 17, 20, 21 and 33—Entry in the Settlement Officer's record not conclusive.*

An entry by a Survey Officer that an occupancy tenant holds the land *rent-free* is not an entry under section 17 of the Khoti Act (Bombay Act I of 1880), [96] and not being final, it can under section 21 be reversed or modified by a decree of a civil Court.

*Balaji Raghunath* v. *Bal bin Raghoji*, I. L. R., 21 Bom., 235, distinguished.

SECOND APPEAL from the decision of Rao Bahadur Kashinath B. Marathe, First Class Subordinate Judge, A. P., at Ratnagiri.

The plaintiffs as khots of the village of Kurtade in the Ratnagiri District brought this suit to recover *thal* (rent) for the years 1886-87, 1887-88 and 1888-89 from the defendant, who was the occupancy tenant of Survey No. 60.

The defendant pleaded (*inter alia*) that the land in suit was not arable, but was used as a place for the deposit of bones and the remains of dead animals of the village ; that the Special Settlement Officer had by his order exempted it from payment of *thal*, and that the claim was barred by limitation, inasmuch as it was not made within a year from the decision of the special Settlement Officer.

It appeared from the evidence that the plaintiffs had recovered *thal* for the land from 1858-59 to 1883-84 ; that it was voluntarily paid in some years, and in others recovered by suits.

In 1888 the Survey Settlement Officer decided that the land in dispute should be enjoyed rent-free by the occupancy tenant, and an entry was made in the record to the effect that

"Falni No. 4 out of Survey No. 60, being a place used for throwing bones on (*hadgal*), should be enjoyed rent-free."

The reasons for the decision so arrived at were recorded by the Settlement Officer in the following terms :—

"The land is *hadgal* and has never been assessed ; one khot is willing to have it still so entered, the other is not, but proves nothing ; therefore I order that the land be enjoyed exempt from all payment to the khot as *hadgal*."

This order was passed on 16th January 1888, and the present suit was filed on 1st October 1889.

The Joint Subordinate Judge of Ratnagiri held that the suit not having been brought within one year from the date of the Survey Officer's order was time-barred, and dismissed the suit.

In appeal the First Class Sudordinate Judge, A. P., of Ratnagiri confirmed the decision of the Joint Subordinate Judge.

[97] Against this decision plaintiffs preferred a second appeal to the High Court.

* Second Appeal, No. 577 of 1893.

*Nagindas Tulsidas* for the Appellants (Plaintiffs) :—The Settlement Officer had no authority to exempt the defendant from liability to pay *thal* or any other rent. His decision was *ultra vires*. See *Antaji Kassinath* v. *Antaji Mahadev*, I. L R., 21 Bom., 480.

*Vasudev Gopal Bhandarkar* for the Respondents (Defendant) :—The Settlement Officer having passed an order under section 17 of the Khoti Act (Bombay Act I of 1880) exempting the land from *thal*, the plaintiff cannot claim it. So long as the entry under section 17 is on the record, it is conclusive. See *Gopal Krishna* v. *Sakhojirav*, I. L. R, 18 Bom., 133. It is not open to a civil Court to go behind this entry and enquire whether the order was correctly or validly made—*Balaji Raghunath* v. *Bal bin Raghoji*, I. L. R., 21 Bom., 235.

**Parsons, J.**:—This suit is brought by the plaintiffs as khots of the village of Kurtade to recover *thal* rents for the years 1886-87, 1887-88 and 1888-89 from the defendant, who is the occupancy tenant of Falni No 4, Survey No. 60, and cultivated it in the years in suit.

It is proved in the case that the plaintiffs have been recovering *thal* for the land from 1858-59 to 1883-84, the same has been voluntarily paid in some years, in others it has been obtained by suit. It is further shown that in 1888 the Survey Officer—presumably acting under section 33 of the Khoti Act —decided that the land should be enjoyed rent-free by the occupancy tenant and an entry was made in the record, and apparently made under section 17, to the effect that "Falni No. 4 out of Survey No. 60 being a place used for throwing bones on (*hadgal*) should be enjoyed rent-free." The grounds of his decision are thus recorded. "The land is *hadgal* and has never been assessed, one khot is willing to have it still so entered, the other is not willing, but proves nothing : therefore I order that the land be enjoyed exempt from all payment to the khot as *hadgal*."

The point in the case is whether the entry that the land shall be enjoyed rent-free is an entry duly made under section 17 and, [98] therefore, final and conclusive. The first essential of an entry under section 17 is that the rent payable shall be according to the provisions of section 33. Section 33 enacts that the rent payable by an occupancy tenant shall be "such fixed amount, whether in money or in kind, as may have been agreed upon or as may at the time of the framing of the survey record, or at any subsequent period, be agreed upon between the khot and the said tenant . or on the expiry of the term for which any such agreement shall have been or shall be made, or if no such agreement have been or be made, such fixed share of the gross annual produce of the said tenant's land, not exceeding one-half in the case of rice land, nor one-third in the case of varkas lands." Thus the occupancy tenant must pay either a fixed amount or a fixed share, and a determination that he shall pay neither one nor the other, in fact that he shall pay nothing at all, is clearly beyond the jurisdiction of the Survey Officer. It really is a determination of tenure, for it amounts to a decision that the cultivator is not a tenant at all, but the proprietor of the land, holding it on better terms than the khot himself, since he has not to pay even assessment for it. Thus an entry that a privileged occupant held his land rent-free, would not be an entry under section 17 at all, for it does not specify the nature and amount of rent payable according to the provisions of section 33. The provisions of section 33 are wholly ignored, and the Survey Officer instead of determining the amount of rent payable has determined the nature of the tenure on which the land is held. Such an entry cannot be conclusive or final evidence.

It may seem that this opinion is opposed to the decision of this Court in *Balaji Raghunath* v. *Bal bin Raghoji*, I. L. R., 21 Bom., 235. It is, however,

not so really when the different facts are considered. In that case there was a holding of six survey numbers. The Survey Officer determined that for the whole holding 7½ maunds of rice should be paid. In working out the details he set out that this amount was payable for five survey numbers, nothing being paid for the sixth number. If based on agreement such a determination as this would not be contrary to the provisions of section 33. I admit that the words used both by myself and [99] by the Chief Justice are wider than the case required, but I have consulted him in the matter and I have his authority for stating that his words should be taken as applicable only to the case we had before us in which, as I have said, the amount payable on the holding as a whole was determined, though in working out the calculation of the whole rent it was found that a small piece of land was thrown in for which no rent was separately charged.

In the present case there has been no determination of any rent being payable by the defendant for his land, but the whole of it has been held to be rent-free, and that, too, not by virtue of any agreement, but by a consideration of the character of the land itself. Such a decision is not declared to be final under the Khoti Act, and it can, therefore, under section 21 be reversed or modified by a decree of a civil Court. The plaintiffs have clearly established that the defendant is not entitled to hold the land in suit rent-free, that he is the occupancy tenant thereof, and that he is liable as such to pay them the customary rent.

We reverse the decrees of the lower Courts and award the *thal* claimed, with costs throughout on the defendant.

**Candy, J.** :—It is unnecessary for me to repeat what I have set out at length in my judgments in the Full Bench Reference in *Antaji Kashinath* v. *Antaji Mahadev*, I. L. R, 21 Bom., 480, and in *Krishnaji Narsinva* v. *Krishnaji Narayan*, *ibid* p. 467. I adhere to the conclusions at which I arrived in those judgments with regard to the various provisions of the Khoti Act (Bombay Act 1 of 1880).

Here we have the following facts: —In 1884 the Settlement Officer under section 33 determined the customary rents of the village. No suggestion was then apparently put forward that as between the khot and the occupancy tenant of the land in suit there was "at the time of the framing of the survey record" an agreement that for the land in suit the khot should take "a fixed amount whether in money or in kind." The entry made in the survey record in accordance with that decision was under sections 17 and 21 *final*. In 1888 the Settlement Officer passed another decision holding that the land in suit should be held rent-free. In accordance with that subsequent decision an entry [100] has been made in the "botkhat of the village." This apparently is a "village record" and not a "survey record." (See my remarks in *Krishnaji Narsinva* v. *Krishnaji Narayan.*)

But assuming that an entry has been made in the "survey record" in accordance with the subsequent decision, and assuming that the Settlement Officer could in 1888 alter the decision and entry made in 1884, (it is not pretended that between 1884 and 1888 any agreement to take and pay a fixed amount was made between the khot and occupancy tenant), then the question arises whether the entry made consequent on the decision of 1888 is final and conclusive. It can only be so if it is "according to the provisions of section 33." But it is directly contrary to those provisions. It states that defendant is entitled to hold the land in suit rent-free. Section 33 provides that an occupancy tenant *shall* pay such fixed share of the produce as shall be determined to be the customary rate of the village, or such fixed amount, whether in money

or kind, as may be agreed upon between the khot and the said tenant. If these words have any meaning at all, they must mean that an occupancy tenant must pay something for his land.

As my learned colleague, who was a party to the decision in *Balaji Raghunath* v. *Bal bin Raghoji*, I. L. R., 21 Bom., 235, has distinguished that case from the present one, it is unnecessary for me to refer further to that case, with some of the remarks in which I respectfully dissent. The result of the decision in the present case is that the decrees of the lower Courts must be reversed, and the *thal* claimed, which the Lower Appellate Court has found to be correct, must be awarded.

*Decree reversed.*

## [101] APPELLATE CIVIL

*The 24th March, 1896.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Fakirappa............(Original Plaintiff) Appellant

*versus*

Yellappa and another............(Original Defendants) Respondents.*

*Hindu law—Inheritance—Grandfather's property—Separated grandson—Partition—Self-acquired property, descent of—United sons, right of.*

As between united sons and a separated grandson, the succession on the grandfather's death to the property, both ancestral and self acquired, left by him goes in preference, according to Hindu law, to the united sons.

SECOND APPEAL from the decision of J. L. Johnstone, District Judge of Dharwar.

Fakirappa brought a partition suit against his grandfather (Somappa) and his uncles and obtained a decree. Part of the property, however, which he alleged to be family property was held to be the self-acquired property of Somappa. Fakirappa, therefore, by the decree was allotted a share of the other property only. He took possession of his share and subsequently lived separate from his grandfather and uncles.

On Somappa's death, Fakirappa filed the present suit against his uncles claiming a share of the property which had been declared to be self-acquired by him.

The Second Class Subordinate Judge dismissed the suit, holding that the plaintiff having separated from his grandfather (Somappa) was excluded by his uncles (Yellappa and Giriappa) who had remained joint.

The plaintiff appealed and the District Judge dismissed the appeal. The plaintiff then appealed to the High Court.

*Shamrao Vithal* and *Dattatraya A. Idgunji*, for the Appellant:—The plaintiff is entitled to a share of Somappa's self-acquired property. On Somappa's death it devolved upon his descendants and became ancestral property. The plaintiff as his grandson is entitled to a share—*Gavrishankar* v. *Amratram*†; *Katama* v. *The Rajah of Shivagunga*, 9 Moo. Ind. Ap., 539, *Ramappa* v. *Sitkammal*, I. L. R., 2 Mad., 182; [102] Mitakshara, Ch. I, s. 2, pl. 1 to 17, and s. 5, pl. 9 and 10; Vyavahar Mayukha, Ch. IV, s. 4, pl. 16, 33.

* Second Appeal No. 591 of 1895.

† P. J., 1893, p. 420; *Sub. Nom. Gavrishankar* v. *Atmaram*, (I. L. R., 18 Bom., 611).

*S. R. Bakhale*, for the Respondents :—In the first suit the plaintiff had claimed a share in the self-acquired as well as the ancestral property of Somappa. His claim to the self-acquired property was not allowed.

**Ranade, J.** :—In this case the appellant, who had already enforced a partition of his share against his grandfather and uncles in respect of joint ancestral property, brought his suit on the death of the grandfather to recover from his uncles by partition his share in the grandfather's share of joint ancestral property, as also in his self-acquired property. Both the lower Courts have disallowed the claim on the authority of West and Bühler, pages 68 and 776, and the precedents on pages 364 and 365.

In the appeal before us, the argument has been confined solely to the self-acquired property of the grandfather, and no claim was urged in regard to the joint ancestral property which fell to the grandfather's share. It was urged that the self-acquired property of the grandfather must be treated as being of the nature of property left undivided at the time of the first partition, and that on the grandfather's death it became divisible among all his sons and grandson who succeeded by right of inheritance to it in equal shares. The appellant's pleader cited *Gavrishankar* v. *Amratram*, P. J. for 1893, p. 429 ; *Katama* v. *The Rajah of Shivagunga*, 9 M I. A., 539 , *Ramappa* v. *Sithammal*, I. L. R., 2 Mad., 182, and also relied upon Mayukha, Ch. 4, s. 4, pl. 16, 33 ss., and Mitakshara, Ch. 1, s. 2, pl. 1 and 5.

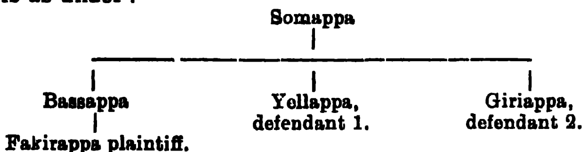
None of the authorities cited appear to us to support appellant's contention. The ruling in *Gavrishankar* v. *Amratram* no doubt held that the circumstance that there had been a partition between the members of a joint Hindu family would not, in the absence of any special agreement between them, alter their rights as to the property still undivided, as to which they would continue to stand to one another in the relation of members of **[103]** an undivided Hindu family. The facts of that case, however, show that the ruling had no reference to self-acquired property as such, and that its application was confined only to the common case where some joint property is divided, and the rest, by reason of its peculiar tenure, or because it was mortgaged, &c., is left common and reserved for future partition. Of course in the absence of special agreement to the contrary, such reserved property may be partitioned at a subsequent time.

In the present case the appellant in his previous suit had claimed a share both in the joint ancestral and self-acquired property of his grandfather. Partition was enforced as regards ancestral property, but the claim as regards self-acquired was not allowed, as it was not liable to enforced partition. In regard to self-acquired property, there was no ruling in that case, while the authorities show that it cannot be treated entirely as if it was joint property left undivided. This is clear from the ruling in *Shivagunga's case* cited on behalf of the appellant. Their Lordships decided in that case that in a united Hindu family where there is ancestral property, and one of the members of the family acquires separate estate, on the death of that member such separate self-acquired estate does not fall into the common stock, but descends to the male issue, if any, of the acquirer, or, in default, to the heirs of his separate estate. The appellant relies on this ruling chiefly because it speaks of the right of the male issue to succeed to such self-acquired property, but it is clear from the context that the male issue here spoken of does not refer to separated sons so much as to those sons who are in union with their deceased father. The succession of the male issue is by right of survivorship to joint estate, and must be confined to sons who are united co-parceners, and cannot include the appellant who is separated from the grandfather and the uncles. In the

case of a joint succession, the sons succeed by survivorship, and sons who have separated from their father and his family are passed over in favour of sons who have remained united with him—West and Bühler, page 68. The sons separated cannot claim any portion of their father's property which he acquired after division—West and Bühler, page 366. This property goes to his after-born son—*Yekeyamian* v. *Agniswa*-**[104]** *rian*, 4 Mad. H. C. Rep., 307,—along with the father's separated share of joint property—*Ibid.*, page 792. A son born to the father after partition inherits his wealth either solely or in common with sons who have become reunited with him—West and Bühler, page 776. Where on a partition one sharer takes his share, and the others live and mess with the father as before, these latter may be presumed to have reunited with their father—*Petamber Dutt* v. *Hurish Chunder Dutt*, 15 W. R., 200. The only remaining case to be noticed is the ruling in *Ramappa* v. *Sithammal*, I. L. R., 2 Mad., 182, in which it was held that the separated son succeeded to the father's estate in preference to his widow. The judgment, however, shows clearly that if there had been united sons living at the death of the father, they would have succeeded in preference to their separated brothers. The head-note expressly inserts the qualification that no united son is living at the time of the father's death, and this qualification is also inferable from the whole text of the judgment.

It would be thus seen from the authorities that, as between united sons and a separated grandson, the succession on the grandfather's death to the property, both ancestral and self-acquired, left by him goes in preference to the united sons. The nature of the self-acquired property can make no difference in this connection, more especially where the grandson enforces his partition against his grandfather's and uncle's will. The succession to a joint estate goes by survivorship to the co-parceners, and the separated grandsons cannot be regarded as co-parceners with the grandfather at the time of his death. In this state of the authorities, it is hardly necessary to consider the original Mitakshara and Mayukha texts cited, which were, moreover, fully discussed in the Madras case and in the Privy Council decision noted above. The fact that no case like the present has come up before the Courts, of a second partition being demanded by a separated sharer, is itself strong evidence that the appellant's contention is not sustainable. A partition once made must be presumed to be final and complete. To hold otherwise would be to open the door to a flood of litigation, for in every case a **[105]** separated son can always put forth the suggestion that a portion of his father's property was self-acquired. On the whole, we think that the lower Courts have correctly decided the points of law, and we must, therefore, confirm the decree of the lower Courts, and dismiss the appeal with costs.

**Jardine, J.**:—I concur in the result and the reasoning. No judicial authority on the point for decision has been shown us. The relationship of the parties is as under:—




Bassappa died and then Fakirappa sued Somappa and his (Fakirappa's) two uncles and obtained a partition by decree of the ancestral property and failed to obtain it of other property which the Court held to be Somappa's self-acquisition. He now claims to be entitled to share in the latter upon Somappa's death at Hindu law. There is no evidence whether Somappa devoted the

property in suit to the purposes of the co-parcenary, wherein he stayed till death with his two undivided sons.

I agree that neither *Katama* v. *The Rajah of Shivagunga*, 9 M. I. A., 539, nor *Ramappa* v. *Sithammal*, I. L. R., 2 Mad., 182, decides the point. Admitting the pre-eminence of a son whether separate or undivided in interest as an heir, the present case differs, as it is one of competition between a son separated and not re-united and other sons unseparated. I distinguish also *Luchomun Pershad* v. *Debee Pershad*, 1 Cal. W. R., 317, because the grandson there (whose father was dead) appears to have been a member of the united family. I agree also that *Santan* v. *Janku*, P. J., 1893, p. 290, is not on all fours. *Nawal Singh* v. *Bhagwan*, I. L R., 4 All., 427, appears to be near to the present. There the separated sons were held to have no rights in the property of their father, self-acquired after they had separated, as against a son born after the partition. But the judgment is based on express texts affirming the right of such after son.

[106] It is admitted by the pleader for the appellant that during his lifetime Somappa might have dealt with this self-acquired property as he chose by gift or will—Mitakshara, Ch. 1, s. 2, pl. 1 to 6. But it is argued that the son takes by unobstructed inheritance—*Ibid.*, Ch. 1, s. 5, pl. 9 and 10—and that on the father's death his right accrues, the fact of partition being immaterial. For this claim the Mitakshara, Ch. 1, s. 3, pl. 1 to 7 are relied upon. No other text has been cited. These placita do not appear to me to declare a rule supporting the present claim, nor have I found any support of it in the texts collected in Colebrooke's Digest or in his comments upon them.

I concur in thinking that the fact that no reported instance of such a claim having been made or awarded signifies that the Hindu law has not been understood as justifying the contention. We are also entitled to consider the grievous inconvenience which the interpretation suggested would produce—*Katama* v. *The Rajah of Shivagunga*. It would stimulate unpleasant litigation. It would interfere with the power of the father and the sons remaining in union with him to provide for a separating son by giving him when he demands partition something more than his proper share of the ancestral property. That can be reasonably done when the self-acquired property left with the father or in the co-parcenary is sufficient to make good provision for those who do not choose to separate. But such reasonable family arrangements would be hampered if the father were at once obliged to protect himself by resorting to gift or will in order to prevent the separating son making claim on the death of the father to share in the self-acquired property. A partition would thus be complicated with arrangements of a testamentary sort and premature. I come to the opinion that the claim is contrary to the spirit and presumptions of the Hindu law and concur in the proposed decree.

*Decree confirmed.*

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NOTES.

[The undivided members are the heirs excluding the divided :—(1908) 32 Mad., 377 ; (1900) 13 C.P.L.R., 137 ; (1913) 21 I.C., 697 (Nagpur).]

## [107] APPELLATE CIVIL.

*The 24th March, 1896.*
PRESENT :
MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Manager Vithoba Timap Shanbhog and another............(Original Defendants) Appellants
*versus*
Vigneshwar Ganap Hegde and others ...........(Original Plaintiffs) Respondents.*

*Mortgage—Interest—Interest a charge —Construction—Limitation Act (XV of 1877), Art. 132*

Where a mortgage-bond stipulated that interest at a certain rate should be paid annually and there were no words limiting this liability to the time fixed for the payment of the principal, and where it appeared from the evidence that interest had been paid for several years after the due date,

*Held*, that the interest was a charge on the property, and that the claim for interest fell under article 132† of the Limitation Act (XV of 1877).

SECOND APPEAL from the decision of E H. Moscardi, District Judge of Kanara.

Suit on a mortgage by the mortgagee. The plaintiff sued on a mortgage, dated 27th November 1870, to recover the principal sum of Rs. 300 and interest Rs. 300 by sale of the mortgaged property.

The mortgage-bond was in the following terms .—

"Simple mortgage bond executed by * * to * * I having borrowed from you for my necessity Rs. 300 and mortgaged to you the property * * *. These three plots * * * I have this day mortgaged to you. The details of the Rs. 300 are as follows * * *. I shall pay interest on this sum at annas 4 per *hun* (Rs 1) per annum. At this rate I will pay interest annually and obtain your receipt The principal amount I will repay in a lump sum on or before Margashirsh Shud 5th of Taran next [corresponding to 1884-85 A.D.] and get back this document with payment endorsed thereon. Up to that date I will not alienate the aforesaid lands to others by mortgage or sale. Thus is the mortgage-bond of lands executed "

The defendants contended as to the interest that under the bond it was not a charge on the property, and that the claim to it was barred by limitation.

It appeared from the evidence that interest was, in fact, for several years paid by the mortgagors after the time fixed in the bond.

[108] The Subordinate Judge held, on the terms of the bond, that only the principal, and not the interest, was secured on the lands ; that there was no provision in the bond for payment of interest after the repayment of the principal in the Taran (1884-85 A.D.) year, and that the claim for interest was, therefore, time-barred. He accordingly awarded the plaintiff's claim for the principal only, and rejected the claim for interest.

In appeal by the plaintiff the District Judge held that under the bond and on the evidence the intention was that interest should be paid until the principal

* Second Appeal No 571 of 1895.

† Art : 132 :—

| Description of suit. | Period of limitation | Time from which period begins to run. |
|---|---|---|
| To enforce payment of money charged upon immoveable property | Twelve years. | When the money sued for becomes due ] |

debt was discharged and that the interest was a charge on the mortgaged property falling under article 132 of the Limitation Act. He, therefore, amended the decree of the Subordinate Judge by adding the amount of Rs. 300, for interest, to the sum awarded by the lower Court.

Defendants preferred a second appeal to the High Court.

*Ghanasham Nilkanth* for the Appellants (Defendants).

*Narayan Ganesh Chandavarkar* for the Respondent (Plaintiff).

The following authorities were cited in argument:—*Gossain Luchmee Narain* v. *Tekait Het Narain*, 18 W. R., 322; *Mansab* v. *Gulab*, I. L. R., 10 All., 85; *Bhagwant* v. *Daryao*, I. L. R, 11 All., 416; *Sri Niwas* v. *Udit*, I. L. R., 13 All., 330; *Gudri* v. *Bhubaneshwari*, I. L. R., 19 Cal., 19; *Thayar* v. *Lakshmi*, I. L. R, 18 Mad., 331; *Narindra* v. *Khadim*, I. L. R., 17 All., 581; *Badi* v. *Sami*, I. L. R., 18 Mad., 257; *Bikramjit* v. *Durga*, I. L. R., 21 Cal. 274; *Rama Reddi* v. *Appaji Reddi*, I. L. R., 18 Mad., 248; *The Managers of the shop of Karsan Nagji* v. *Harbhamji*, P. J., 1895, p. 277.

**Jardine, J.**:—The argument that the interest is not a charge on the property was not seriously pressed; and may, therefore, be disregarded.

Before dealing with the decisions as to whether article 132 of the Limitation Act of 1877 applies to the interest, or article 116 to damages for deprivation of the use of the money lent by the plaintiff on the mortgage, we have to determine the construction of the mortgage-bond where it stipulates interest. The bond **[109]** Exhibit A is dated the 27th November 1870. It provides that the principal shall be repaid in a lump sum on or before the year called Taran. Under the Circular Orders section 50 the judgment of the District Court should have stated the year in the English Calendar also. It appears to be 1884-85. The stipulation about the interest is that it is to be paid annually and at a certain rate, but it does not say how long the mortgagor is to go on paying interest. The bond thus differs from those dealt with in *Gossain Luchmee Narain* v. *Tekait Het Narain*, 18 W. R., 322; *Mansab* v. *Gulab*, I. L. R., 10 All., 19; *Bhagwant* v. *Daryao*, I. L. R., 11 All, 416; *Sri Niwas* v. *Udit*, I. L. R., 13 All., 330; *Gudri* v. *Bhubaneshwari*, I. L. R., 19 Cal., 19; *Thayar* v. *Lakshmi*, I. L. R., 18 Mad., 331, and from *Narindra* v. *Khadim*, I. L. R., 17 All., 581, and *Badi* v. *Sami*, I. L. R, 18 Mad., 257, as interpreted by the Court.

The above are cases like *Cook* v. *Fowler*, L. R., 7 H. L., 27, which dealt with a case of claim for interest after the date up to which interest was stipulated.

In the case before us it was not pleaded at the trial that the parties did not intend by their written contract that interest should be payable after the due date of the principal, *i.e.*, the year Taran or 1884-85. The District Judge lays stress on the fact that the defendant-mortgagors did go on paying the interest at the stipulated rate for several years afterwards. The Judge holds on the words of the bond and on this evidence that the intention was that the interest at the stipulation rate should continue to be paid until the principal was discharged, which would be up till decree—*The Managers of the shop of Karsan Nagji* v. *Harbhamji*, P. J., 1895, p. 277, *Sub. Nom. Chaturbhai* v. *Harbhamji*, I. L. R., 20 Bom., 744,—subject, as in the present case, to the law of *damdupat*. Without framing an issue on the intention of the parties and taking evidence it would be wrong for this Court to disagree with the District Judge's finding on this point. But as the defendants did not plead what is argued now, it would be wrong to delay the passing of a final decree.

**[110]** The case has, therefore, to be considered as one where the interest is a charge on the property mortgaged and where no question arises of claim

for interest after due date stipulated for payment of interest. The construction we place on the bond distinguishes the case from *Rama Reddi* v. *Appaji Reddi*, I. L. R., 18 Mad., 248. We, therefore, follow *Thayar* v. *Lakshmi*, I. L. R., 18 Mad., 331, 333, and hold that article 132 applies. The claim for interest is admittedly within the period there provided, wherefore the Court confirms the decree with costs.

**Ranade, J.**:—The two points raised by the appellants in this case relate to the question of the interest claim.

The Court of First Instance had disallowed this claim on the ground that the bond did not provide for payment of interest after the time fixed for repayment of principal in the bond. The District Judge construed the bond in a different way, and held that there was a stipulation to pay interest, and that the interest amount was a charge on the property. The appellant contends that the District Judge was in error in the construction he put on the bond, and further that the interest, if allowed, was only compensation and not a charge on the property, and as such the claim was time-barred.

The appellants relied chiefly on the authority of *Narindra* v. *Khadim*, I. L. R., 17 All., p. 581, which is a Full Bench decision, and reviews all previous decisions of that Court as also of the Calcutta High Court on this subject—*Bhagwant* v. *Daryao*, I. L. R., 11 All., 416; *Sri Nivas* v. *Udit*, I. L. R., 13 All., 330; *Bikramjit* v. *Durga*, I. L. R., 21 Cal., 274. This last decision of the Calcutta High Court was expressly dissented from by the Full Bench. In that decision the Calcutta High Court held that the interest on the mortgage is not necessarily the interest which the parties stipulated by the mortgage-bond should be paid, but would also include interest which under the law is payable after the due date, where there is no stipulation for interest after that date. This Calcutta ruling was followed by the Madras High Court in *Rama Reddi* v. *Appaji Reddi*, I. L. R., 18 Mad., 248, and these two authori-
[111] ties were relied upon by the respondent. No Bombay authority was cited on the subject, for the obvious reasons that all the decisions quoted above relate to section 88 of the Transfer of Property Act, IV of 1882, which was not introduced in this Presidency till 1st January 1893. If the decision in the present case has been governed by the Transfer of Property Act it might have been necessary to consider whether this Court should follow the Calcutta and Madras rulings noted above, or the Full Bench decision of the Allahabad Court. The present suit was, however, instituted in 1892 before the Transfer of Property Act came into force in this Presidency, and we must decide the question independently of section 88 of that Act.

We are inclined to accept the construction put upon the mortgage-bond by the District Judge. The mortgage-bond stipulates that interest at Rs. 4 per annum shall be paid annually, and there are no words limiting this liability to the time fixed for the repayment of the principal. This is not, therefore, a case where there is no stipulation for the payment of interest after a certain time. The conduct of the parties is also in favour of this construction, for it has been found that interest was, in fact, paid after the time fixed in the bond for several years.

There is, therefore, no occasion to have recourse to Interest Act of 1839 in support of the claim. The interest claim, like the principal sum, is, therefore, a charge on the property, and there is no bar of limitation operating in this case. We accordingly confirm the decree of the lower Court and reject the appeal with costs on the appellants.

*Decree confirmed.*

**NOTES.**

[See also (1897) 19 All., 39; (1909) P.L.R., 116.]

# [112] ORIGINAL CRIMINAL.

*The 8th to 11th and 13th and 14th September, 1897.*

PRESENT:

MR. JUSTICE STRACHEY.

Queen-Empress
*versus*
Bal Gangadhar Tilak and Keshav Mahadev Bal.

*Penal Code (Act XLV of 1860), Sec. 124 A—Evidence—Writings showing intention or animus—Letters of contributors published in newspapers—Disaffection—Order to prosecute—Criminal Procedure Code (Act X of 1882), Sec. 196—Construction—Reference to proceedings in Legislative Council.*

The accused, who was the editor, proprietor, and publisher of the *Kesari* newspaper, was charged under section 124 A of the Penal Code (Act XLV of 1860) with exciting and attempting to excite feelings of disaffection to Government by the publication of certain articles, &c., in the *Kesari* in its issue of the 15th June 1897.

At the trial an order for the prosecution given by Government under section 196 of the Criminal Procedure Code (Act X of 1882) in the following form, dated July 26, 1897, was tendered in evidence :—

"Under the provisions of section 196 of the Code of Criminal Procedure, Mirza Abas Ali Baig, Oriental Translator to Government, is hereby ordered by His Excellency the Governor in Council to make a complaint against Mr. Bal Gangadhar Tilak, B.A., LL.B., of Poona, publisher, proprietor and editor of the *Kesari*, a weekly vernacular newspaper of Poona, and against Mr. Hari Narayan Gokhale, of Poona, printer of the said newspaper, in respect of certain articles appearing in the said newspaper, under section 124A of the Indian Penal Code and any other section of the said Code which may be found to be applicable to the case."

Counsel for the accused objected that the order was too vague and should have specified the articles with reference to which the accused was to be charged.

*Held*, that the order was sufficient and was admissible, but that if it were not sufficient, the commitment might be accepted and the trial proceeded with under section 532* of the Code of Criminal Procedure. *Queen-Empress* v. *Morton*, I. L R., 9 Bom., 288, followed.

In order to show the intention of such publications, counsel for the prosecution tendered in evidence a certain letter signed "Ganesh" which appeared in the issue of the *Kesari* of May 4, 1897. Objection was taken that it was not admissible, inasmuch as letters to newspapers often express opinions which are not the opinions of the editor and publisher.

*Held*, that the letter was admissible to show intention and animus.

The proceedings in the Legislative Council which result in the passing of an Act cannot be referred to as aids to the construction of that Act. *Administrator-General of Bengal* v. *Premlal Mullick*, I. L. R., 22 I. A., 107, followed.

* [Sec 532 :—If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

When irregular commitments may be validated.

If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment, and direct a fresh inquiry by a competent Magistrate.]

[113] Section 124 A of the Penal Code (Act XLV of 1860) explained. Meaning of the word "disaffection."

At the close of the Judge's charge to the jury, counsel for the first accused asked that the following points might be reserved for the decision of the Court under section 434* of the Criminal Procedure Code (Act X of 1882), *viz.*:—

1. Whether the order for the prosecution was sufficient under section 196 of the Criminal Procedure Code.

2. Whether the High Court had power, in the absence of a sufficient order, to accept the commitment of the accused under section 532 of the Criminal Procedure Code and to proceed with the trial.

3. Whether the meaning given to the term "disaffection" by the Judge in his charge to the jury was correct.

The Judge declined to reserve the above points.

The first accused having been convicted applied to a Full Bench under clause 41 of the Amended Letters Patent, 1865, for a certificate that the case was a fit one for appeal to the Privy Council. The points upon which he desired to appeal were those which his counsel at the close of the trial asked the Judge to reserve as above stated

The Full Bench refused to grant the certificate.

THE first accused was the editor, proprietor and publisher and the second accused was the acting printer and manager of a newspaper called the *Kesari*. They were charged under section 124 A of the Penal Code (Act XLV of 1860) with (1) exciting, and (2) attempting to excite, feelings of disaffection to the Government established by law in British India by publishing in Bombay certain paragraphs and articles in the said newspaper in its issue of the 15th June 1897. The first of the publications complained of appeared in the said newspaper under the heading "Shivaji's Utterances" and was partly in verse: the second was an account of the proceedings at the Shivaji's coronation festival held on the 12th June 1897. The publications were as follows:—

I.

## SHIVAJI'S UTTERANCES.

By annihilating the wicked I lightened the great weight on the terraqueous globe. I delivered the country by establishing "swarajya" † (and) by saving [114] religion. I betook myself to heaven ‡ to shake off the great exhaustion which had come upon me. I was asleep; why then did you, my darlings, awaken me? I had planted upon this soil the virtues that may be likened to the Kalpavriksha §, of sublime policy ¶, based on a strong foundation, valour in the battlefield like that of Karna ||, patriotism, genuine dauntlessness, (and)

*[Sec. 434:—When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

Power to reserve questions arising in original jurisdiction of High Court.

If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail,

Procedure when question reserved.

and the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit.]

† Literally, "one's own government," native rule.

‡ The text of "heaven" literally means "the Paradise of Indra."

§ One of the five trees of Indra's heaven which yields whatever may be desired.

¶ May also mean "morality."

|| The name of the half-brother to the Pandav princes, famed for munificence.

unity the best of all. Perhaps you now wish to show me the delicious fruits of these. Alack ! What is this ? I see a fort has crumbled down. Through (mis) fortune I get a broken stone to sit upon. Why does not my heart break like that this day ? Alas ! Alas ! I now see with (my own) eyes the ruin of (my) country. Those forts of mine, to build which I expended money like rain, to acquire which fresh (and) fiery blood was spilled there, from which I sallied forth roaring like a lion through the ravines, have crumbled down. What a desolation is this ! Foreigners are dragging out Lakshmi * violently by the hand † by (means of) persecution. Along with her plenty has fled (and) after (that) health also. This wicked Akabaya ‡ stalks with famine through the whole country. Relentless death moves about spreading epidemics of diseases.

*Shlok* (*Metre.*)

Say, ye, where are those splendid Mavlas, my second lives §, who promptly shed their blood on the spot where my perspiration fell ? They eat bread once ¶ (in a day), but not enough of that even. They toil through hard times by tying up their stomachs (to appease the pangs of hunger). Oh people ! how did you tolerate in the Kshetra || the incarceration of those good preceptors, those religious teachers of mine, the Brahmans whom I protected, (and) who, while they abided by their own religion in times of peace, forsook the darbha ** in (their) hands for arms which they bore when occasion required ? The cow—the foster-mother of babes when (their) mother leaves (them) behind—the mainstay of the agriculturists, the imparter of strength to many people, which I worshipped as my mother, and protected more than (my) life, is taken daily to the slaughter-house and ruthlessly slaughtered (there). " He himself came running exactly within the line of fire of (my) gun ! " " I thought (him to be) a bear ! " " Their spleens are daily enlarged ! " How do the white men escape by urging these meaningless pleas ? This great injustice seems to prevail in these days in the [115] tribunals of justice. Could any man have dared to cast †† an improper glance at the wife of another, a thousand sharp swords (would have) leapt out of (their) scabbards instantly. Now, (however,) opportunities are availed of in railway carriages, and women are dragged by the hand. You eunuchs ! How do you brook this ? Get that redressed ! " He is mad. Lift him up and send him at once on a pilgrimage. " " He is fond of pleasure. Deprive (him of his) powers, saying that it would be for a time only." This is the way in which royal families are being handled now. What misfortune has overtaken (the land) ! How have all these kings become quite effeminate, like those on the chess-board ! How can I bear to see this heart rending sight ? I turn (my) glance in another direction after telling (*i.e.*, leaving with you) a brief message. Give my compliments to my good friends, your rulers, over whose vast dominions the sun never sets. Tell them " How have you forgotten that old way of yours, when with scales in hand you used to sell (your goods) in (your) warehouses ? " (As) my expeditions in that direction were frequent, it was at that time possible (for me) to drive you back to (your own) country. The Hindus, however, being magnanimous by nature, I protected you. Have you not thus been laid under deep obligations ? Make, then, your subjects, who are

* The goddess of wealth.

† There being a pun upon the word "kara," which means both "the hand" and "taxes," the second meaning of this sentence may be got at by substituting "by (levying) taxes" for "by the hand."

‡ The eldest sister of Fortune ; *Miss Fortune* ; misfortune personified.

§ "Second lives," *i.e.*, beloved.

¶ Meaning, they take only one meal a day.

|| A sacred place.

** A sacred grass used in sacrifices, &c.

†† The text of these words literally means "oblique vision."

my own children, happy. It will be good for (your) reputation if you show your gratitude now by discharging this debt (of obligation).

*Mark of the Bhawani Sword.*

II.

The Shri Shivaji-coronation festival here commenced on Saturday, the 12th instant, and was brought to a close last night. The temple of Vithal, near the Lakdipul (*i.e.*, wooden bridge), was decorated in an excellent style for the festival. An image of Shri Shivaji on horseback was installed and around (it) were arranged pictures of Shri Shivaji Maharaja drawn by different artists. The picture drawn specially for this festival by Mr. Pimpalkhare, the accomplished local artist, representing the incident of Samarth Ramdas Swami and Shri Shivaji Maharaja meeting in the jungle at the foot of Sajjangad and the Samarth exhorting Shri Shivaji, and the "bust" of the Maharaja executed by Mr. Bhide, were worth seeing. (Some) students having recited *pada* (songs) in praise (of Shivaji) at the commencement of the festival, Professor Paranjpe read the *Puran*. He had for the text of his *Puran* (reading) the story in the Mahabharat, about the exasperation on (his) return (home) of the ambitious Suyodhana at the sight of the *Rajasuya* sacrifice*, performed by Dharmaraja, his thoughts in that connection (and) the conversation he had with Shakuni-mama and Dhritarashtra (on the subject). The *Puran* reader having, with a view to give his audience a clear idea of the *Rajasuya* sacrifice, compared it with the Diamond Jubilee, commenced the *Puran* (reading), observing, by way of an exordium, that his was not an attempt to uphold (or justify) what Duryodhana did, but [116] (only) to lay before them the† philosophical enquiry pursued in the Mahabharat as to the potency and quality of ambition which inspires all beings, and the innate power it has of elevating a country or a party. Professor Paranjpe's style of speaking is vigorous and impressive, (and) therefore the excellence of the most beautiful picture which Shri Vyasa has depicted of an ambitious mind was on this occasion well impressed upon the minds of (his) hearers by the *Puran* reader ‡ "Discontent is the root of prosperity, but contentment destroys prosperity." These maxims were the sum and substance of the *Puran* (reading). The dissertation as to how a man, even in affluent circumstances, prefers death in his exasperation to the indignity of being trampled under foot by his enemies, and how a discontented man secures co-operation and makes up for the lack of arms (and) missiles by (his) craftiness and other matters, was specially impressive. After the *Puran* (reading) was over, Professor Jinsiwale very earnestly requested the audience to study the Mahabharat. Professor Jinsiwale on this occasion said that the reason why Shri Shivaji Maharaja should be considered superior to Cæsar (and) Napoleon was that, while the great men of Europe were actuated by ambition alone, like Duryodhana, the uncommon attributes displayed by our Maharaja were not the blaze of the fire of ambition or discontent, but were the outcome of the terrible irritation at the ruin of his country and religion by foreigners. After the (reading of the) *Puran* there was a *Kirtan* § by the pious Matangi Bava at night. The verses composed by the Bava himself on the coronation (of Shivaji) were couched in simple language, and as the Bava had all the accompaniments required for the *Katha*¶ with him, the *Katha* was very

* A sacrifice performed by a universal monarch attended by his tributary princes.

† This may also be thus rendered.—"but (only) to lay before them, in an elementary form, the enquiry pursued in the Mahabharat," &c.

‡ This text is in Sanskrit.

§ Celebrating the praises of a god with music and singing.

¶ A legend of the exploits of some god related with music and singing.

much enjoyed. * Veda-Shastra Sampanna * Matangi had specially come here from Satara for this *Katha* †.

On the morning of the second day there were athletic sports in Vinchurkar's Wada. The students of the New English School and the Nutan Marathi Vidyalaya and the other schools acquitted themselves creditably in their performance with Indian clubs and on the malkhamb‡. The students of the New School showed themselves to be proficient in playing kathi § dandpatta ¶ bothati ||, &c. We hope that the students of other schools will follow their example (in this matter). The students attending the various schools as well as the people attending the gymnasia at this place will not find a better occasion than the festival (of the anniversary) of Shivaji's birth for exhibiting their skill in manly [117] sports. If the managers of the various schools take concerted action in this matter, it is likely to give special encouragement to physical and manly sports amongst boys. We hope that this our suggestion will be duly considered by the principals of different schools. Well, on the night of the same day a lecture on the subject of "The killing of Afzulkhan" was delivered by Professor Bhanu, under the presidentship of Mr. Tilak. The Professor ably refuted the charge of "murder" which English historians bring against Shri Shivaji Maharaja. The Professor has abundant (or strong) evidence in his possession (to prove) that Pantoji Gopinath was not a servant of Afzulkhan, but was from the first a servant of Shri Shivaji Maharaja **. Professor Bhanu having no permission to publish the papers relating to this matter for two years (more), did not place his (documentary) evidence on this (subject) before the meeting.** It is, therefore, evident that the charge of treachery brought against Pantoji Gopinath is literally false. How was it possible for the Maharaja even to imagine that Afzulkhan, who had undertaken on oath either to seize (Shivaji) and bring him alive or to kill him and bring his head to Bijapur, and who had on (his) way trodden under foot the goddess of Tuljapur and the Vithoba of Pandharpur, meant really to treat with him? What treachery did the Maharaja commit if he went to meet Afzulkhan on the *machi*†† of Pratapgad after making every preparation for battle for his (own) safety? The English historians assert that the Maharaja was the first to thrust in the *waghnakhs* ‡‡ but we see it stated in two *bakhars* (*i.e.*, memoirs), one of them written thirty years after the death of the Maharaja and the other about a hundred years after (his) death, that Afzulkhan was the first to strike (Shivaji). Even if we assume that the Maharaja was the first to strike Afzulkhan, what right has any writer to call that man a "murderer" who, while nine years of age, had divine inspiration not to bow down his head in the slightest degree before the Musalman Emperors? If Mazzini of Italy dons a mourning dress from (his) ninth year for the loss of the independence (of his country), why should not the Maharaja even at a tender age be stirred to put forth prodigious efforts for protecting §§ the walking and speaking depositories of knowledge §§ and the kine which are the living index of our prosperity? How can English writers have the audacity to belaud Clive and Warren Hastings, who were incomparably inferior to the Maharaja and whose careers were fraught with foul deeds? Is it not a deli-

*. Learned in the Vedas and Shastras.

† A legend of the exploits of some god related with music and singing

‡ A pillar on which the athletes perform their feats.

§ A stick.

¶ Exercise with a fencing stick in one hand and the weapon called "patta" in the other.

|| A staff of bamboo with a top-knot or bunch of cloth.

** These brackets are in the original.

†† Level ground at the foot or between the foot and summit of a mountain.

‡‡ A weapon resembling a tiger's claw.

§§ *i.e.*, the Brahmans.

berate outrage to the purity of truth that the pen of the same English writers whose (code of) morality refrains from applying the epithet "rebel" in speaking of Washington, calls Shivaji a rebel? The history of Europe cannot show even a single upright man of Shivaji's type. History will find fault with Shivaji, (but) from the point of view of ethics his act does not merit censure. How can the European science of ethics, which has "the greatest good of the greatest number" as its basis (or principal axiom), condemn Shivaji for abandoning a minor duty for the purpose of accomplishing the major one? [118] In the Mahabharat a man of this type is called "*Buddha*" *. The Professor concluded (his discourse on) the original theme with the declaration that even if (the Maharaja) had committed five or fifty more faults (? crimes), more terrible than those which historians allege Shivaji committed, he would have been just as ready as at that moment to profoundly prostrate himself a hundred times before the image of the Maharaja.

At the conclusion of the lecture Professor Bhanu said: Every Hindu, every Maratha, to whatever party he may belong, must rejoice at this (Shivaji) festival. We all are striving to regain (our) lost independence, and this terrible load is to be uplifted by us all in combination. It will never be proper to place obstacles in the way of any person who, with a true mind, follows the path of uplifting this burden in the manner he deems fit. Our mutual dissensions impede our progress greatly. If any one be crushing down the country from above, cut him off; but do not put impediments in the way of others. Let bygones be bygones; let us forget them and forgive one another for them. Have we not had enough of that strife, which would have the same value in the estimation of great men as a fight among rats and cats? All † occasions like the present festival, which (tend to) unite the whole country, must be welcome. So saying the Professor concluded his speech. Afterwards Professor Jinsiwale said: If no one blames Napoleon for committing two thousand murders in Europe, (and) if Cæsar is considered merciful though he needlessly committed slaughters in Gaul (France) many a time, why should so virulent an attack be made on Shri Shivaji Maharaja for killing one or two persons? The people who took part in the French Revolution denied that they committed murders and maintained that they were (only) removing thorns from (their) path. Why should not the same principle (? argument) be made applicable to Maharashtra? Being inflamed with partisanship, it is not good that we should keep aside our true opinions. It is true that we must (*i e.*, should not hesitate to) swallow down our opinions on any occasion when an expression of them might be thought detrimental to the interests of the country (*i.e*, nation), but no one should permit his real opinions to be permanently trodden under foot. Professor Jinsiwale concluded his speech by expressing a hope that next year there will be witnessed greater unity amongst the various parties in Poona on the occasion of this festival.

After the conclusion of Professor Jinsiwale's speech, the President, Mr. Tilak, commenced his discourse. It was needless to make fresh historical researches in connection with the killing of Afzulkhan. Let us even assume that Shivaji first planned and then executed the murder of Afzulkhan. Was this act of the Maharaja good or bad? This question which has to be considered should not be viewed from the standpoint of even the Penal Code or even the Smritis of Manu or Yadnyavalkya, or even the principles of morality laid down in the western and eastern ethical systems. The laws which bind society are for common men like [119] yourselves and myself. No one seeks to trace the genealogy of a Rishi,

* Means, in Sanskrit, "enlightened."

† This sentence may also be rendered thus: "The more the occasions like........ the whole country, the better."

nor to fasten guilt upon a king. Great men are above the common principles of morality. These principles fail in their scope to reach the pedestal of great men. Did Shivaji commit a sin in killing Afzulkhan or how? The answer to this question can be found in the Mahabharat itself. Shrimat Krishna's advice (teaching) in the Gita is to kill even our teachers (and) our kinsmen. No blame attaches (to any person) if (he) is doing deeds without being actuated by a desire to reap the fruit (of his deeds). Shri Shivaji Maharaja did nothing with a view to fill the small void of his own stomach (*i. e.*, from interested motives). With benevolent intentions he murdered Afzulkhan for the good of others. If thieves enter our house and we have not (sufficient) strength in our wrists to drive them out, we should without hesitation shut them up and burn* them alive God has not conferred upon the *Mlenchhas* † the grant inscribed on a copperplate of the kingdom of Hindustan. The Maharaja strove to drive them away from the land of his birth; he did not thereby commit the sin of coveting what belonged to others. Do not circumscribe your vision like a frog in a well. Get out of the Penal Code, enter into the extremely high atmosphere of the Shrimat Bhagavatgita, and (then) consider the actions of great men. After making the above observations in connection with the original theme, Mr. Tilak made the following remarks relating to the concluding portion of Professor Bhanu's address:—A country which (*i.e.*, a people who) cannot unite even on a few occasions should never hope to prosper. Bickerings about religious and social matters are bound to go on until death; but it is most desirable that on one day out of the 365 we should unite at least in respect of one matter. To be one in connection with Shivaji does not mean that we are completely to forget our other opinions. For quarrelling there are the other days of course. We should not forget that Ram and Ravan felt no difficulty whatever to meet in the same temple on the occasion of worshipping (the god) Shankar. After the lecture, *pada* (verses) of the Sanmitra Samaj and Maharashtra Mela were sung, and this brought the second day's (celebration) to a close.

On the third day Professor Jinsiwale delivered a very long lecture, which was replete with information. As it is not at all possible to compress Professor Jinsiwale's address in a brief space, we cannot give even a summary of it to-day. We are glad to say that the *Kirtan* of the pious Ghamande was, as usual, worth hearing. He took up the same story (subject) of the assassination of Afzulkhan, and though it was (narrated) in the old style, it was full of new thoughts, as is usually the case with the Bava (*i.e.*, preacher).

Other articles and extracts from the *Kesari* and from another newspaper called the *Mahratta* (of which the first accused was **[120]** also the publisher and proprietor) of dates prior to the 15th June 1897 were put in evidence to show animus on the part of the accused. Articles were put also in evidence by the defence to show that the accused were not actuated by any intention to excite feelings of disaffection to the Government.

*Lang* (Advocate-General), *Macpherson* and *Strangman*, for the Prosecution.

*Pugh* and *Davar* appeared for the First Accused.

The Second Accused was not defended.

*Lang* in opening the case read section 124A of the Penal Code and as to the meaning of the word "disaffection" referred to the definition given in Johnson's Dictionary, Webster's Dictionary, &c., *viz*, dislike, disgust, unfriendliness, ill-will, alienation, disloyalty, hostility, &c., and to the construction of

* The text of 'burn alive' may on the authority of Molesworth's Dictionary be translated 'oppress or torment (them) exceedingly.'

† The generic term for a barbarian or foreigner, that is, for one speaking any language but Sanskrit and not subject to the usual Hindu institutions.

it by PETHERAM, C.J., in his charge to the jury in the case of *Queen-Empress* v. *Jogendra Chunder Bose*, I. L. R., 19 Cal., 35 at p. 44.

In commenting upon the extracts from the *Kesari* he said there was nothing necessarily disloyal in celebrating the anniversary of Shivaji, who was unquestionably a great and distinguished man, but he contended that advantage had been taken of the celebration to use language with reference to the British Government which was intended to excite disaffection, and to incite those who heard and read the speeches and articles contained in the *Kesari* to follow the example of Shivaji and overthrow British rule. That was plainly the object of the accused. In order to show the intention he referred to an extract from the *Kesari* of May 4th, 1897, which appeared in the form of a letter signed 'Ganesh.'

*Pugh* objected that a letter addressed to a newspaper could not be used to show the animus or intention of the editor or publisher of the paper. Letters appearing in newspapers often give expression to opinions which are not the opinions of the editor and publisher.

*Lang, contra*, contended that all contributions to the paper which appeared in it were accepted by the publisher and might be used [121] in evidence against him. These contributions were of the same tendency and expressed the same opinions as were found in the articles for which the editor and publisher was necessarily responsible.

[STRACHEY, J.:—I do not think that I can exclude the evidence. As in cases of defamation, the proprietor and publisher would be liable for articles or letters published by him, though purporting to be signed by outsiders, and, therefore, I think that such contributions are admissible to show his intention and animus, as well as articles purporting to represent the views of the paper. It is, of course, open to the accused to put in any contributions of a different tendency which he may have published, and so to show that those put in by the Crown do not express his intention.]

*Lang*, continuing, referred to other articles which, he submitted, drew a comparison between the condition of the people under Shivaji and under British rule, altogether unfavourable to the latter, and contended that they were published for the purpose of exciting disaffection against the latter.

He argued that one of the articles in the *Kesari* on which the charges were framed contained a clear attempt to justify political assassination. It was significant that within a week of the publication of these articles, Mr Ayerst and Mr. Rand were murdered at Poona He could not produce evidence to show that these murders were directly caused by the publication of these articles. It would be for the jury to form an opinion as to the probable effect of publishing such articles at a time when much excitement and distress existed in consequence of the famine and plague and the measures which the Government had been obliged to take to prevent the spread of the latter.

At the conclusion of the Advocate-General's speech, evidence was called. The first witness was Mirza Abas Ali Baig, by whom the prosecution was instituted. He said :

"I am the Oriental Translator to the Government of Bombay. I instituted these prosecutions under the orders of Government in respect of these articles of the 15th June."

[122] *Lang* tendered in evidence the order given by Government under section 196 of the Criminal Procedure Code (Act X of 1882) which was as follows :—

"Under the provisions of section 196 of the Code of Criminal Procedure, Mirza Abas Ali Baig, Oriental Translator to Government, is hereby ordered by His Excellency the Governor

in Council to make a complaint against Mr. Bal Gangadhar Tilak, B.A., LL.B., of Poona, publisher, proprietor and editor of the *Kesari*, a weekly vernacular newspaper of Poona, and against Mr. Hari Narayan Gokhale of Poona, printer of the said newspaper, in respect of certain articles appearing in the said newspaper, under section 124A of the Indian Penal Code and any other section of the said Code which may be found to be applicable to the case.

"By order of His Excellency the Governor in Council,
"S. W. EDGERLEY,
"Secretary to Government

*Poona, July 26th 1897.*"

*Pugh* objected. This order is inadmissible. It is not a sufficient order under section 196. It is not in proper form. It is too vague. It does not specify the articles with reference to which complaint is to be laid. The *Kesari* newspaper has been in existence for seventeen years. This order would permit a prosecution for any article which has appeared during all that time. A general sanction is not a good one—*Queen-Empress* v. *Samavier*, I. L. R., 16 Mad., 468. Here the order is indefinite. He also cited *Reg.* v. *Vinayak Divakar*, 8 Bom. H. C. Rep., 32 Cr. Ca.

*Lang, contra* :—Section 196 does not require the order to be in writing. The witness has sworn that he had the authority of Government to institute this prosecution on the two articles in the *Kesari* on which the accused was charged. That sufficiently proves the order. If, however, that is not sufficient, I tender a further and later order of Government in this matter. The document now tendered was as follows.—

"Whereas under the provisions of section 196 of the Code of Criminal Procedure, Mirza Abas Ali Baig, Oriental Translator to Government, was, by order of His Excellency the Governor in Council, dated 26th July 1897, ordered to make a complaint against Mr. Bal Gangadhar Tilak, B.A., LL.B., of Poona, publisher, proprietor and editor of the *Kesari*, a weekly vernacular newspaper of Poona, in respect of an offence committed by him punishable under [123] section 124A of the Indian Penal Code, and whereas under the same provisions of the said section 196 the said Mirza Abas Ali Baig was by further order of His Excellency the Governor in Council, dated the 27th July 1897, ordered to make a complaint against Keshav Mahadev Bal, clerk in charge or acting manager of the Aryabushan Press in Poona as printer of the said newspaper *Kesari* in respect or an offence committed by him punishable under the said section 124A of the Indian Penal Code. It is by order of His Excellency the Governor in Council hereby declared that the said orders had and have reference to certain articles appearing on page 2 of the said *Kesari* newspaper of issue, dated the 15th June 1897, under the headnig or title 'Shivaji's Utterances' and in paragraph on page 3 of the same issue beginning with the 2nd paragraph commencing in the 1st column which said articles at the time when the said orders were passed were then before and under the consideration of His Excellency the Governor in Council"

*Pugh* :—This further order is not admissible. It is simply a declaration that the previous order related to the articles in question. It is not for the Governor in Council but for the Court to say what is the construction and meaning of the first order.

[STRACHEY, J. :—I do not think it necessary to consider the admissibility of this last document, as I must hold the order of the 26th July to be sufficient and to be admissible. Under section 196 of the Code, no Court is to take cognizance of any offence punishable under Chapter VI of the Penal Code, in which section 124A occurs, unless upon complaint made by order of, or under authority from the Governor-General in Council or the Local Government. In this case a complaint has been made of an offence punishable under section 124A, it was made by the Oriental Translator to Government, an order by the Local Government to the complainant for the prosecution of the prisoner under section 124A is produced, and the complainant in the witness box has sworn

that he instituted the prosecution in respect of these articles by order of the Government. Mr. Pugh has objected to the order on two grounds, first, that it directs a prosecution in respect of certain "articles" and that the extracts in question do not fall within that description, and secondly that the order does not satisfy the requirements of section 196 because it is too vague and does not specify by date or otherwise the extracts in respect of which action is to be taken. As to the first point, I am of opinion that the word "articles" in the order **[124]** covers and was intended to cover not only articles in the strict sense, but, generally, matter published in the paper which was considered objectionable. As to the second point, if any particular articles or any dates had been specified, the complainant would no doubt have been limited to them, but the effect of no such specification being made is to give him the widest latitude in selecting the matter to be complained of. It is only necessary to see whether the complaint relates to matters falling within the words "certain articles appearing in the said newspaper," and it is obvious that it does, and the order is, therefore, complied with. It may be desirable, and I think it is, that orders under section 196 should be expressed with greater particularity, but I cannot read into the section restrictions which are not there. The section does not proscribe any particular form of order, and does not even require the order to be in writing. I am, therefore, of opinion that the order is sufficient. But even if I am wrong in this view, and if the order does not comply with section 196, I am still of opinion that the objection must be disallowed. The section says that no Court shall take cognizance of an offence punishable under Chapter VI of the Penal Code unless upon complaint made by order of or under authority from the Government. It is the Magistrate who takes cognizance of an offence upon complaint (section 191): the High Court takes cognizance of an offence not upon complaint, but upon commitment (section 194). Therefore, this is really an objection that the Magistrate, for want of a proper order under section 196, had no jurisdiction to take cognizance of the offence upon the complaint and to commit the accused for trial, and that, there being no valid commitment, the High Court has no jurisdiction to try the accused. But although in general where the Magistrate has no jurisdiction to commit an accused for trial, the High Court cannot accept the commitment, section 532 of the Code creates an exception, and provides that in such a case the High Court may accept the commitment if it considers that the accused has not been injured thereby, unless during the proceedings before the Magistrate he objected to the Magistrate's jurisdiction. Mr. Pugh has argued that section 532 does not apply to the absence of a proper order under section 196, but I think that I am bound by the decision of the Full Bench in *Queen-* **[125]** *Empress* v. *Morton*, I. L. R., 9 Bom., 288, to hold that it does. In this case no objection was taken in the Magistrate's Court, and I cannot hold that the accused has been in any way prejudiced. The object of section 196 is to prevent unauthorized persons from intruding in matters of State by instituting State prosecutions, and to secure that such prosecutions shall only be instituted under the authority of the Government. I have no doubt that these proceedings have been authorized by the Government, and I disallow the objection.]

*Pugh*, in addressing the jury for the accused No. 1, submitted that the articles on which the accused were charged did not fall within section 124A Tilak had taken an independent line with regard to the measures taken by Government in dealing with the plague and had co-operated with Government in that work. His action in that respect brought him into opposition to the leading men of his community. That was surely not consistent with any attempt to cause disaffection. The articles describing the sufferings of the

people were quite consistent with loyalty. They no doubt set forth grievances, but it was not seditious to do that. There were articles in the *Kesari* describing the power and resources of the British Government. They would not have appeared if the publisher was seeking to stir up disaffection, for they would only show how hopeless any attempt at revolt would be. The articles on the Jubilee showed a genuine loyalty. No doubt there were articles in praise of Shivaji. They, however, only expressed a general admiration for him as a man of extraordinary power and talents. The books used in the schools subject to Government inspection used expressions about Shivaji as strong as any in these articles. The object of the accused was clearly only to create a national sentiment, just as the Scotch and Welsh and Irish people by their national celebrations endeavour to keep alive and foster a national spirit. There was not any suggestion of overthrowing the British Government. That could never be attempted except by a combination of Hindus and Mahomedans, and praises of Shivaji were not likely to bring about such a combination.

As to the meaning of section 124A, he referred to the speech **[126]** of the Legal Member of the Indian Legislative Council when proposing its enactment.

[STRACHEY, J. :—I do not think, Mr. Pugh, you can refer to that speech as showing the meaning of the section.]

*Pugh* contended that the speech might be referred to, and cited, in support of his contention, *In re Mew*, 31 L. J. Bkcy, 87; *The Queen* v. *The Bishop of Oxford*, 4 Q. B. D, 525; *Queen-Empress* v. *Kartick Chunder*, I. L. R., 14 Cal., 721 at p. 728; *Romesh Chunder* v. *Hiru Mondal*, I. L. R., 17 Cal., 852; *Gopal Krishna* v. *Sakhojirao*, I. L. R., 18 Bom., 133; *Regina* v. *Courvoisier*, 9 C. and P., 362; *Shaik Moosa* v. *Shaik Essa*, I. L. R., 8 Bom., 241 at p. 247.

STRACHEY, J :—I have no doubt upon the point that has been raised. It is clearly settled by authority. Mr. Pugh has cited both English and Indian cases in support of his contention. The first English case he cited was that of *In re Mew*, 31 L. J., Bkcy., 87, in which it is true that Lord WESTBURY referred to a speech made in the House of Commons That, however, was so far back as 1861. It is clear, I think, that since then in England the practice has been not to refer to speeches made in the Legislature for the purpose of construing statutes. In the case of *The Queen* v. *The Bishop of Oxford*, 4 Q. B. D. at p. 534, which came before the Court of Appeal in 1879, Mr. Bowen, afterwards Lord BOWEN, who was counsel for the appellant, alluded in his argument to the speech made by the Lord Chancellor in the House of Lords upon the third reading of the Public Worship Regulation Bill as an authority upon the construction of the Church Discipline Act, which had for many years been law. An objection was at once taken that a report of a debate in Parliament was not receivable as an interpretation of a statute. Mr. Bowen expressly admitted that the speech to which he referred was inadmissible so far as it related to the effect of the bill before the House of Lords, but contended that he might refer to it as a statement by the Lord Chancellor of what the law was at the time the speech was made. He thus sought to use it not for the purpose of construing the bill which was being introduced at the time the speech was delivered, but **[127]** merely to show the then existing state of the law. The Judges were divided as to whether they could allow the speech to be read. BAGGALLAY, L. J., said (p. 576) that he had some doubts whether it was right to permit it, but, on the whole, did not object, and THESIGER, L. J., considered it to be "inexpedient in a very high degree." BRAMWELL, L. J., however, saw no objection to its being done. That case went on appeal to the House of Lords, and during the argument of the appeal, Lord CAIRNS and Lord SELBORNE

expressed the strongest disapproval of the conduct of the Court of Appeal in allowing the speech to be cited. Their disapproval is not stated in the Law Reports, but in the Law Journal report, 49 L. J. (Q. B.), 578; *Julius* v. *Bishop of Oxford*; see also *South Eastern Railway Co.* v. *Railway Commissioners*, 50 L. J. (Q. B.), 203. It will be observed that even those Judges of the Court of Appeal who allowed the speech to be cited, only allowed it for the purpose of construing a statute in force at the time when the speech was made. They never suggested, any more than counsel had done, that it might be cited as an authority for the construction of the bill before the Legislature. The language of one of them at least strongly implies the contrary. That is what Mr. Pugh desires to do here. He wishes to refer to Sir James Stephen's speech for the purpose of construing the section which he was then proposing to introduce into the Penal Code. That, I think, upon the authority of the English cases he cannot do

But in India the law is now quite clear. It is true that there have been decisions in the Courts in India in favour of allowing the proceedings in the Legislative Council to be referred to for the purpose of construing an Act, but the Privy Council in a case decided so recently as 1895 (*The Administrator-General of Bengal* v. *Premlal*, L. R., 22 I. A., 107), has held that this ought not to be done. If there has been a practice to the contrary in the Courts in India, that practice is wrong and cannot be permitted any longer. I am bound by this decision of the Privy Council, and I must hold that it is inadmissible to take as an aid in the construing of an Act the proceedings in the Legislative Council which resulted in the passing of that Act. But if I were free to consider the ques-[128]tion apart from authority, I may say that I agree entirely with the judgment of EDGE, C. J., in *Kadir Buksh* v. *Bhawani*, I. L. R., 14 All., 145, at p. 150, in which he condemned the practice of referring to the proceedings in the Legislature in order to ascertain the meaning of an Act. I think with him that "if Judges were to allow their minds to be influenced in the construing of a statute by debates in Parliament or reports of Select Committees or other bodies on the bill, statute law would be reduced to confusion, and instead of there being one principle of construction of statutes well understood by lawyers the construction of statutes would be reduced to no principle at all." Mr. Pugh can, of course, read any passages from Sir James Stephen's speech as a part of his address, and as stating his own argument in words which he adopts as his own, but he cannot cite them as Sir James Stephen's opinion and as authority showing the construction to be put upon the section.

*Pugh*, continuing, read passages from the speech of Sir James Stephen in the Legislative Council when proposing the enactment of section 124A as part of his argument to show that the section was really intended to punish an attempt to create a rebellious spirit against Government. The Advocate-General had referred to dictionaries for the meaning of the word 'disaffection,' but the question here was not as to the etymological meaning of the word 'disaffection,' but as to its meaning as defined by law. The jury should take a generous and liberal view of the articles on which the accused was charged. He referred to CAVE, J's. judgment in *Reg.* v. *Burns*, 16 Cox. Cr. Ca. 355 at p. 359; the summing of FITZGERALD, J., in the *Queen* v. *Sullivan*, 11 Cox. Cr. Ca., 44; *Queen-Empress* v. *Kahanji*, I. L. R., 18 Bom., 758

The Judge then charged the jury as follows:—

STRACHEY, J.: —Gentlemen of the Jury,—The two accused, Bal Gangadhar Tilak and Keshav Mahadev Bal, are here arraigned before you upon two charges. Each of them is charged, in the first place, with having excited feelings of disaffection towards the Government established by law in British India.

Each of them is also charged with having attempted to excite feelings of disaffection towards the Government established by law in British [129] India. And they are charged with doing these things by means of certain articles appearing in a newspaper called the *Kesari* of the 15th June of this year. Before going into any other part of the case, it is necessary to explain to you what is the responsibility of these persons, if any attaches to them, in respect of these articles; and, secondly, we will proceed to consider what is the nature of the offence with which they are charged. I have directed that copies of section 124A of the Indian Penal Code should be distributed among you, and if they have not already been distributed, this will presently be done. The section, you will observe, defines the offence of exciting, or attempting to excite, feelings of disaffection. It has been held by the late Chief Justice of Calcutta, Sir COMER PETHERAM, that it is not only the writer of the alleged seditious article but whoever uses in any way words or printed matter for the purpose of exciting feelings of disaffection to the Government that is liable under the section, whether he is the actual author or not; and I entirely agree with him. The question is, whether the accused used words printed in a newspaper for the purpose of exciting disaffection towards the Government. That is what you have to consider.

The matter complained of consists of two articles published in the *Kesari* of the 15th June. As to the preliminary question of the connection of the accused with these articles, I will take the case of the prisoner Tilak first. The *Kesari* is a weekly paper, published in Marathi every Tuesday at Poona. It has a considerable circulation, having six or seven thousand subscribers, not only in Poona, but in many other places, including Bombay. This particular issue of the 15th June contained these two articles, and it was sent by post from the office at Poona to the subscribers in Bombay and elsewhere. So the paper's publication extended to Bombay. I only mention this matter of publication in Bombay, because it gives this Court jurisdiction to try this case. Sending the newspaper by post from the office where it is published to other places constitutes in law the publication in Bombay or any other place to which it is so sent. It is not denied by the defence that there was this particular publication in Bombay. It is in evidence that a copy of the paper containing these articles was sent from the office, and posted at Poona on the 15th, and [130] reached a particular subscriber at Bombay on the 16th of June. The prisoner Tilak is the proprietor and editor of that paper, and he is also the publisher. He has not attempted to dispute that, but has admitted it. He has also, in his statement before the committing Magistrate, admitted that he was cognisant of the fact that the paper was despatched to various places, including Bombay. It is further in evidence that before any matter is published in the *Kesari*, proofs are submitted to him. Upon the evidence you would be justified in holding that he is the publisher of this paper, and also the publisher of these particular articles in the paper. He has signed a declaration under an Act which the Legislature passed in 1867, and that declaration is in evidence. The Act requires the publisher of every newspaper to make a certain declaration that he is the publisher of it. The declaration in regard to the *Kesari* was made by Tilak some time in 1887. The law says that that may be taken as sufficient *primâ facie* evidence that the person signing the declaration is the publisher of every part of any paper bearing a name corresponding to that mentioned in the declaration. And, therefore, under that Act, in the absence of any evidence to the contrary, you will be justified in holding that the prisoner Tilak was the publisher of every article and every word in the *Kesari*. He published it through his servants; and it must be

taken as a fact, until the contrary is proved, that he authorised them not only to print it, but to give it out to the world and to distribute it in Poona and various other places, among them being Bombay. You will be justified in holding, in the absence of any evidence to the contrary, that Tilak was the publisher, and that he published these particular articles at Bombay by causing the paper containing them to be sent to and distributed in Bombay through his agents on the 15th of June. The prisoner has not disputed, but on the other hand has boldly avowed, his connection with the paper. He has not attempted to shirk any responsibility which attaches to him in respect of these articles. So much with regard to the responsibility of Tilak.

Now I turn to the question of the responsibility of the other accused person Bal, who takes up a different position altogether. He has admitted in the statement which he has handed to the [131] Court that he was the acting manager of the paper in June last. He had been acting for some time in the place of the substantive holder of the office, who had been absent since last October. The second accused was officiating for that person. Letters signed by him "for manager" have been put in. In one letter he describes himself as "acting manager." He was head printer also of the Arya Bhushan Press, where the *Kesari* and the *Mahratta*, also belonging to the prisoner Tilak, are printed. As the acting manager he superintended the printing of the paper, because he was also acting printer. He is not the registered printer. It is further in evidence, and witnesses for the Crown have told you, what was the practice in the office with regard to printing matter for publication. Bal used to receive manuscripts, and he used to make them over to the compositors, and when proofs were handed to him he sent them to Tilak. He does not deny that. He is the officiating manager, he is the officiating printer, and he is the person through whose hands proofs ordinarily passed, and he was occupying that position on the 15th of June Observe what he says in his statement that, although the proofs passed through his hands, it was not his business to correct them. He says that he was a paid servant, receiving only Rs. 30 per month. It was not his duty to pay attention to or correct the proofs that passed through his hands, which were corrected by a corrector and then submitted to Tilak. That statement of his is borne out by the evidence of the witnesses for the Crown. The witnesses say that it was not his business to examine the proofs. They were corrected by a corrector. That, in a nut-shell, is the evidence of the part taken by the second accused in bringing out these articles. Apparently the literary department was not under his control. That being the state of facts, how have you to deal with the question of his responsibility? You have to deal with it in this way. As he was the manager and superintendent in bringing out the matter—which was distinct from having a control over the literary department—as he was the printer of it, you may presume that he was acquainted with what he was printing and distributing. You have to find whether he authorised the insertion of these articles or their distribution. It is a pure question of fact. If you are not satisfied that [132] the prisoner was cognisant of the particular articles, or that he directed or authorised the insertion or distribution of them, then I will advise you to find him not guilty, because you must have regard to the section, which requires distinct proof by the Crown against him. You must be satisfied that for printing or using the words that were published, he was responsible, and that he used those words for the purpose of exciting disaffection. If you come to the conclusion that he knew nothing about these articles, then it is a question for you to consider whether you can properly say that he used those words with that purpose in his mind. It is entirely for you to consider whether you believe Bal's uncontradicted statement that he was absolutely ignorant of what appeared in these articles.

But this does not apply to Tilak. He stands in a different position. Tilak was the proprietor and publisher of the paper, and he must be taken as authorising the publication of everything appearing in the paper. No evidence has been called on his part to refute or rebut that position. He must be presumed to have been cognisant of what was published in his paper. * * * If you are satisfied that the two prisoners, or either of them, are responsible for the publication of these two articles in the *Kesari*, the next question is whether that makes either of them guilty of an offence under section 124A of the Penal Code. Did they or either of them, by means of the articles, excite or attempt to excite in their readers feelings of disaffection to the Government established by law in British India? That is a question of the meaning and effect of the articles, and the intention of the accused in publishing them, and it is entirely and exclusively a question for you to decide. But there is a preliminary question to be considered, and that is, what is the meaning of section 124 A of the Penal Code, and what is the nature of the offence which it makes punishable? That preliminary question is for me to decide. The Code of Criminal Procedure requires you to accept from me the explanation of the section and of the offence— if my explanation is wrong, the responsibility rests upon me and me alone—and it is then for you to determine, upon the evidence before you, whether the facts constituting the offence as explained by me have been established, and whether the prisoners are guilty or not.

**[133]** Now, I come to deal with the law as contained in section 124A of the Indian Penal Code, and before I read it I would point out that there are certain matters which I shall ask you to dismiss altogether from your minds. In the first place, in construing the section I do not propose to discuss the English law of seditious libel, though I have most fully considered the cases to which Mr. Pugh has referred, and the writings of Sir James Stephen and others on the subject. I believe that the explanation which I shall give you is not in any way inconsistent with the best English authorities; but in England the offence of seditious libel is not a statutory offence defined by Act of Parliament, but a common law misdemeanour elaborated by the decisions of Judges. In this country the law to be applied is the Penal Code. I will now ask you to look at the section and the way it is worded. It says: "Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life, or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine." To the above is appended the following explanation:—"Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause." You will observe that the section consists of two parts: first, a general clause, and then an explanation. The object of the explanation is a negative one, to show that certain acts which might otherwise be regarded as exciting or attempting to excite disaffection, are not to be so regarded. We must, therefore, first consider the first or general clause of the section by itself, and then see how far the explanation qualifies it.

The offence as defined by the first clause is exciting or attempting to excite feelings of disaffection to the Government. **[134]** What are "feelings of disaffection"? I agree with Sir COMER PETHERAM in the *Bangobasi* case that disaffec-

tion means simply the absence of affection *. It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. "Disloyalty" is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite; he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment: if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section. In the next place, it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question. It is true that there is before you a charge against each prisoner that he has actually excited feelings of disaffection to the Government. If you are satisfied that he has done so, you will, of course, find him guilty. But if you should hold that that charge is not made out, and that no one is proved to have been excited to entertain feelings of disaffection to the Government by reading these articles, still that alone would not justify you in acquitting the prisoners. For each of them is charged not only with exciting feelings of disaffection, but also with attempting to excite such feelings. You will observe that the section places on absolutely the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them, so that, if you find that either of the prisoners has tried to excite such feelings in others, you must convict him even if there is nothing to show that he succeeded. [135] Again, it is important that you should fully realize another point. The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124 A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section, and to a misapplication of the explanation beyond its true scope. Lastly, the authority or institution against which it is an offence to excite or attempt to excite feelings of disaffection is "the Government established by law in British India." What is the meaning of that expression? It means, in my

* This should have been "the contrary of affection": see I. L. R., 19 Cal. at p. 44. "Disaffection means a feeling contrary to affection, in other words, dislike or hatred." "Disaffection" is defined in The New English Dictionary as "absence or alienation of affection or kindly feeling, dislike, hostility, political alienation or discontent, a spirit of disloyalty to the Government or existing authority": in Latham's edition of Johnson as "dislike, ill-will, want of zeal for the Government, want of ardour for the reigning prince": in Webster as "state of being disaffected, alienation or want of affection or good-will, unfriendliness, disloyalty," with synonyms "dislike, disgust, unfriendliness, ill-will, alienation, disloyalty, hostility."—A. S.

opinion, British rule and its representatives as such,—the existing political system as distinguished from any particular set of administrators. The result is that you have to apply this test to the case of each of these two prisoners: did he, by these articles, try to excite in the minds of their readers feelings of disloyalty or enmity to the Government?

Now I come to the explanation to section 124 A, and the question is how far it qualifies the section as just explained by me, and whether it supplies you with any other test to apply to these articles. Let us read the explanation again:—"Such a disap-[136] probation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation, is not an offence within this clause." Let us consider each part of this explanation, as we have considered each part of the first clause. Observe first that, as I have already said, while the first clause shows affirmatively what the offence made punishable by the section is, the explanation states negatively what it is not: it says that something "is not disaffection," and "is not an offence within this clause." Therefore its object is to protect from the condemnation pronounced by the first clause certain acts which it distinguishes from the disloyal attempts which the first clause deals with. The next and most important point for you to bear in mind is that the thing protected by the explanation is "the making of comments on the measures of the Government" with a certain intention. This shows that the explanation has a strictly defined and limited scope. Observe that it has no application whatever unless you come to the conclusion that the writings in question can fairly and reasonably be construed as "the making of comments on the measures of the Government." It does not apply to any sort of writing except that. It does not apply to any writing which consists not merely of comments upon Government measures, but of attacks upon the Government itself. It would apply to any criticisms of legislative enactments, such as the Epidemic Diseases Act, or any particular tax, or of administrative measures, such as the steps taken by the Government for the suppression of plague or famine. But if you come to the conclusion that these writings are an attack not merely upon such measures as these, but upon the Government itself, its existence, its essential characteristics, its motives, or its feelings towards the people, then you must put aside the explanation altogether, and apply the first clause of the section. In the next place, supposing that you are satisfied that these writings can fairly and reasonably be construed as "comments on the measures of the Government" and not as attacks upon [137] the Government itself, still you cannot apply the explanation unless you believe that such comments were made with the intention of exciting only "such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority." This, you will see, draws a distinction between attempting to excite feelings of "disaffection" to the Government, and intending to excite only a certain species of "disapprobation" of Government measures; and protects the latter only. What is the meaning of "disapprobation" of Government measures as contrasted with "disaffection" to the Government? I agree with Sir COMER PETHERAM that while disaffection means the absence of affection or enmity, disapprobation means simply disapproval; and that it is quite possible to like or be loyal to any one, whether an

individual or a Government, and at the same time to disapprove strongly of his or its measures. This distinction is the essence of the section. It shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section, and the explanation will not save him.

The object of the explanation is to protect honest journalism and *bonâ fide* criticism of public measures and institutions with [138] a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers. So long as a journalist observes this distinction, he has nothing to fear. It seems to me that this view of the law secures all the liberty which any reasonable man can desire, and that to allow more would be culpable weakness, and fatal to the interests not only of the Government but of the people. But now there are other words in the explanation which we have still to consider. To come within the protection of the explanation, a writing must not only be the making of comments on Government measures with the intention of exciting only disapprobation of them as distinguished from disaffection to the Government, but the disapprobation must be "compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority." What that means is that even exciting disapprobation of Government measures may be carried too far. For instance, if a man published comments upon Government measures which were not merely severe, unreasonable or unfair, but so violent and bitter, or accompanied by such appeals to political or religious fanaticism, or addressed to ignorant people at a time of great public excitement, that persons reading those comments would carry their feelings of hostility beyond the Government measures to their author, the Government, and would become indisposed to obey and support the Government, and if it could fairly be gathered from the writing as a whole that the writer or publisher intended these results to follow, then he would be guilty under the section and would not be protected by the explanation. Observe the nature of this "disposition," which makes the whole difference between a "disapprobation" of measures which amounts to "disaffection" to the Government, and a disapprobation which does not. It is not merely "a disposition to render obedience to the lawful authority of the Government." It is a disposition both to render obedience and also to support the lawful authority of the Government against unlawful attempts to subvert or resist it. And it is a disposition to support that lawful [139] authority against unlawful attempts not only to "resist" it—that is, to oppose it—but also to "subvert" it—that is, to weaken and undermine it by any unlawful means whatever. And, lastly, it is a disposition to support the Government

against all such unlawful attempts whenever occasion may arise, not only against any particular unlawful attempt proceeding or impending at the time of the publication. I believe that it is an inaccurate reading of this part of the explanation, a too exclusive attention to the expressions about obedience and resistance, and an insufficient attention to other expressions equally important, which has caused some people to misunderstand the whole section, and to imagine that no one can be convicted under it even if he assails the Goverment itself, and not merely Government measures, unless he counsels or suggests rebellion or forcible resistance.

You will thus see that the whole question is one of the intention of the accused in publishing these articles. Did they intend to excite in the minds of their readers feelings of disaffection or enmity to the Government? Or did they intend merely to excite disapprobation of certain Government measures? Or did they intend to excite no feeling adverse either to the Government or its measures, but only to excite interest in a poem about Shivaji and a historical discussion about his alleged killing of a Mahomedan general? These are the questions which you have to consider. But you may ask, how are we to ascertain whether the intention of the accused was this, that, or the other? How can we tell whether his intention was simply to publish a historical discussion about Shivaji and Afzul Khan, or whether it was to stir up, under that guise, hatred against the Government? There are various ways in which you must approach the question of intention. You must gather the intention as best you can from the language of the articles; and you may also take into consideration, under certain conditions, the other articles that have been put in evidence, such as the articles about the plague and the Diamond Jubilee and so forth. But the first and most important index of the intention of the writer or publisher of a newspaper article is the language of the article itself. What is the intention which the articles themselves convey to your minds? [140] In considering this, you must first ask yourselves what would be the natural and probable effect of reading such articles in the minds of the readers of the *Kesari*, to whom they were addressed? Read these articles, and ask yourselves how the ordinary readers of the *Kesari* would probably feel when reading them. Would the feeling produced be one of hatred to the Government, or would it be simply one of interest in a poem and a historical discussion about Shivaji and Afzul Khan and so forth? If you think that the only feelings which such readers would be excited to are feelings of interest in a poem or a historical or ethical discussion, then you may presume that that is all the accused intended to excite. If you think that such readers would naturally and probably be excited to entertain feelings of enmity to the Government, then you will be justified in presuming that the accused intended to excite feelings of enmity or disaffection. As a matter of common sense a man is presumed to intend the natural and ordinary consequences of his acts: he cannot, speaking generally, say: Although this language would have the natural and ordinary effect of exciting feelings of disaffection, I did not when publishing it intend that it should do so. But in considering what sort of effect these articles would be likely to produce, you must have regard to the particular class of persons among whom they were circulated, and to the time and other circumstances in which they were circulated. In judging what would be the natural and ordinary consequences of a publication like this, and what, therefore, was the probable intention of the writer or publisher, I must impress on you, as perhaps the most important point in my summing up, that you must bear in mind the time, the place, the circumstances, and the occasion of the publication. An article which, if published in England, or among highly educated

people, would produce no effect at all—such as an article on cow-killing—might, if published among Hindus in India, produce the utmost possible excitement. An article which, if published at a time of profound peace, prosperity and contentment would excite no bad feeling, might, at a time of agitation and unrest, excite intense hatred to the Government. When you are considering the probable effect of a publication upon people's minds, it is essential to consider who the people are. In my opi-[141]nion, it would be idle and absurd to ask yourselves what would be the effect of these articles upon the minds of persons reading them in a London drawing-room or in the Yacht Club in Bombay; but what you have to consider is their effect, not upon Englishmen or Parsis or even many cultivated and philosophic Hindus, but upon the readers of the *Kesari* among whom they are circulated and read—Hindus, Marathas, inhabitants of the Deccan and the Konkan. And you have to consider not only how such articles would ordinarily affect the class of persons who subscribed to the *Kesari*, but the state of things existing at the time, not in the year 1890 or 1891, or 1892 or 1893, or even 1896, but in June 1897, when these articles were disseminated among them. Then you have to look at the standing and the position of the prisoner Tilak. He is a man of influence and importance among the people; he would be in a position to know what effect such articles would probably produce in their minds. Would then the readers of the *Kesari* at that time, and in the then existing state of the country and of public feeling, regard the articles as a poem and a historical discussion applying no moral to the British Government here and now, or would they be excited by them to feelings of enmity to the Government?

But in the next place, in judging of the intention of the accused, you must be guided not only by your estimate of the effect of the articles upon the minds of their readers, but also by your common sense, your knowledge of the world, your understanding of the meaning of words, and your experience of the way in which a man writes when he is animated by a particular feeling. Read the articles, and ask yourselves, as men of the world, whether they impress you on the whole as a mere poem and a historical discussion without disloyal purpose, or as attacks on the British Government under the disguise of a poem and historical discussion. It may not be easy to express the difference in words; but the difference in tone and spirit and general drift between a writer who is trying to stir up ill-will and one who is not, is generally unmistakeable, whether the writing is a private letter, or a leading article, or a poem, or the report of a discussion. You can form a pretty accurate notion of what a man is driving at, or what he wants to convey, from [142] a perusal of the writing, and can generally tell whether the writing is inspired by good-will or is meant to create ill-will. It is not very difficult to distinguish between the language of hostility and the language of loyalty and good-will or of criticism and comment. You must ask yourselves, having read the articles, whether the writer or publisher is trying to stir up the feelings of his readers against the Government, or is trying to do something altogether different. If the object of a publication is really seditious, it does not matter what form it takes. Disaffection may be excited in a thousand different ways. A poem, an allegory, a drama, a philosophical or historical discussion, may be used for the purpose of exciting disaffection, just as much as direct attacks upon the Government. You have to look through the form and look to the real object: you have to consider whether the form of a poem or discussion is genuine, or whether it has been adopted merely to disguise the real seditious intention of the writer. Again, in judging of the intention of the writer or

publisher, you must look at the articles as a whole, giving due weight to every part. It would not be fair to judge of the intention by isolated passages or casual expressions without reference to the context. You must consider each passage in connection with the others and with the general drift of the whole. A journalist is not expected to write with the accuracy and precision of a lawyer or a man of science; he may do himself injustice by hasty expressions out of keeping with the general character and tendency of the articles. It is this general character and tendency that you must judge the intention by, looking at every passage so far as it throws light upon this. You have heard much discussion as to the exact meaning of various expressions in these articles and the best way of rendering certain passages into English. You must remember that there has been a dispute about the correctness of some of the translations which have been put before you. For most of you the documents that you have to deal with are, in their original form, in a foreign language. I do not intend to trouble you with any criticism of the various renderings which are in evidence. The discussions which have taken place on the subject are, I assume, within your recollection. They no doubt were necessary, and it is important that we should, as far as possible, exactly understand [143] the true meaning of every word. But it would be a great mistake to let the decision of this case turn upon mere verbal niceties of translation or discussions as to the best English equivalents of particular Marathi terms. We must look at these articles, not as grammarians or philologists might do, but as the ordinary readers of the *Kesari* would look at them—readers who are impressed not by verbal refinements but by the broad general drift of an article. Two translations have been put before you, one of which has been called a free and the other a literal translation. Both are equally official translations. What I would advise you is that wherever there is no dispute about the accuracy of the free translation, where its rendering has not been challenged, you should be guided by the free translation. It is altogether a mistake to suppose that because a translation is literal, it is more correct than the translation which is called free. It does not follow that the most literal translation of a passage is that which best conveys its meaning in English. What we want to get at is the way in which an ordinary reader would understand the whole article, and hence to gather the intention with which the article was written and published. An absolutely literal translation from one language to another may give in the second language an extremely imperfect and really inaccurate idea of the meaning and spirit of the original. These documents have been translated by a translator of the Court, a Hindu gentleman, whose capacity to translate cannot for one moment be doubted. The accuracy of his literal rendering of the articles has not been challenged by the defence; but the defence have found fault with the free translation as regards certain expressions occurring in the articles. The free translation does not profess to give the absolutely literal meaning of the words, but their real genuine equivalents in English. As I have said, where the accuracy of the free translation is not disputed, I advise you to be guided by that: where there is any dispute, I advise you to compare the literal with the free translation, to look at the context of the disputed passage, and to judge, by reference to that, which conveys the true meaning and intention. Again, where there is a conflict of evidence as to the meaning of a particular expression, I would advise you to give, [144] under the usual rule, the benefit of any reasonable doubt to the accused. Were the accused publishing a harmless poem and historical discussion, or were they using the form of a poem and a historical discussion for the real purpose of exciting enmity to the Government? In dealing with this question, as with all others in a criminal case, you must remember to give the accused the benefit of any

reasonable doubt, and to give the articles not only a fair but a liberal and generous consideration. You must remember that the prosecution have to establish against the accused that the construction of the articles which they have put forward is the true one. In all cases, and whether the charge is one of sedition or murder or any other offence, the prosecution have to prove their case; and here they have to prove their construction of the articles, and to prove that the articles were published by the accused with the intention of exciting disaffection.

I will now come to the articles, but in doing so I wish you to bear in mind the nature of the Shivaji controversy. (His Lordship then proceeded to analyse and comment upon the articles on which the charges were drawn and also the various other articles that had been put in evidence, and concluded by asking the jury to give the matter an impartial consideration. He urged them to read the articles with the other evidence, and putting aside all prejudice from their minds, to say if Tilak was trying to make his readers hate the Government, or was commenting upon Government measures simply with the object of exciting a disapprobation compatible with a disposition to obey and support the Government, or was trying to interest his readers in a poem and a historical discussion with no practical application to the present day. His Lordship also impressed upon the jury, in view of the importance of the case, to endeavour to come to an unanimous verdict).

(The jury then retired.)

*Pugh*: -May I ask your Lordship for a reservation upon two points. The first is whether there is any sufficient order or authority, within the meaning of section 196 of the Criminal Procedure Code, for the complaint made in this case; and secondly, **[145]** whether this Court had power, notwithstanding the absence of a sufficient order or authority, to accept the commitment under section 532 of the Criminal Procedure Code, and proceed with the trial. Then there is a third point in regard to the Charge. It is a question as to the meaning of the term "disaffection," and this is of very great moment. Although this is only the second case under this section, others are pending, some in this Court and others outside the Court, which will come up immediately for decision. What I desire to put before the Court is as to the meaning of the term "disaffection." Your Lordship has put it that disaffection is simply want of affection, afterwards explaining it by ill-will, dislike, and enmity. The point, I take it, is that disaffection is the absence of affection. The point I ask to have reserved is whether your Lordship's direction to the jury that disaffection means simply want of affection in any degree towards British rule or its representative, is correct.

STRACHEY, J. :—That is not quite a complete account. I was anxious not to pin down the jury to "absence of affection," (see note at p. 134 *ante*), and that is why I also included those other terms, enmity, ill-will and so forth, as to the meanings of which there may be some shadow of difference. The word disaffection covers, in my opinion, all those terms.

*Pugh* :—I understood your Lordship to say that disaffection was absence of affection in any degree, and that you illustrated it by ill-will, dislike, enmity.

STRACHEY, J. : —I held that disaffection was a common term embracing all these others.

*Pugh* :—My point is that disaffection does not mean, as Sir COMER PETHERAM put it, "the contrary of affection."

STRACHEY, J. :—I have considered the various points which Mr. Pugh has asked me to reserve. I am of opinion that no good purpose would be served by reserving them, and I decline to reserve them.

The jury by a majority of six to three found the first prisoner guilty, and they unanimously acquitted the second.

[146] The first prisoner having been convicted, subsequently applied under clause 41 of the Amended Letters Patent, 1865 *, for leave to appeal to the Privy Council. The following is the material part of his petition :—

"6. That in the course of the said trial the said alleged sanction or authority to prosecute your petitioner was tendered in evidence on the part of the prosecution and was objected to on behalf of your petitioner on the ground that the same was not a sufficient order or authority under section 196 of the Code of Criminal Procedure for the complaint against your petitioner in respect of the offence charged against him, but the said objection was overruled, the learned Judge holding that the said alleged sanction was sufficient within the said section, and that even if it was not, the effect, if any, was cured by the provisions of section 532 of the said Code. Your petitioner humbly submits that the reception of the said sanction in evidence greatly prejudiced him in his trial."

"9. That in the course of his summing up to the jury the said learned Judge, among other things, directed the jury and, as your petitioner is advised, misdirected the jury as follows, that is to say :—

(a) That 'disaffection' meant simply absence of affection.

(b) That it meant hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government.

(c) That disloyalty was perhaps the best general term, and that it comprehended every possible form of bad feeling to the Government.

(d) That a man must not make or try to make others feel enmity of any kind against the Government.

(e) That the word Government meant British rule or its representatives or administrators.

"10. That before the verdict of the jury was delivered your petitioner's counsel applied to the said learned Judge to reserve the following questions of law, namely :—

[147] (1) whether there is any sufficient order or authority, within the meaning of section 196 of the Criminal Procedure Code, for the complaint made in this case ;

(2) if not, whether this Court had power nevertheless to accept the commitment under section 532 of the Criminal Procedure Code and to proceed with the trial ;

(3) whether the direction to the jury that disaffection means simply absence of affection in any degree towards the British rule or its administrators or representatives is correct ;

for the opinion of this Honourable Court, but that His Lordship declined to do so.

"11. That your petitioner thereafter through his solicitor Mr. Bhaishankar Nanabhai applied to the Honourable the Advocate-General for a certificate under section 26 of the Letters Patent, but the Honourable the Advocate-General declined to grant it.

"12. That your petitioner is advised and verily believes that, in addition to the specific instances above-mentioned, the learned Judge also misdirected the jury upon other points, and that, if the learned Judge had not so misdirected the jury as above-mentioned, the majority of the jury would not have found a verdict against your petitioner.

"13. That this case is one of the greatest importance not only to your petitioner, but to the whole of the Indian Press and also to all the Indian subjects of the Crown, inasmuch

* Clause 41 :—

"And we do further ordain that from any judgment, order, or sentence of the said High Court of Judicature at Bombay made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf."

as, according to His Lordship's charge, a petition for the redress of grievances however unobjectionable in other respects would subject the person or persons presenting the same to the punishment provided by section 124A of the Indian Penal Code.

"14. That your petitioner is also advised and verily believes that, if the said charge be held to be a correct exposition, it will seriously interfere, if not entirely do away, with the liberty of the press and the right of freedom of speech and public meeting in India.

"Your petitioner, therefore, humbly prays that Your Lordships will be pleased to declare under clause 41 of the Letters Patent that this case is a fit one for appeal to Her Majesty in Council."

The application was heard by a Full Bench consisting of FARRAN, C. J., CANDY and STRACHEY, JJ., on the 24th September.

*Russell* for Petitioner:—The authorities show that the Privy Council will hear appeals in three classes of cases: (1) where questions of jurisdiction arise; (2) where questions of grave importance arise which are likely to recur; (3) where refusal to do so would lead to a failure of justice to the accused—*Poonea-khoty* [148] *Moodeliar* v. *The King*, 3 Knapp P. C., 348, 352; *Aga Kurboolie Mahomed* v. *The Queen*, 4 Moo. P. C. C., 239, 243; *Jannokee* v. *Bindabun*, 1 Moo. Ind. Ap., 67 at p. 75; *Queen* v. *Eduljee Byramjee*, 3 Moo. Ind. Ap., 468; *Reg.* v. *Alloo Paroo*, 5 Moo. P. C. C., 296; *Reg.* v. *Bertrand*, L. R., 1 P. C., 520; *Queen* v. *Murphy*, L. R., 2 P. C., 35, 535; *Reg.* v. *Reay*, 7 Bom. H. C. Rep., 77 (Cr. Ca.); *Reg.* v. *Pestanji Dinsha*, 10 Bom. H. C. Rep., 75; *Carter* v. *Molson*, 8 Ap. Ca., 530; *Riel* v. *The Queen*, 10 Ap. Ca., 675; *In re Abraham Mallory Dillet*, 12 Ap. Ca., 459; *Ex parte Deeming*, (1892) Ap. Ca., 422; *In re MacCrea*, I. L. R., 15 All., 311; *Ex parte Kops*, (1894) Ap. Ca., 650. All these cases justify the appeal in the present case. We submit that the sanction given by Government was not a sufficient sanction, (see sanction, *supra.*, p. 122), under section 196 of the Criminal Procedure Code (Act X of 1882) so as to give the Magistrate jurisdiction to hear and to commit the case to the Session. The sanction should set out the complaint, giving dates, particulars, &c. Here the Government gave the Oriental Translator a free hand to bring any complaint he pleased with respect to anything that had appeared in the *Kesari* from the date it first appeared. The nature of the complaint should be definitely stated in the sanction. The Government could not delegate to another the duty that was cast upon it. If the sanction was insufficient, the Magistrate had no jurisdiction to commit.

Next we contend that the Judge misdirected the jury as to the meaning of the word 'disaffection.' It was wrong to say that it was the absence of affection. It really means active disloyalty.

(STRACHEY, J.:—I pointed out that I agreed with Sir COMER PETHERAM'S definition, and I clearly meant to express that. I do not think that the word 'absence' was a fortunate word to use, but I think you will see that taken with the context I meant not mere negation, but an active feeling. I wanted to avoid pruning down the definition to any one word, and the word 'absence' does not accurately represent my meaning. The word was not used as fully defining the meaning of disaffection. You cannot take it that I meant an attitude of mere negation from the words which followed, for I said that disaffection meant exciting the [149] people to hate their rulers, that is, coupled with the word enmity, and means an active feeling. The words 'absence of affection' were coupled with exciting disapprobation of Government measures with a view to holding Government itself to the hatred or contempt of the readers.)

There must be an excitement to disorder—Mayne's Criminal Law, p. 473.

Lastly, we contend that the Judge was wrong in his definition of the word Government as meaning British rule or its representative or administrator.

*Lang* (Advocate-General), for the Crown :—No case has been made out to justify a certificate of leave to go to the Privy Council. The grounds on which the cases go to the Privy Council are stated in the *Dillet's* case, 12 Ap. Ca., 459, and this case clearly does not fall within the class of cases there specified. There is no question of jurisdiction here. The only point is whether the prosecution was instituted by the authority of Government. No written authority is required. The Magistrate has only to decide whether the Government sanctioned the prosecution. Here the complaint was laid by the Translator to Government, who produced the written order of Government, and the case was conducted by the Government Solicitor. Could any Court for a moment consider it doubtful that the Government had sanctioned the complaint. It is difficult to treat the point seriously. The Code does not require any particular form in which the Government is to give its sanction.

The only other point is the alleged misdirection of the Judge with regard to the word disaffection. I do not admit there was any misdirection. The whole clause must be taken together. Words and passages must not be isolated and regarded separately from the context. Taking the whole clause it was clear that the definition of disaffection given was correct and agreed with that given by PETHERAM, C.J., in *Queen-Empress* v. *Jogendro Chunder Bose*, I. L. R., 19 Cal., 35.

**Farran, C. J.**:—The question to be decided in this case is whether in the opinion of this Court this is a fit case for appeal [150] to Her Majesty in Council. In reference to that it must be remembered that the Privy Council have themselves laid down certain rules which guide them in considering whether appeals in criminal cases are fit cases for appeal or not, and that they have expressly decided that there is no general appeal in criminal cases. It is only when an important or doubtful question of law arises, or when there has been a miscarriage of justice, that they will deal with appeals in criminal cases. I think this will include nearly all cases—excluding for the moment questions of the absence of jurisdiction—in which appeals have been allowed by the Privy Council. Therefore we have to apply our minds to consider whether in this case there is an important question of law to be considered, whether there has been a miscarriage of justice, and also whether there has been any want of jurisdiction shown in the committing Magistrate or the High Court.

Now, as to the question of jurisdiction, we are all of opinion without doubt that this prosecution was instituted under the authority of Government, and that, to use the words of the present Code (Act X of 1882), this complaint was made "by order of or under the authority of Government." There is no special mode laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion. In this case the prosecution was conducted by the Government Solicitor, it was instituted by the Oriental Translator to Government, and he produced the written order of Government to institute the complaint. Now though the complaint must undoubtedly contain the article complained of to give information to the accused of the charge against him, there is nothing in the Code to show that the written order to make the complaint—if written order is required—must specify the exact article in respect of which the complaint is to be made. Therefore we think that it would be puerile on that point to send the case before another tribunal.

The other ground upon which Mr. Russell has asked us to certify that this is a fit case to be sent to Her Majesty in Council, is that there has been a

misdirection, and he based his argument [151] on one major and two minor grounds. The major ground was that the section cannot be said to have been contravened unless there is a direct incitement to stir up disorder or rebellion. That appears to us to be going much beyond the words of the section, and we need not say more upon that ground. The first of the minor points is that Mr. Justice STRACHEY in summing up the case to the jury stated that disaffection meant the "absence of affection." But although if that phrase had stood alone it might have misled the jury, yet taken in connection with the context we think it is impossible that the jury could have been misled by it. That expression was used in connection with the law as laid down by Sir COMER PETHERAM in Calcutta in the *Bangaboshi* case There the Chief Justice instead of using the words "absence of affection," used the words "contrary to affection." If the words "contrary to affection" had been used instead of "absence of affection" in this case there can be no doubt that the summing up would have been absolutely correct in this particular. But taken in connection with the context it is clear that by the words "absence of affection" the learned Judge did not mean the negation of affection, but some active sentiment on the other side. Therefore on that point we consider that we cannot certify that this is a fit case for appeal.

In this connection it must be remembered that it is not alleged that there has been a miscarriage of justice.

The last minor point was with reference to the definition of the word Government. This is a very minor point in the case, but striking out the words which Mr. Russell has alluded to, but which were not in the original summing up*, we cannot see that there has been any misdirection as to the meaning of the word [152] Government. We, therefore, think that the application must be refused.

*Application refused.*

For the Crown :—Mr. *E. F. Nicholson*, Acting Government Solicitor.

For the Prisoner :—Messrs. *Bhaishanker and Kanga.*

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**NOTES.**

[There was an appeal from this decision to the Privy Council, which, however, rejected it. It is reported at (1898) 22 Bom., 528.

This decision led to the Amendment of the Penal Code, and the present section 124A was inserted in 1898.

This decision was also followed by the Full Bench decision in (1898) 22 Bom., 152 and the latter was regarded in *The Bal Gangadhar Tilak* security case, decided in November 1916, (to be reported in 1917) to have overruled STRACHEY'S definition of '*disaffection*' in this case.

See also (1906) 8 Bom. L. R., 421; (1908) 10 Bom. L. R., 848 (*B. G. Tilak's* second case); (1909) 34 Bom., 378; (1908) 32 Mad., 3; (1909) 32 Mad., 338; (1909) 32 Mad., 384; (1907) 34 Cal., 991 (*Swaraj*); (1909) 37 Cal., 467; (1908) 35 Cal., 945; (1910) 15 C. W. N., 141, etc.]

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* In the copy of the charge annexed to the petition f - leave to appeal, the definition of the words in section 124A of the Penal Code, "the Government established by law in British India" was given thus:—"It means, in my opinion, British rule and its representatives *and administrators* as such—the existing political system as distinguished from any particular set of administrators." In the charge as delivered the words here italicised "*and administrators*" were not used. The sentence should be, "It means, in my opinion, British rule and its representatives as such—the existing political system as distinguished from any particular set of administrators."

[22 Bom. 152]

# APPELLATE CRIMINAL.

## FULL BENCH.

*The 23rd November, 1897.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Queen-Empress

*versus*

Ramchandra Narayan and another.*

*Penal Code (Act XLV of 1860), Sec. 124A—'Disaffection,' meaning of—Seditious publication.*

The word "disaffection" in section 124A of the Indian Penal Code (Act XLV of 1860) is used in a special sense as meaning political alienation or discontent, a spirit of disloyalty to the Government or existing authority.

An attempt to excite feelings of disaffection to the Government is equivalent to an attempt to produce political hatred of Government as established by law, to excite political discontent, and alienate the people from their allegiance.

This meaning of the word "disaffection" in the main portion of the section is not varied by the explanation.

*Per* PARSONS, J.:—The word "disaffection" used in section 124A of the Indian Penal Code cannot be construed as meaning an absence of or the contrary of affection or love, that is to say, dislike or hatred, but is used in its special sense as signifying political alienation or discontent, that is to say, a feeling of disloyalty to the existing Government, which tends to a disposition not to obey, but to resist and subvert the Government.

*Per* RANADE, J.:—"Disaffection" is not a mere absence or negation of love or good-will, but a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, it secretly seeks to alienate the people and weaken the bond of allegiance and prepossess the minds of the people with avowed or secret animosity to Government,—a feeling which tends to bring the Government into hatred or contempt by im-[153]puting base and corrupt motives to it, and makes them indisposed to obey or support the laws of the realm, and which promotes discontent and public disorder.

APPEAL from the conviction and sentence recorded by H. F. Aston, Sessions Judge of Satara, in the case of *Queen-Empress* v. *Ramchandra Narayan and another*.

This was a prosecution under section 124A of the Indian Penal Code.

Accused No. 1 was the editor, and accused No. 2 the proprietor, of a newspaper called the *Pratod*, which was printed and published at Islampur in the Satara District.

The accused were charged under section 124A of the Indian Penal Code with having published on the 17th May 1897, in the *Pratod* newspaper an article headed "Preparations for becoming Independent," in which they attempted to excite feelings of disaffection to the British Government.

* Criminal Appeal, No. 564 of 1897.

The article, in respect of which the offence was alleged to have been committed, was to the following effect:—

"*Preparation for becoming independent*.—Canada is a country in North America under the British rule, the people of which have now become intolerant of their subjection to England. Though they are subject to the British people, they are not effeminate like the people of India. It is not their hard lot to starve themselves for filling the purse of Englishmen. They are not obliged to pay a pie to England. Their income from land revenue and taxes are expended for their own benefit. They enact their own laws independently and appoint their own officers except one or two who are sent from England. Of even this nominal dependence they have become impatient and are now busy making efforts to throw it off. It is natural for them to envy their neighbours, who after casting off their English nationality and assuming the designation of Americans are now enjoying the blessings of a free nation. They have appointed a committee to frame an independent constitution for themselves.

"This committee has issued a notification of their aims, copies of which have been distributed even in India. In this notification they have clearly stated their intention of throwing off the English yoke and establishing a Government of their own. Like us, they are not men given to vain prattling, but can act up to their word. There is also strong unity amongst them. Spirited men show by their actions what stuff they are made of. There are no people on earth who are so effeminate and helpless as those of India. We have become so callous and shameless that we do not feel humiliation while we [154] are laughed at by all nations for losing such a vast and gold-like country as India. What manliness we can exhibit in such a condition is self-evident."

To prove the animus of the accused, the Crown relied upon two other articles which were published in the *Pratod* newspaper on the 26th April and 17th May 1897, respectively.

The accused were tried by the Sessions Judge of Satara with the aid of assessors.

Both the assessors were of opinion that the article complained of did not disclose any attempt to excite feelings of disaffection to the Government.

The Sessions Judge, however, disagreed with the assessors and found the accused guilty of the offence under section 124 A of the Indian Penal Code, and sentenced accused No. 1 to transportation for life, and accused No. 2 to transportation for seven years.

Against this conviction and sentence the accused appealed to the High Court.

*Anderson* (with him *M. B. Chaubal* and *M. V. Bhat*), for Accused.

*Lang*, Advocate-General (with him Rao Bahadur *V. J. Kirtikar*, Government Pleader), for the Crown.

**Farran, C. J.**:—The accused in this case have appealed from their conviction and the sentences passed upon them, respectively, by the District Judge of Satara, under section 124 A of the Indian Penal Code, for the offence of attempting to excite feelings of disaffection to the Government established by law in British India. The first prisoner has been sentenced to transportation for life, the second to transportation for seven years.

The libel in respect of the publication of which the accused have been convicted was published on the 17th May 1897, in the *Pratod* newspaper, which is a newspaper printed and published every week at Islampur. It is not denied that the first accused Ramchandra Narayen is criminally responsible for the publication of the libel if its contents contravene the provisions of section 124 A of the Penal Code: but for him it has been contended that the libel does not transgress the law enacted in that section. The same contention has been made on behalf of the accused No. 2, Krishnaji Dhondev, but in his case the defence has also been [155] urged that although he is the registered printer and publisher of the *Pratod* newspaper, he had ceased to take any part in its

management long before the publication of the libel, and that he is not criminally responsible for its publication, even though seditious matter is contained in it.

It will be convenient, before referring to the terms of the article the subject of the charges, to consider the meaning of the section upon which the prosecution is based. That section enacts that whoever by words, &c. . . excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine. The punishment, it will be observed, varies according to the nature and gravity of the offence from simple fine to life-long transportation and fine. The explanation appended to the enacting part of the section does not directly deal with attacks or libels upon the Government itself, but with comments or attacks upon the measures of Government. It runs thus: "Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause." From this it follows that a wider latitude is allowed to a writer who comments on, or attacks the measures of the Government than to a writer who attacks the Government directly. Neither the section nor the explanation, however, defines the term "disaffection," nor is it defined in other parts of the Code. We must ascertain first its meaning in its usual popular and ordinary sense, and then consider whether from the scope and wording of the section read as a whole it is used there with the same or in a different signification.

In Murray's Dictionary—at present the most complete dictionary of the English language so far as it has been published—it is [156] stated that the adjective "disaffected" is almost always employed in a special sense as meaning "Unfriendly to the Government or the constituted authority; Disloyal." The noun "disaffection" is defined as "absence or alienation of affection or kindly feeling—dislike—hostility." *Specially*, "Political alienation or discontent, a spirit of disloyalty to the Government or existing authority." The quotations given show the correctness of this view. From *The Rambler* (A. D. 1751) we have this passage:—"Thou hast reconciled disaffection—thou hast suppressed rebellion"; and in Green's History (A. D. 1874) we find "The popular disaffection told even in the Council of State." In this last sense it is, I think, employed in the main portion of the section we are considering.

An attempt to excite feelings of disaffection to the Government is thus equivalent to an attempt to produce hatred of Government as established by law, to excite political discontent and alienate the people from their allegiance. This is an offence under English law. In Stephen's Criminal Law the publication of a libel with seditious intent is classed as a misdemeanour, and seditious intention is thus defined:—"A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs or successors, or the Government and constitution of the United Kingdom as by law established . . . or to raise discontent or disaffection amongst Her Majesty's subjects." I quote the passage as conveniently summarising the English law. It is, I think, fully supported by the rulings of the English Judges and all the recognised text books on criminal law.

Turning to the explanation, we find that disapprobation of the measures of Government is not disaffection provided that it is of such a nature as to be

compatible with a disposition to obey Government and to support its lawful authority against attempts to resist or subvert it. The meaning of that passage appears to me to be that a loyal subject who disapproves Government measures is not to be deemed disloyal or disaffected on that account if, notwithstanding his disapprobation of such measures, he is ready to obey and support Government. If he is at heart loyal he is not [157] disaffected, merely because he disapprobates certain measures of Government. The converse proposition does not appear to me to be true or deducible from the explanation, namely, that a subject who is ready to obey Government and support its lawful authority is necessarily loyal or well affected. He may be a rebel at heart though for the time being prepared to obey and support Government. The distinction is doubtless fine, but I think it exists, and it consequently follows that the publication of a libel exciting to disaffection against Government itself—the constitution established by law—may be an offence, though the libel may insist upon the desirability or expediency of obeying and supporting Government. The ordinary meaning of the term disaffection in the main portion of the section is not, I think, varied by the explanation.

The article in the present case is not one which is concerned with any measure of Government. If libellous, it is by reason of its exciting feelings of disaffection to the Government itself—causing the people to hate the constitution under which they live and to desire to subvert and change it for another form of Government. It opens with an untruthful representation of the aims and wishes of the Canadian subjects of Her Majesty, but as to this I think it must be assumed in favour of the accused that he was misled by some notification which had been seen by him, or by a reference to some such notification which had been published in some other paper, or otherwise had come to his knowledge. The accused were not questioned about this, nor has the prosecution proved the contrary. It ought not, I think, to be presumed that the existence of the notification was evolved from the imagination of the writer. Having started with this misleading account of the position of the Canadians, their aims and wishes, he proceeds to contrast their political position with that of Her Majesty's Indian subjects, greatly to the prejudice of the latter. The writer then goes on to address his readers. He informs them that they once possessed a vast and gold-like country—India—and assures them that they are laughed at by all nations for having lost it. He upbraids them for their effeminacy and want of spirit, and urges them to action. "Spirited men show by their actions what stuff they are made [158] of." He ends with this enigmatic passage: "How we can exhibit manliness in such a condition is self-evident." The article as a whole has, I think, the object of making its readers impatient of their allegiance to a foreign sovereign and creating in them the desire of casting off their dependence upon England—in other words, of exciting feelings of disaffection to the Government established by law in British India. The publication of the libel is, I think, an offence under section 124A. The first accused was, therefore, in my opinion, properly convicted.

As to the second accused, he is admittedly the proprietor of the *Pratod*. He is its declared printer and publisher. *Primâ facie*, therefore, he is responsible for what is published in it. When the prosecution has proved these facts, the *onus* is thrown upon the accused No. 2 to rebut the inference which arises from them. *Ramaswami* v. *Lokanada*, I. L. R., 9 Mad., p. 387, is, I think, an authority in favour of this view of the law. I think that its reasoning is applicable to a prosecution under section 124A. From his own statement, corroborated as it is by the evidence of some of the witnesses for the prosecution,

I think it is established that the accused No. 2 now leaves the general management of the *Pratod* to the first accused, but I am not satisfied that he is not from day to day cognizant of the more important matters which appear in it. This being so I am not prepared to upset the conviction in his case. His offence appears, however, to me to have consisted rather in passively acquiescing in, and negligently allowing the publication of the libel in question, than in actively directing it.

As to punishment, it should in each case be commensurate with the offence. As to the article itself, there is nothing practical about it. It sets nothing tangible before its readers. It is calculated, I think, rather to excite unrealizable dreams—abstract feelings of discontent—than to spur to immediate action, and I do not think that the other articles put in to show the intent of the writer carry the case any further. This should be taken into consideration. The article also does not vituperate the Government at present existing. This is, I think, a feature to be borne [159] in mind. It appears, after all, in but an obscure paper published in a small town by an obscure person. The circulation of the *Pratod* is very small. The libel is written at a period when profound peace dwells in the land, and the law as it exists upon the subject of creating disaffection has been so long left in abeyance that its true purport may not have possibly been realized by the accused. At the same time the article certainly is calculated, and I think intended, to widen the slight breach or misunderstanding which in some parts of the country exists between the Government and its subjects, when the aim of all good writers should be to lessen and to close it.

We alter the sentence on the first accused to one year's rigorous imprisonment. This will, I think, be commensurate with the offence, and will be amply sufficient to deter other newspaper managers from publishing similar articles. The accused No. 2 is an old man. His offence is rather one of negligence in permitting the publication of the article than of taking an active part in it. Three months' simple imprisonment will, I think, be an adequate punishment in his case—and we alter it accordingly. The more severe punishment which the section admits of ought, in my opinion, to be reserved for a more dangerous class of writing published in times of public disturbance.

**Parsons, J.** :— I concur. In my opinion the word "disaffection" used in the section under discussion (124 A) cannot be construed to mean an absence of or the contrary of affection, or love, that is to say, dislike or hatred; but must be taken to be employed in its special sense as signifying political alienation or discontent, that is to say, a feeling of disloyalty to the Government or existing power, which tends to a disposition not to obey but to resist and attempt to subvert that Government or power. Its meaning thus exactly corresponds to the almost, if not quite, universally accepted meaning of its adjective "disaffected." To make or attempt to make a person disaffected, that is, to excite or attempt to excite in him a feeling of disloyalty to Government, or to create or attempt to create in his mind a disposition to disobey, to resist the authority of or to subvert the existing Government, is the act under this section declared an offence.

[160] The article in question clearly comes within this definition. Under the false representation of what the Canadians were about to do, it chides the people of India for their effeminacy and want of spirit, and exhorts them to exhibit some manliness in order to cast off their subjection to the English rule, to establish a Government of their own, and to become independent. In veiled language, but in no uncertain tone, it attempts to incite the readers to subvert the Government and replace it by another. I would confirm the convictions,

but alter the sentence on No. 1 to one year's rigorous imprisonment, and on No. 2 to three months' simple imprisonment.

**Ranade, J.**:—I concur. It seems necessary in the circumstances of this case that I should briefly state the reasons which lead me to this conclusion. To understand correctly the precise scope of section 124 A, it is necessary to bear in mind that this section, together with section 121 A, was avowedly inserted in Chapter VI of the Code relating to offences against the State, with a view to fill up an inadvertent omission of a special provision for the punishment of the offence of abetment of rebellion. In the words of Sir FITZ JAMES STEPHEN, it was felt that as the causes which produce rebellion are wide, and spread over a longer period, a wider definition of abetment in the case of rebellion was necessary than sufficed in the case of theft or murder. In giving effect to this view, the principles of the English statute and common law were followed, and the section, as originally drafted by the Indian Law Commissioners in 1837, was finally incorporated in the Code in 1870, as substantially representing the law of England of the present day "though much more compressed, and more distinctly expressed."

The connection between English law and this particular section being thus admitted, the precise sense intended to be conveyed by the words "exciting or attempting to excite feelings of disaffection" used in the section can best be ascertained by a study of the corresponding English statutes and the decisions of the great English Judges who have declared what the common law is on the subject of this class of offences against the State. As regards statute law, I need go no further back than 60 George **[161]** III and I George IV, c. 8, which was expressly enacted for the punishment of seditious libels, which are described as "libels tending to bring into hatred or contempt the person of the King, or his Government or constitution as by law established, or excite the subjects to attempt the alteration of any matter of Church or State as by law established otherwise than by lawful means." The close correspondence between this provision and the section 124 A, with the explanation attached to it, will be obvious on the most superficial comparisons of both.

The same connection becomes still more obvious when we consider the principles laid down by the Judges in some of the more remarkable prosecutions for seditious libels in England and Ireland. In *R.* v. *Collins*, 9 C. & P., 456, 461, LITTLEDALE, J., laid down that the people were allowed to hold free and full and candid discussion of public matters, but they must not do this in a way to excite tumult. In *R.* v. *Tutchin*, 5 St. Tr., 527, HOLT, C. J., said that no Government is possible if men cannot be called to account for possessing the minds of the people with an ill opinion about the Government. Far more to the point is Lord ELLENBOROUGH'S pronouncement of the law in his charge to the jury in *R.* v. *Cobbett*, Holt on Libel, 114. His Lordship said that if the publication is calculated to "alienate the affections of the people" by bringing the Government into disesteem, whether the expedient employed is ridicule or obloquy, the publication is seditious. The same expression,—alienating the affections of the people,—occurs in the charge to the jury in *R.* v. *Lambert*, 2 Camp., 400, of the same great Judge. In *R.* v. *Sullivan*, 11 Cox, 45, FITZGERALD, J., defined sedition to be "all practices which have a tendency to disturb public tranquility, and to lead people to subvert the Government and the laws. The objects of sedition are to create discontent and insurrection, or stir up opposition to Government. Sedition is further on described as disloyalty in action. Practices which create discontent and dissatisfaction, or create public disturbance, or bring into contempt or hatred the

Government, or the laws and the constitution, are punishable as [162] sedition." The limitations on public discussion are thus laid down in the same judgment. "A journalist is free to canvass and discuss the acts of Government or its Ministers. He is free to discuss and point out errors, but he must do all this in calm and temperate language. He should not impute improper motives." The mere use of strong language is not a crime, but if the publication is of a character to "excite contempt for the Government" or the laws, to bring them into disrepute, or to "excite disaffection," or "disturb public peace," then the publication is punishable.

These extracts will suffice. The Calcutta High Court adopted this same view when PETHERAM, C. J., observed in I. L. R., 19 Cal., p. 35, that if a publication is calculated to create in the minds of the people to whom it is addressed a disposition not to obey lawful authority, or to subvert or resist that authority, if and when occasion should arise, and if the intention of the writer was to create such a feeling, it is clearly punishable under section 124A. Disaffection, as thus judicially paraphrased, is a positive political distemper, and not a mere absence or negation of love or good-will. It is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, it secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossess the minds of the people with avowed or secret animosity to Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motives to it, makes men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder.

The decisions quoted above have recognized greater freedom in the criticisms of the acts or measures of Government and its officers than is permitted in attacks on the Government itself, as also against the fundamental laws and the constitution, and it is this difference which is given effect to in the explanation attached to the main section, within the limits therein laid down. This distinction is operative not only in respect of seditious libels, but also in blasphemy and attacks on public morals. Fair and candid and *bonâ fide* criticism is permissible in all these three cases, but when these limits are exceeded in a spirit of reckless [163] wantonness and levity, legal malice is presumed, and the protection ceases.

Having thus seen what is the character of the main offence and its limitations, the question how far the particular libel under consideration comes within the principle of the law as thus laid down becomes a comparatively easy one. We have only to see whether the words used were calculated to create the public distemper described as disaffection. Did it suggest or counsel or encourage the spirit of public discontent and insubordination to the law? Did it seek to alienate the affections and weaken the bonds of allegiance of the people, or to bring the political order of things as at present established into contempt? Did it promote political unrest or disorder? Of course the question is not whether these bad effects were or were not actually produced, but whether the words were calculated and intended to produce this public mischief. Judged by these tests, it appeared to me that the article in dispute was calculated to produce this mischief. Its evident animus was to excite a feeling of aversion and hatred. It was not directed as an attack against any particular act or measures of Government or its officer, but it appears to be the outcome of a general sense of vague dissatisfaction with the existing political constitution and order. The article was based apparently on no reliable document or notification issued by any responsible party in Canada. As a statement of well-known contemporary facts, it is not true to state that Canada is

desirous of throwing off the English connection. An imaginary ideal of independence is held up for imitation, and the people of this country are blamed for their apathy in the matter and scornfully disparaged for their want of spirit. It is quite clear, therefore, that the words are calculated to create the feeling which the law reprobates and seeks to punish. The evidence of criminal intention is to be mainly gathered from the article itself, and the other articles which were admitted in evidence. Any actively malevolent intention does not appear clear from this evidence, but there can be no doubt that there was sufficient foundation for the inference of legal malice drawn by the Sessions Judge. In respect of such a publication, the professed writer, as also the registered proprietor, are legally responsible. The Sessions Judge was, therefore, right in convicting both [164] the accused. At the same time he greatly overrated the influence and mischief of the publication. The proprietor's responsibility is of a very technical character, and even the writer must be leniently judged because of the insignificance of his paper, its small circulation, and his poor education.

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**NOTES.**

[ See the notes to (1898) 22 Bom., 112.]

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**[ 22 Bom. 164 ]**

## ORIGINAL CIVIL.

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*The 16th July, 1897.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE STRACHEY.

Khushal Sadashiv............(Original Plaintiff) Appellant

*versus*

Punamchand Jusrupji and others............(Original Defendants) Respondents.*

*Mortgage—Payment of mortgage-debt by third person at request of mortgagor—Deposit of mortgage-deed and documents of title with such third person at request of mortgagor—Effect of transaction—Equitable mortgage by deposit—Costs—Appeal as to costs.*

The first defendant held a mortgage as a security for a loan of Rs. 350. On the 23rd June 1893, the mortgagors themselves paid him the interest due on the mortgage and on the same day at the request of the mortgagors the plaintiff paid him the principal sum of Rs. 350, which payment was endorsed upon the mortgage-deed. The deed so endorsed together with another document of title was thereupon handed over to the plaintiff by direction of the mortgagors. The plaintiff subsequently brought this suit, alleging that the defendant had agreed to assign over the mortgage to him and praying that he might be ordered to execute a transfer. The lower Court found that there was no agreement to assign the mortgage, but that the plaintiff was, under the circumstances, entitled to have an assignment executed to him by the defendant. It, however, ordered the plaintiff to pay the defendant's costs of suit, being of opinion that the defendant had been justified in refusing to execute a transfer.

On appeal by the plaintiff,

*Held*, that the plaintiff was not entitled to an assignment of the mortgage from the defendant. If he had been so entitled he ought not to have been ordered to pay the defendant's costs. But

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* Suit No. 503 of 1895. Appeal No. 938.

*Held* also, dismissing the appeal, that the plaintiff had no right of suit against the defendant. The defendant's mortgage was at an end It was paid off, and noth ng remained for the defendant to do but to retransfer the property to the mortgagors or to such person as they should direct, but as there was no contract or privity between the defendant and the plaintiff, the latter could enforce no right against the defendant. His remedy was against [165] the mortgagors. When the defendant at the request of the mortgagors handed over the endorsed mortgage-deed and the other document of title to the plaintiff, a new mortgage, *viz.*, an equitable mortgage by deposit of title-deeds, was effected by the mortgagors in favour of the plaintiff. What rights that deposit gave against the mortgagors, depended on the agreement between them.

The law as to the right of appeal on a question of costs is correctly laid down in the judgment in *Ranchordas* v. *Bai Kasi*, I. L. R., 16 Bom., 676.

THE plaintiff in this suit prayed that the defendant might be ordered to execute a transfer to him of a certain mortgage which he alleged had been assigned to him by the defendant.

The plaint alleged that the defendant held a certain mortgage as security for a sum of Rs. 350 lent by him to the mortgagors; that he assigned it to the plaintiff for Rs. 350 and that on the 23rd June 1893, the plaintiff paid him that sum, the payment being then endorsed on the mortgage-deed which with another document of title was handed over to the plaintiff by the defendant; that the defendant undertook to execute a formal deed of transfer whenever called upon, but had subsequently refused to do so.

The plaint further stated that the plaintiff was desirous of realizing the security and for that purpose it was necessary to obtain a formal transfer of the mortgage to himself. He, therefore, brought this suit, praying that the defendant might be ordered to execute the necessary transfer.

The defendant denied that he had agreed to assign the mortgage and alleged that the Rs. 350 had been paid to him by the plaintiff at the request of the mortgagors and in satisfaction of the principal debt due on the mortgage.

At the hearing, FULTON, J., found that there was no agreement to assign the mortgage to the plaintiff; that on the 23rd June, the mortgagors themselves having paid the interest, the plaintiff at their (the mortgagors') request paid the defendant the Rs. 350 in satisfaction of the principal debt due on the mortgage and that the mortgage-deed and another document of title was handed over by the defendant to the plaintiff by the mortgagor's direction. He held that under the circumstances the plaintiff was [166] entitled to have the mortgage assigned to him, but he directed the plaintiff to pay the defendant's costs of suit, being of opinion that the defendant had been justified in refusing to execute a transfer to the plaintiff. The following is an extract from his judgment:—

"I find on issues 1, 2 and 3 in the negative, for I do not consider that there was any express arrangement either for the assignment or discharge of the mortgage; but I hold that as the principal was paid off with the plaintiff's money and the title-deeds were left with him, with the mortgagors' consent, the plaintiff is entitled to an assignment of the mortgage for Rs. 350 with interest subsequent to the 23rd June 1893. I think, however, the plaintiff must pay the costs of the suit, for in the absence of any definite arrangement it was impossible for the defendant to assign until the facts were proved. He has substantially made out the allegations set forth in the written statement, and though I think a conveyance ought now to be given to the plaintiff, the latter must pay all expenses incidental to establishing his right to it. The mortgagors' story about the deposit of Rs. 350 was put forward on their own account and was never set up by the defendant."

The plaintiff appealed, contending that the lower Court ought to have found that there had been an express agreement to assign the mortgage to

him, and that the defendants ought to have been ordered to pay his costs, or that the costs of the issues should have been apportioned.

*Lang* (Advocate-General) and *Viccaji*, for Appellant :—This is an appeal as to costs—*Ranchordas* v. *Bai Kasi*, I.L.R., 16 Bom., 676. The plaintiff although successful has been ordered to pay the defendants' costs. That order is wrong —Morgan on Costs (2nd Ed.), p. 95.

*Starling* and *Russell*, for Respondents :—The appellants have appealed on the question of costs. We say the order as to costs is right, and support it on the ground that the suit ought to have been dismissed with costs. So much of the decree as relates to costs was right. The rest of the decree was wrong and ought to be varied. We are entitled to support the order as to costs on this ground although we have not appealed against the decree—Civil Procedure Code (Act XIV 1882), section 561.* We say this suit should have been dismissed with costs, because a stranger who as a matter of fact pays off a mortgage is not necessarily entitled to an assignment of it. It was the mortgagors who [167] borrowed money from the plaintiff and gave the mortgage, and they only can require the defendant to reconvey the property. Possibly they might be entitled to require him to assign it to their nominee. But a third person cannot compel the mortgagee to assign to him. At the time of the mortgage there was no express or implied agreement by the mortgagee that he would assign the mortgage ; and any agreement of the kind made after payment at the request of the mortgagors was without consideration. We, therefore, contend that the plaintiff is not entitled to the assignment he claimed, and that his suit should have been dismissed with costs. The part of the decree which orders him to pay costs is, therefore, right and this appeal on the point of costs ought to be dismissed.

*Lang* in reply : -It is only the order as to costs that is wrong. The decree in so far as it orders the assignment prayed for by the plaintiff is right. The plaintiff's prayer being granted, he should get his costs. The defendant (the mortgagee) knew that the plaintiff at the request of the mortgagors paid off the mortgage-debt, and the defendant then handed over the mortgage-deed to the plaintiff with the payment endorsed. In effect this was a sale of the mortgage to the plaintiff for Rs. 350 —Transfer of Property Act (IV of 1882), section 59,† section 8. The defendant's right was made over to the plaintiff and the plaintiff is entitled to have a legal recognition of that right from the defendant.

**Farran, C. J.** :—This is an appeal from the decree of the Division Court which, while directing the defendants to execute a transfer to the plaintiff of the mortgage (Exhibit A), which the defendant held over the several pieces of

* [Sec. 561 :—Any respondent, though he may not have appealed against any part of the decree, may upon the hearing not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has filed a notice of such objection not less than seven days before the date fixed for the hearing of the appeal.

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

Form of notice, and provisions applicable thereto.

Such objection shall be in the form of a memorandum, and the provisions of section 541, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.]

† [Sec. 59 :—Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.]

land of one Dadoba Jagonath and his sons, ordered the plaintiff to pay all the costs of the suit, both those of the defendants and his own.

It is objected that there cannot be an appeal upon the question of costs; but though a Court of appeal is averse to interfere with the discretion of a Judge of first instance in awarding costs, and rarely, if ever, exercises its power, except in cases in which some question of principle is involved and the principle has been violated, the Civil Procedure Code (Act XIV of 1882), does allow [168] of an appeal from any part of a decree including the award of costs. This was decided in *Ranchordas* v. *Bai Kasi*, I. L. R., 16 Bom., 676. The law upon this subject is, we think, correctly laid down in the judgment of BAYLEY, C. J., in that case.

It would, I think, as argued by the Advocate-General, be difficult to maintain the order as to costs in this case if the Division Bench is right in its conclusion that the plaintiff was entitled to an assignment of the mortgage from the defendant. If the plaintiff had such a right as against the defendant, and the defendant refused to recognise and give effect to it, surely the plaintiff would be entitled to sue to establish it in Court, and ought not to have been directed to pay the defendant's costs, though his mode of shaping his case and the raising of unnecessary and improper issues might have justified an order depriving him of his costs or even an order that he should pay the defendant's costs of the issues which he had improperly raised and which were found against him. I do not mean to say that the plaintiff himself raised these issues, but his allegations in the plaint necessitated their being raised.

Feeling this difficulty Mr. Starling contended, as under section 561 he was entitled to contend, that the Division Court was not right in its conclusion that the plaintiff was entitled to an assignment of the mortgage at the hands of the defendant; and in that contention he was, in my opinion, correct. The facts as found by the Division Bench are that the mortgagors on the 23rd June 1893, themselves paid the interest due under the mortgage and that the plaintiff on the same day at the request of the mortgagors paid the principal sum of Rs. 350 to the defendant, the mortgagee. Thereupon the mortgagee made the following endorsement upon the mortgage:—

"The 23rd June in the year 1893; on this day Rs. 350, the amount of this mortgage-deed, has been received in full, by the hands of Khushal Sadashivji, who has paid the same. The handwriting is that of Sha Punamchand Jusrupji. The amount of the deed which had been registered has been received. The handwriting is that of Punamchand."

[169] After making this endorsement the mortgagee by the mortgagors' directions handed the endorsed mortgage-deed and another document of title to the plaintiff. It is found by the Division Court that there was no agreement between the defendant and the plaintiff that the former should assign his mortgage to the latter. It was not seriously contended that this finding was not correct. The terms of the endorsement preclude the idea of such an agreement.

What, then, was the effect of the defendant's handing over the endorsed mortgage and the other document of title to the plaintiff at the request of the mortgagors? The answer is—the mortgagors thereby created a new mortgage—an equitable mortgage by deposit of title-deeds—in favour of the plaintiff. What rights such deposit gave against the mortgagors depends upon the agreement between them—the plaintiff and the mortgagors. In the absence of an agreement, the English law gave him a right to call for the legal estate and right to foreclosure—Coote, p. 351 (Ed. 1884). The Transfer of Property Act is silent upon the subject. It preserves such mortgages and says no more about them—section 39.

But whatever may be the rights which such deposit gave to the plaintiff as against the mortgagors, it gave, in my opinion, none as against the defendant. His mortgage was paid off and done with. Nothing remained for him to do but to re-transfer the property to the mortgagors or to such person as they should direct—to the plaintiff, it may be, at such direction; but as there was no contract or privity between the defendant and the plaintiff, the latter could enforce no right against the defendant. His remedy was against the mortgagors. If he had sued the mortgagors for a conveyance of the legal estate, he might possibly properly have made the present defendant a party defendant to the suit, as the legal estate was outstanding in him. In that case the present defendant would have been merely a formal party and he would have submitted to any order which the Court should make and have asked for his costs. Against him directly, however, in my opinion the plaintiff had no right of suit, and the order that the plaintiff should pay his costs is, therefore, right. The decree [170] would have been, I think, technically more correct if it had dismissed the suit with costs.

*Appeal dismissed with costs.*

Attorneys for the Appellants:—Messrs. *Mansuklal, Damodar and Jamsetji.*

Attorney for the Respondent:—Mr. *K. J. Mantri.*

NOTES.

[1. As regards the necessity of assignment, see the criticism of Dr. Rash Behari Ghosh in his Mortgages (1911) IV Edn., Vol. I, pp. 336-337; also (1911) 22 M. L. J., 364 (whether a reversioner has an interest);

2. As regards appeal on a question of costs, see also (1910) 12 Bom. L. R., 621; (1902) 6 O. C., 52; (1912) 19 I. C., 611 (Oudh); (1911) 13 Bom. L.R., 1061.]

[22 Bom. 170]

## APPELLATE CIVIL

*The 30th March, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Hanmant Anyaba............(Original Defendant) Appellant

*versus*

Rajmal Manikchand............(Original Plaintiff) Respondent.*

*Jurisdiction—Money lent to public officer—Money lent to him in his official capacity—Jurisdiction of Subordinate Judge—Act XIV of 1869, Sec. 32.*

The plaintiff had contracted to supply materials requisite for a public building. The defendant was the supervisor, Public Works Department, in charge of the work. From time to time defendant borrowed money from the plaintiff, and (*inter alia*) four sums amounting to Rs. 385 which he paid as wages to labourers working under him. It was not proved, however, that he had borrowed the moneys as supervisor, and the defendant did not plead that he borrowed them in his official capacity.

*Held*, that inasmuch as a Public Works supervisor has not usually authority to borrow money for the purpose of the work of which he may be in charge, or in any way to pledge the credit of Government, the mere statement of the defendant when he borrowed the moneys that he wanted them to pay the labourers was not under the circumstances enough to show that the defendant borrowed them in his official capacity, and that the Subordinate Judge had authority to entertain the suit in respect of them.

* Cross Second Appeals, Nos. 60 and 100 of 1895.

In claims arising out of contracts the same test must be applied to determine the question of jurisdiction as in those having their origin in tort, *viz.*, was the loan contracted by the defendant in his official capacity?

SECOND APPEAL from the decree of A. Steward, District Judge of Ahmednagar.

The plaintiff sued to recover certain sums of money lent by him to the defendant.

[171] The plaintiff was the contractor for the building of the Mamlatdar's kacheri at Rahuri, and the defendant was the Public Works supervisor employed on the work.

The defendant pleaded that he had lodged Rs. 521-14 with the plaintiff and had drawn on this sum as he required it by *chitties* (cheques) on the plaintiff; that if he had overdrawn at all he had not done so beyond the amount of Rs. 55, which he was willing to pay to the plaintiff.

The Subordinate Judge passed a decree for the plaintiff for Rs. 524-13-6, finding that the defendant had repaid the sum of Rs. 887-9-0.

The District Judge on appeal varied the decree by awarding the plaintiff Rs. 1,027-6-6. He, however, disallowed an item of Rs. 385 claimed by the plaintiff, holding that this sum, which had been lent to the defendant for the purpose of paying the labourers employed on the kacheri, had been lent to the defendant in his official capacity, and that as regards it, the suit was one against the defendant in his official capacity which under section 32* of Act XIV of 1869 the Subordinate Judge had no jurisdiction to entertain.

Both parties appealed.

*Daji A. Khare*, for the Appellant (Defendant).

*Gangaram B. Rele*, for the Respondent (Plaintiff).

**Farran, C.J.**:—The District Judge in this case has disallowed Rs. 385 out of the plaintiff's claim on the ground that the Subordinate Judge was incompetent, having regard to section 32 of Act XIV of 1869, to entertain the suit in so far as it included that sum. He held, as to it, that the suit was against the defendant in his "official capacity."

The plaintiff had contracted to supply the wood-work and stones requisite for the building of the Mamlatdar's kacheri at Rahuri. The defendant was the supervisor, Public Works Department, in charge of the work. The defendant appears to have constituted the plaintiff as his banker or savkar and to have borrowed several sums from him in respect of which the plaintiff opened an account or "khata" with him in the plaintiff's books. [172] Amongst the sums so borrowed are four items making up the above sum of Rs. 385, and the question is whether the defendant borrowed them in his "official capacity."

No cases have been brought to our notice, nor do we know of any in which this question has arisen in connection with a claim arising out of contract; but we think that the same test must be applied to such a claim as to one having its origin in tort, *viz*., was the loan contracted by the defendant in his official capacity? See *William Allen* v. *Bai Shri Dariaba*, I. L. R., 21 Bom., 754. In considering that question it must be borne in mind that a Public Works supervisor has not usually authority to borrow money for the purpose of the works of which he may be in charge, or in any way to pledge the credit of Government. That being so, in order to deprive the Subordinate Judge of jurisdiction it must, we think, be shown that the defendant purported at least

* [ Sec. 32 :—No Subordinate Judge shall receive or register a suit in which Government or any officer of Government in his official capacity is a defendant, but he shall refer the party presenting the plaint in such suit to the District Judge, in whose Court alone such suit shall be instituted].

Reference of Government suits.

to borrow the money as supervisor; that he affected to enter into the contract on behalf of his department. If he did not, but only intended and affected to pledge his own private credit, it is difficult to understand how he can be said to have contracted the loan in his official capacity.

Now in the present case the parties made no distinction between the sums in question and the other moneys which the defendant borrowed from the plaintiff. The defendant did not sign the orders for the money as supervisor, but simply in his own name. The sums were entered to his debit in his own private account, and when the plaintiff sued for them, he sued for them and the rest of the items upon the same footing. The defendant did not himself plead that he borrowed them officially. The parties evidently treated these as private borrowings. In the course of the evidence it came out that the defendant, when he borrowed the sums in question, wanted them to pay labourers. Why he so needed them is not shown. Whether he had received and spent the money to pay the labourers, or whether he wanted to pay them before he received official moneys for that purpose, we know not. The defence was not raised in the Court of First Instance, so no evidence was given upon the question. All we [173] know is that the defendant stated, when he borrowed the moneys, that he wanted them to pay labourers.

Having regard to the other circumstances which we have referred to, we consider that that is not enough to show that the defendant borrowed these sums in his official capacity and that the Subordinate Judge had authority to entertain the suit in respect of them. We must, therefore, allow the cross appeal and vary the decree of the District Judge by awarding to the plaintiff Rs. 385 in addition to the sum decreed, or Rs. 1,412-6-6 in all. We do not think that we can, in second appeal, award interest between the date of suit and decree. The District Judge was not asked to do it, nor is this made a ground of appeal. We have already intimated our opinion that the defendant's appeal cannot be sustained. The defendant must pay the costs throughout on the amount awarded.

*Decree varied.*

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[22 Bom. 173]
## APPELLATE CIVIL.

*The 31st March, 1896.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Ranchhod Hirabhai and others............(Original Plaintiffs) Appellants

*versus*

The Secretary of State for India in Council............(Original Defendant) Respondent.*

*Civil Procedure Code (Act XIV of 1882), Secs. 59, 138, 139—Production of documents—Bombay Revenue Jurisdiction Act (X of 1876), Sec. 11—Practice—Procedure.*

Under section 11 of the Bombay Revenue Jurisdiction Act (X of 1876) in a suit to which that Act applies, the Court, before taking evidence on the merits, should require the plaintiff to prove first of all that he has, previously to bringing the suit, "presented all such appeals allowed by the law for the time being in force as within the period of limitation allowed for bringing such suit it was possible to present."

Section 138† of the Civil Procedure Code (Act XIV of 1882) is enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government.

*Syed Ikram* v. *Ram Lochun*, 23 Cal. W. R., 29, followed.

[174] APPEAL from the decision of R. A. L. Moore, Assistant Judge, F. P., of Surat at Broach.

Plaintiffs sued to recover possession of certain *gabhan* lands, alleging that they had been wrongfully dispossessed of the same by the Assistant Collector of Broach. They also claimed damages for loss caused to them by the superstructure on the said lands having been pulled down.

The defendant pleaded (*inter alia*) that under section 11 of Act X of 1876‡ the suit could not be entertained, as the plaintiffs had not presented all such appeals to the Revenue Courts as were allowed to him by law.

The first hearing of the case took place on 25th March 1893. The issues were framed on 31st July 1893; and the case was adjourned to the 12th March 1894, when some evidence was taken; but the plaintiffs made no attempt to prove that they had exhausted all the rights of appeal in the Revenue Courts until the 19th March 1895, when they tendered in evidence two papers purporting to be answers to appeals made by them to the Collector of Broach and the Secretary to Government, respectively.

* Appeal, No. 66 of 1895.

† [Sec. 138:—The parties or their pleaders shall bring with them and have in readiness at the first hearing of the suit, to be produced when called for by the Court, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court at any time before such hearing has ordered to be produced].

(Margin: Documentary evidence to be in readiness at first hearing.)

‡ Section 11 of Act X of 1876.—No civil Court shall entertain any suit against Government on account of any act or omission of any Revenue officer unless the plaintiff first proves that previously to bringing his suit he has presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit, it was possible to present.

The Assistant Judge under sections 138 and 139* of the Civil Procedure Code (Act XIV of 1882) refused to admit the documents because they had been produced at so late a stage of the suit.

He then dismissed the suit, holding it to be premature, the plaintiffs not having exhausted all rights of appeal to the Revenue authorities.

From this decision plaintiffs appealed to the High Court.

*Gokaldas Kahandas*, for the Appellants (Plaintiffs):—The objection that the plaintiff had not exhausted all his remedies in the Revenue Courts was taken by the defendant in his written statement. The burden of proving this allegation was, therefore, upon [175] him. The plaintiff however, produced the documents received from the Revenue authorities. The Assistant Judge ought to have admitted them in evidence. They did not take the defendant by surprise. These documents had not been called for. Section 138 of the Code of Civil Procedure (Act XIV of 1882) does not apply; see *Mahbub* v. *Patasu*, 1 Beng. L. R., 120. That section is merely intended to prevent surprise, or fraud, or forgery: see *Syed Ikram* v. *Ram Lochun*, 23 Cal. W. R., 29.

Rao Saheb *Vasudev J. Kirtikar* Government Pleader, for the Respondent-Defendant.—Under section 138 of the Civil Procedure Code a plaintiff ought to be ready with the whole of his evidence at the first hearing. The cases of *Mahbub* v. *Patasu*, 1 Ben. L. R., 120, and *Minakshi* v. *Velu*, I. L. R., 8 Mad., 373, do not apply. The plaintiffs knew what he had to prove. The issues were fixed on 31st July 1893, and fifteen hearings took place subsequently, at which evidence on the merits was recorded. Section 59 of the Civil Procedure Code precludes the plaintiff from producing new evidence.

**Jardine, J.**:—There have not been many decisions on section 138 of the Code of Civil Procedure: but we follow *Syed Ikram* v. *Ram Lochun*, 23 Cal. W. R., 29, in believing that it was enacted to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government. The Court below has overlooked the excuse given by the appellants, *viz.*, that the Court had not called on them to produce the documents, which is supported by *Mahbub* v. *Patasu*, 1 Ben. L. R., 120, and *Minakshi* v. *Velu*, I. L. R., 8 Mad., 373. The record does not show that any call was made.

As Act X of 1876 was held to apply, the Court ought, before taking evidence on the merits, to have required the plaintiffs (appellants) to prove first of all that they had, previously to bringing the suit, "presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit it was possible to present." Otherwise, as section 11 says, "no civil Court shall entertain any suit against [176] Government, &c." By taking evidence on the merits without dealing with this question of jurisdiction raised in the 7th issue the plaintiffs were likely to be misled as to what section 59 of the Code requires. We refrain from deciding whether the requisite appeals had been presented and whether an appeal presented after the period of limitation, therefore, is outside of the words "allowed by the law." The facts must first be found.

The Court for these reasons, and considering that, in such matters of procedure as section 138 deals with, it should rather lean to an interpretation

* [Sec. 139:—No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of section 138, shall be received at any subsequent stage of the proceedings unless good cause be shown to the satisfaction of the Court for the non-production thereof. And the Judge receiving any such evidence shall record his reasons for so doing.]

Effect of non-production of documents.

which advances justice than to a contrary interpretation, reverses the decree of the Assistant Judge and remands the suit to his Court for disposal according to law: costs to abide the result.

*Suit remanded.*

**NOTES.**

[As regards the late and irregular production of documents, see also (1907) 12 C. W. N., 312; (1907) 6 C. L. J., 621.]

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[22 Bom. 176]

## APPELLATE CIVIL.

*The 8th April, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Tatia............(Original Plaintiff) Appellant

*versus*

Babaji...............(Original Defendant) Respondent.*

*Vendor and purchaser—Executed deed of sale set aside for want of consideration—Contract Act (IX of 1872), Sec. 25.*

On the 18th November 1892, *A* executed to *B* a deed of sale of certain land. The deed was duly registered and it recited that the consideration money, Rs. 90, had been duly paid. *B* got into possession of the land. *A* subsequently brought a suit to set aside the deed of sale, and to recover possession, alleging that he had been induced to execute the deed when incapacitated from illness, and that the consideration money had not been paid. Both the lower Courts found that the consideration money had not been paid. The Lower Appellate Court dismissed the suit, holding that A's remedy was to sue for the consideration money if it was unpaid, and that he had a lien on the land for the amount, but that he could not set aside the deed.

*Held*, that the deed should be set aside and the plaintiff should recover possession.

*Per* FULTON, J.:—The sale was void for want of consideration. Section 25 of the Contract Act (IX of 1872) applied to the transaction.

*Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*, I. L. R., 3 Bom., 172, distinguished.

[177] *Per* FARRAN, C. J.:—The judgment itself appears to me to disclose a state of facts which shows that there was no sale at all, and that the plaintiff was tricked into executing and registering the conveyance. I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyance of lands in the mofussil perfected by possession and registration, where the consideration expressed in the conveyance to have been paid has not been paid in fact, in the same category as contracts void for want of consideration.

SECOND APPEAL from the decision of Rao Bahadur Narhar Gadadhar Phadke, First Class Subordinate Judge of Sholapur with appellate powers, reversing the decree of Khan Saheb Rattonji Mancherji, Subordinate Judge of Barsi.

Suit to set aside a deed of sale and to recover possession of land.

The plaintiff alleged that he being very ill, the defendant undertook to cure him on condition of obtaining a portion of his land; that on the 18th

* Second Appeal No. 611 of 1895.

November 1892, the defendant by holding out false hopes of curing him induced him to execute a deed of sale of the land in question for the consideration of Rs. 90; that the consideration money was not paid by the defendant; and that he had been induced to execute the deed by the defendant's fraud and deceit.

The plaint further stated that the defendant had got possession by a summary suit in the Mamlatdar's Court.

The plaintiff now prayed that the deed of sale should be set aside and for possession.

The defendant pleaded that the deed of sale was duly registered and that the plaintiff had admitted payment of consideration before the Registrar; and that the plaintiff showed no ground for setting aside the deed.

The Subordinate Judge found that the deed was void or want of consideration, and allowed the plaintiff's claim.

On appeal the Judge, though he found there was no consideration for the deed, reversed the decree and dismissed the suit, relying on *Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*, I. L. R., 3 Bom., 172.

The plaintiff preferred a second appeal.

**[178]** *Balkrishna N. Bhajekar* for the Appellant (Plaintiff):—At the time the deed was executed the defendant was in possession of the land as tenant. It was not under the deed that he got possession. The decision relied on by the Judge is distinguishable. In that case the contract itself was not illegal, while in the present case the plaintiff was induced to execute the sale-deed by deceit and fraud. Section 25 of the Contract Act (IX of 1872) is applicable, as well as sections 11 and 12, because at the time of the sale the plaintiff was incapacitated by illness.

Section 54 of the Transfer of Property Act (IV of 1882) defines a sale. Some consideration, if not the whole of it, must pass to validate a sale. Both the lower Courts have found that no consideration was paid to us—*Umedmal Motiram* v. *Davu bin Dhondiba*, I. L. R., 2 Bom., 547.

*Mahadev B. Chaubal*, for the Respondent (Defendant):—The Judge held that the consideration was not paid. He did not hold that the sale deed was void for want of consideration. If the consideration was not paid, the plaintiff has a lien for the unpaid purchase-money. He can sue for the price—*Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*, I. L. R., 3 Bom., 172. But he cannot get back the ownership, which was transferred to us by the sale-deed. The Transfer of Property Act is not applicable, because the sale-deed was passed before that Act came into force in this Presidency.

**Fulton, J.**:—In this case the plaintiff, who on the 18th November 1892, had executed a deed of sale of certain land in favour of the defendant, sued to have the deed set aside, and possession of the land, which had passed to the defendant, restored to him, on the ground that the sale deed was void for want of consideration and that he was induced to pass it by the defendant's fraud and deceit. The defendant alleged that the consideration of Rs. 90 had been paid as stated in the deed, and that certain other statements in the plaint were untrue.

The recital in the deed about the payment of the consideration was as follows:—" I (the plaintiff) received the above mentioned sum of Rs. 90 twelve days ago. In respect thereof there is no **[179]** document or khata. I have received payment of the money. There has remained no dispute as to payment of the money." The Subordinate Judge on the evidence held that no valuable consideration passed for the sale, which was, therefore, void, and ought to be set aside, and he accordingly decreed possession to the plaintiff with costs of the suit.

The First Class Subordinate Judge with Appellate Powers agreed with the lower Court in holding that the consideration money had not been paid, but rejected the plaintiff's claim on grounds stated as follows:—

"A vendor of immoveable property who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession because the purchase-money is not paid. His remedy is to sue for the sum due, and he has a lien on the property for the amount—*Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*, I. L. R., 3 Bom., 172. There is no contention in the present case that the land was not held by the defendant as its purchaser after the sale-deed in continuation of the previous lease tenure as admitted by him in No. 8. The sale-deed cannot be cancelled, as there is no fraud or deceit proved to subsist in its execution by the plaintiff."

The plaintiff is, therefore, left in the unfortunate position of getting his money nor his land. He may seek to recover the money in another but, if the defendant still continues to allege payment, it is very dou. whether the fact of non-payment will be treated as a *res judicata*, for it n. probably be argued that, as the appellate Court considered that the transfer of ownership was effected by the mere execution of the deed and delivery of possession, the finding that the price had not been paid was immaterial to the result, the suit being dismissed not in consequence of that finding, but in spite of it.

Now, of course, if we considered that the lower Court had rightly applied the law to the facts found, we should be obliged to uphold its decision, but I am glad to think that according to the view which I take of the law we shall not be compelled to concur in such an unsatisfactory result. To the learned First **[180]** Class Subordinate Judge's statement of the law I entirely assent, but not to its application in the present case. The fallacy of his argument appears to lie in the use of the word "vendor." If the transaction was a "sale," and the plaintiff was a "vendor," undoubtedly he could not now recover possession of the land; but if there was no consideration, either paid or promised, then, I think, there was no sale, and the remarks above quoted have no bearing on the case. The decision—*Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*, I. L. R., 3 Bom., 172,—relied on by the First Class Subordinate Judge is wholly inapplicable. The validity of the contract there was unquestionable. The consideration for the sale consisted in the promise to pay the price by instalments, and, on this promise being broken, the remedy lay not in a rescission of the contract but in a suit to recover the money due under it. The case of *Umedmal* v. *Davu*, I. L R., 2 Bom., 547, is more analogous to the present case. There the deed of sale, it is true, recited that the purchase-money had been paid; but the conduct of the parties showed that the real intention was that the money was to be paid subsequently; for thirteen days after execution the purchaser, finding that he could not raise it, returned the deed to the vendor. Therefore, in that case it could not be argued that there was no consideration. There was an understood promise to pay, and on this consideration the contract was valid, and by the execution of the deed embodying it the vendor's title was conveyed to the vendee and could not be restored to him except by a subsequent agreement. The evidence, however, offered to prove such agreement was inadmissible by reason of the terms of the Registration Act, and the vendee's title could not be disproved. That case simply emphasized the principle that a contract of sale is completed when the terms are agreed on and the deed is executed, but cannot be treated as an authority for the proposition that a mere conveyance not containing the terms of a valid agreement is sufficient in itself to transfer the property. In that particular case the

contract was valid, but I do not think that the learned Judges who decided it intended to affirm that in all cases where a deed of sale was signed, and possession was delivered, the property *ipso facto* **[181]** passed. In most cases, no doubt, where the execution of a deed is the final act of a valid contract of sale, it is correct to say that the property is transferred by the deed, but the matter seems to me to hinge on the validity of the contract. Nor I think can it be argued that in all cases in which the price is incorrectly recited to have been paid, we ought to infer that the real agreement was that it was to be paid. In many cases no doubt such an inference would properly be drawn having regard to the well-known laxity of recitals on this point, but the inference to be drawn in many (or perhaps in most) cases cannot be extended to all. It is a mere presumption of fact. Each case must be decided on its own merits.

In the present case, having regard to the great care taken by the parties to the deed to exclude the possibility of any claim for future payment, and the fact that neither party has alleged a promise or intention to pay in future, it would not, I think, be possible consistently with section 114* of the Evidence Act to presume that payment was promised. To me it seems very unlikely that any future payment was promised or intended. If on the meagre facts before us I were compelled to form a theory as to the reason which induced the plaintiff, who is found not to have received the Rs. 90, to sign the deed, I think I should be inclined to accept his own version of the story, which, though not proved, may nevertheless be true. But it is not necessary to speculate on this point, for the lower Court has expressly found that there was no consideration for the sale. Such being the case, I think section 25 of the Contract Act applies to this transaction as to any other contract. It is true that this deed was executed before the Transfer of Property Act came into force, and that, therefore, it is not affected by section 4 of that Act, which declares that the chapters and sections relating to contracts shall be taken as part of the Indian Contract Act; but even apart from this section there is, I think, no reason for excluding from the general provisions of the Contract Act contracts of sale of land. The wording of these provisions certainly does not suggest any such exclusion. In *Rajan Harji* v. *Ardeshir*, I. L. R., 4 Bom., 70, it seems to have been assumed by Sir M. WESTROPP and Mr. Justice F. D. MELVILL that **[182]** a sale of land was subject to the provisions of sections 23 and 24 of the Contract Act, though the finding that there was no fraudulent or unlawful object rendered any decision on the point unnecessary. In *Manna Lal* v. *Bank of Bengal*, I. L. R., 1 All., 309, the Allahabad High Court held a mortgage effected by a duly registered deed to be void for want of consideration under section 25 of the Contract Act. This case is on all fours with the present case, excepting that here the transaction purported to be a sale and there a mortgage. See also *Ganga Bakhsh* v. *Jagat Bahadur Singh*, L. R., 22 I. A., 153, in which the applicability of section 16 of the Contract Act to a gift of land appears to have been admitted.

Of course it may be said that as the plaintiff chose to sign a sale deed without any consideration, either paid or promised, there is in justice no more reason for setting it aside than there would be for annulling a deed of gift. The plaintiff, if he chose, was at liberty to give away his land. But the answer to this argument appears to be that if the defendant had come into Court with a deed of gift it would almost certainly, under the circumstances set forth in

* [Sec. 114 :— The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.]

Court may presume existence of certain facts.

the judgments, have been avoided as obtained by means of undue influence. Considering the illness of the plaintiff and the fact that he was unable to manage his property and remembering that no intelligible motive has been assigned for the alienation of this land, the Court would doubtless have come to the conclusion that there had been unfair dealing. It is quite as strong a case as *Clark* v. *Malpas*, 4. D. F. and J., 401, in which a completed sale was set aside on the ground that the inadequacy of the consideration and the helpless condition of the vendor, who was illiterate, ill, and without independent advice, proved a transaction which was "equitably void." Numerous other cases might be referred to in which transactions have been avoided where the consideration was so grossly inadequate as to indicate fraud; but I have thought it enough to refer to *Clark* v. *Malpas* to show how hopeless it would have been to attempt to uphold this transaction as a gift based on no consideration at all

This point, however, need not be further discussed. The transaction, as it stands, purports to be a sale and nothing else. But **[183]** as a sale it is void for want of consideration. There being no contract, there could, I think, be no transfer of property by sale.

I would, therefore, reverse the decree of the First Class Subordinate Judge and restore that of the Subordinate Judge, with costs on defendant throughout.

**Farran, C. J.**:—I am not prepared to dissent from the conclusion which my learned colleague has come to in this particular case. The findings of the Subordinate Judge, A. P., that "the defendant has been in possession of the land in dispute from times previous to the sale to him and it is evident that he is aware of the real valuableness of the same. He, therefore, seems to have the same conveyed to himself by the plaintiff at a more or less price which he managed not to pay to the latter," and that there was no fraud or deceit proved to subsist in the execution of the conveyance by the plaintiff, are to my mind self-contradictory, especially bearing in mind that the plaintiff was at the time of the execution incapacitated by illness from managing his business. The judgment itself appears to me to disclose a state of facts which shows that there was no sale at all and that the plaintiff was tricked into executing and registering the conveyance. I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the Mofussil perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem to me to have been sufficiently borne in mind throughout the judgment. I refrain, however, from saying more upon this subject until the problem is presented to the Court in a more intelligible form. The Transfer of Property Act, section 54, will for the most part in future regulate conveyances which come before the Court under such circumstances.

Decree of the Joint Subordinate Judge, A. P., reversed and that of Subordinate Judge restored. Cost of appeals on respondent.

*Decree reversed.*

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**NOTES.**

[Messrs Pollock & Mulla in their Indian Contract Act, 1872 (III Edn. 1918) express the opinion that the decision would be the same under the Transfer of Property Act 1882, sec. 54 read with sec. 4. As regards the right to recover the property when consideration has not been paid, see also (1912) 34 All., 273; (1905) 16 M.L.J., 524; (1903) 5 Bom., L.R., 177; (1909) 6 N.L.R., 98; (1905) 1 N.L.R., 146.]

## [184] APPELLATE CIVIL.

*The 13th April, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

The British India Steam Navigation Company, Limited ........(Original Defendants) Appellants

*versus*

Ratansi Ramji......... .....(Original Plaintiff) Respondent.*

*Bill of lading—Contract of carriage—General words of exemption—" Or otherwise "—Construction—Short delivery of goods—No evidence as to how goods were lost—Burden of proof.*

The plaintiff was the consignee of a large consignment of goods shipped from Bombay in bags on board the defendants' steam ship "Java" for carriage to Zanzibar. On arrival of the "Java" at Zanzibar the goods were landed by the defendant company and placed in the customs godown, where the plaintiff in due course demanded delivery. Some of the bags were not forthcoming, but the evidence did not show how the loss had occurred. The bill of lading contained the following condition:—

"The company's liability shall cease as soon as the packages are free of the ship's tackle, after which they shall not be responsible for any loss or damage, however caused. If stored in receiving ship, godown or upon any wharf, all risks of fire, dacoity, vermin *or otherwise* shall be with the merchant, and the usual charges shall be paid before delivery of the goods. Fire insurance will be covered by the company's agents on application."

In a suit brought by the plaintiff for short delivery of goods,—

*Held* that the defendants were liable. They did not show how the loss occurred, and as it might have occurred from causes not covered by the exception (*e.g.*, from misdelivery) they did not bring themselves within the protection afforded by the exemption.

The general words "or otherwise" contained in the 10th clause of the bill of lading could not be read so as to cover all possible losses, for that would make them include wilful misconduct on the part of the defendants' servants, and general words are not read with such an extended meaning. Nor would they include misdelivery, for that was provided for in the eighth clause.

APPEAL from the decision of H.W. de Sausmarez, Consular Judge of Zanzibar, in Civil Suit No. 514 of 1894.

Suit to recover Rs. 1,028-12-6 on account of damages for short delivery of goods.

The plaintiff was the consignee of certain goods shipped from Bombay to Zanzibar in the defendants' steamer "Java." On arriving in the port at Zanzibar they were landed by the defend-[185]ants at the custom-house, where with other merchandise they were placed by order of the collector of customs in a godown. The defendants landed the goods themselves, not allowing the consignee to take delivery at the ship's side, delivery being given by the defendants' delivery clerk in the godown on the production by the consignee of the bill of lading.

The plaintiff in due course presented his bill of lading to the defendants' delivery clerk and it then transpired that the goods in question had disappeared between the time of their being landed by the defendants and demanded by the plaintiff.

* Appeal, No. 128 of 1895.

The defendants pleaded that under the conditions of the bill of lading they were absolved from liability. The conditions relied on were as follows:—

"8. The goods are to be distinctly marked with the marks, numbers and port of destination, or the company is not to be responsible for detention or wrong delivery."

"10. The company to have the option of delivering these goods into receiving ship or landing them at consignee's risk and expense as per scale of charges to be seen at the agent's offices, the company having a lien on all or any part of the goods against expenses incurred on the whole shipment. The company's liability shall cease as soon as the packages are free of the ship's tackle, after which they shall not be responsible for any loss or damage, however caused. If stored in receiving ship, godown or upon any wharf, all risks of fire, dacoity, vermin *or otherwise* shall be with the merchant, and the usual charges shall be paid before delivery of the goods. Fire insurance will be covered by the company's agents on application."

The Judge allowed the claim and passed a decree for the plaintiff.

The defendants appealed.

*Scott* (with *Craigie, Lynch* and *Owen*) appeared for the Appellants (Defendants).

*Lang* (Advocate-General, with *Manekshah J. Taleyarkhan*) appeared for the Respondent (Plaintiff).

**Farran, C. J.**:—The decision of this appeal depends upon the proper construction to be placed upon the conditions of the bill of lading of the defendant company. The facts which the evidence establishes are, in our opinion, these.

**[186]** The plaintiff was the consignee of a large consignment of flour and coffee shipped from Bombay in bags on board the defendants' S. S. "Java" for carriage to Zanzibar, including the bags of flour and coffee, the subject of this suit. On the arrival of the "Java" at Zanzibar the goods in question were landed by the defendant company and placed in the customs godown with the rest of the cargo of the "Java." When the plaintiff in due course came to demand delivery under his bill of lading he was unable to obtain delivery from the company of the bags in question, which were not forthcoming. The evidence does not enable us to say whether they had been stolen from the customs godown or had been misdelivered by the defendants' agents to some person other than the plaintiff, or how, in fact, the loss occurred.

As the defendants' contract as carriers, and under their bill of lading, was to carry the goods and deliver them to the consignee, the above facts disclose a breach of contract on their part, which would render them liable to the plaintiff for the value of the goods short delivered, unless they are protected by the terms and conditions of their bill of lading. It is not material to consider in this case the terms of the body of the bill of lading, which are mainly conversant with the carriage of the goods during the voyage. The eighth and tenth conditions printed at its foot contain the terms which more immediately relate to the question which we have to decide. They run as follows:—[His Lordship read the clauses set forth *supra* p. 185, and continued.]

It is contended by Mr. Scott for the appellants that the present case is covered by the first portion of the tenth condition, and that after the goods in question were free of the ship's tackle and placed in the company's boats, the responsibility of the company came absolutely to an end. He relies upon the case of *Petrocochino* v. *Bott*, L. R., 9 C. P., p. 355. There, according to the custom of the Victoria Docks, with reference to which the bill of lading was drawn, the Dock Company landed the goods from the ship and placed them on the quay at the expense of the ship. The consignee received them from the Dock Company. In ordinary course the ship-owner would be liable until such

delivery was duly made to the consignee, [187] but the bill of lading provided that the goods were "to be delivered from the ship's deck when the ship's responsibility shall cease at the aforesaid port of London." It was held that this term of the bill of lading protected the ship-owner from loss of the goods after they had come into the keeping of the Dock Company. The Dock Company were an intermediate agency, and under the bill of lading the ship's responsibility ceased as soon as the goods passed from the ship's deck into the hands of the intermediate agent.

The bill of lading before us is of a different character. The goods after they leave the ship's tackle are to be landed by the Company and delivered by them on shore. When examined it will be found to provide (1) for the carriage of the goods on the voyage, (2) for the landing of the goods, (3) for storing them on the wharf or in a godown, and (4) for their delivery: and appropriate exemptions from liability are inserted to cover each stage of the defendants' responsibility. With the first stage we are not now concerned. The second, the landing of the goods, is to be at consignee's risk; the commencement of that stage is marked by the provision that the Company's liability is to cease as soon as the packages are free of the ship's tackle. They are still, however, in the charge of the Company by whom they are to be landed; but during the process the Company are not to be responsible for any loss or damage, however caused. Then when the goods are landed, and they have to be stored, the responsibility of the Company is regulated by the concluding portion of the 10th condition, which provides that all risks of fire, dacoity, vermin or otherwise shall be with the merchant. It has been contended by Mr. Scott for the appellants that the storage here referred to is storage on extraordinary occasions, such as when the goods are retained by the Company to secure their lien for freight and such like, but there is nothing in the wording of the condition to lead us so to limit its application. The bill of lading treats the storage of the goods on the wharf, or in a godown, as one of the ordinary incidents of the contract of carriage, and such the evidence shows that it is in Zanzibar.

It remains to consider whether the Company are exempted by the condition as to storage from their responsibility for the loss [188] of the plaintiff's goods while they were in the custom-house godown. During such storage the bill of lading protects the Company from all risks of fire, dacoity, vermin *or otherwise*. It is, we apprehend, upon the Company, in order to absolve themselves from liability, to show that the goods have been lost by reason of one of the excepted risks. It is not suggested that the loss has occurred through any of those specifically enumerated. The Company rely upon the general words "or otherwise" to protect them. Their contention, as they have not shown how the loss occurred, must be that these words cover all possible losses. This would include wilful misconduct on the part of the Company's servants, but general words are not read with such an extended meaning—*Steinman & Co.* v. *Angier Line*, (1891), 1 Q. B. D., 619. Nor do we think that they would include misdelivery, as that is specially provided for in the eighth condition, which we have read, that the goods are to be distinctly marked or the Company is not to be responsible for wrong delivery. In *Norman* v. *Binnington*, 25 Q. B. D., 475, the expression "negligence * * * or otherwise" was used in antithesis to "negligence in navigating the ship", and it was held that it covered negligence of some persons for whose action the ship-owner was responsible though they were not engaged in navigating the ship. In *Baerselman* v. *Bailey*, (1895), 2 Q. B. D., 301, the words were similar, and it was held that the expression "or otherwise" following the words "the ship-owner not to be liable for any act,

negligence, default * * * of the master, mariners or other servants of the ship-owner in navigating the ship" covered the case of a stevedore employed by the ship-owner in storing the cargo. Lord ESHER in that case is careful to point out that the words "or otherwise" do not include all possible cases of negligence. These authorities do not, we think, compel us to hold that the expression "or otherwise" used in a bill of lading like the one before us includes all possible risks.

The Consular Court at Zanzibar has in this case held that the expression "or otherwise" following the specific risks enumerated **[189]** does not cover a loss by theft. We are not prepared to assent to that view, at least in the case of thefts committed by persons other than the Company's servants; but as the Company have not shown how the loss occurred, and as it may have occurred from causes not covered by the exception which we are considering, as for example from misdelivery, we are of opinion that they have not brought themselves within the protection afforded by the exemption, and that the appeal must, therefore, fail.

Decree confirmed with costs.

*Decree confirmed*

**NOTES.**

[See also (1906) 30 Mad., 79; (1908) 32 Mad., 95; (1913) 25 M. L. J., 162 citing *Chartered Bank of India and Australia v British Steam Navigation Co.* (1909) A. C., 369 as having overruled 32 Mad., 95.]

**[22 Bom. 189]**

## ORIGINAL CIVIL.

*The 17th September, 1897.*

PRESENT:

MR. JUSTICE FULTON.

Dadabhai Hormusji Dubash............Plaintiff

*versus*

C. J. Khambatta and another............Defendants.*

*Contract to deliver—Suit for non-delivery—Clause exempting from liability in case of loss of carrying ship—Loss of ship—Declaration of ship after date of loss—Appropriation of goods after goods lost.*

The defendants by a contract dated 10th January 1896, sold 2,500 tons of coal to the plaintiff of the February and March shipment to be delivered in Bombay. No ship was named in the contract, which contained the following clause:—"In the event of the ship being lost, this contract shall be null and void." February and March shipments ordinarily arrive in Bombay on or before the 30th April following. All of the coal contracted for was duly delivered by the defendants except 1,376 tons, which still remained to be delivered to the plaintiff. By a letter dated 25th April 1896, addressed to the plaintiff the defendants declared the S. S. "Eastby Abbey" as the ship carrying the said 1,376 tons of coal remaining due under the contract. There was no evidence of any appropriation of coal on board the "Eastby Abbey" to the purpose of the above contract prior to this declaration. It subsequently transpired that the "Eastby Abbey" had run on a reef in the Red Sea on the 16th April and had been so seriously damaged that being taken to Suez (where such of her cargo as had not been thrown overboard was sold) she was found unable to proceed to Bombay, and she returned to England for repairs. The plaintiff sued the defendants for non-delivery of

* Suit No. 454 of 1896.

1,376 tons of coal. The defendants pleaded that the ship having been lost, they were exempt from liability under the above clause in the contract.

**[190]** *Held*, that the defendants were liable for the non-delivery of the coal. There having been, previously to the declaration of the ship, no appropriation of the coal on board to the purposes of the contract, the exemption clause did not apply.

*Semble.*—In case of a contract containing such an exemption clause as the one in question, the declaration of a ship so as thereby to appropriate goods on board to the purposes of the contract is useless if made after the ship has been lost, whether the fact of the loss is known to the declarant or not.

SUIT for damages for non-delivery of 1,376 tons of coal.

On the 10th January 1896, the defendants sold to the plaintiff 2,500 tons or thereabouts of Davison's West Hartley coal, February and March shipment. No ship was named in the contract, which contained the following clauses:—

"All conditions in the charter party or bill of lading to be binding on the purchaser.

"In case of riots, strikes, frosts, floods or other accidents beyond seller's control interfering with the shipment to be made under this contract, sellers to have the option of shipping other good ordinary description of Welsh and/or East Coast coal at the ordinary market difference. Should the sellers decline to ship another description, buyers may cancel the contract, or must allow the sellers as many additional days for shipment as the strike, riots, lockout, &c., may last, in which case sellers may at their option substitute another steamer.

"Should the vessel put back or into any port through stress of weather, or any other cause, the terms of this contract shall not be prejudiced thereby.

"*In the event of the ship being lost, this contract shall be null and void.*

"Should the purchaser fail to take delivery on receipt of notice that the ship is ready to discharge, it shall be optional with the vendors to resell from alongside, or land and afterwards resell the said coal, giving twenty-four hours' notice of their intention to do so; and the purchaser hereby holds himself, his heirs, representatives or executors responsible, and obliges himself or them to forfeit any advantage or to make good any loss or difference that may arise through such resale."

Coals of February and March shipment would ordinarily arrive in Bombay on or before the 30th April.

The defendants duly delivered to the plaintiff two lots of coal, *viz.* 664 tons and 460 tons, leaving a balance of 1,376 tons still to be delivered under the above contract. It was for damages for the non-delivery of this balance that the present suit was brought.

**[191]** The defendants pleaded that the goods were on board the S. S. "Eastby Abbey" which was lost on the voyage to Bombay, and that the contract was, therefore, null and void under the above clause in the contract.

It appeared that the defendants had declared the "Eastby Abbey" as the ship carrying the 1,376 tons in question by a letter dated Saturday, the 25th April 1896. The plaintiff, however, alleged that this letter although dated the 25th was not delivered to him until noon on Monday the 27th April, and that telegraphic news of the loss of the "Eastby Abbey" had been received on the previous day (the 26th) by the ship's agents (Messrs. Killick Nixon and Co.), and the fact of the loss had become generally known in Bombay on the morning of Monday the 27th April.

The plaintiff having (as he alleged) received on the 27th the defendant's letter dated the 25th declaring the "Eastby Abbey" replied the same day as follows declining to accept the declaration:—

"*Bombay, 27th April 1896.*

"Your note declaring coal 1,376 tons per S. S. 'Eastby Abbey' reached us this day at about 12 o'clock. Messrs. Killick Nixon and Co. had given out early this morning that the

S. S. 'Eastby Abbey' was probably lost. Under the circumstances we must decline to accept the declaration of the coal per this steamer at present."

The defendants then wrote the following letter to the plaintiff, stating that their declaration had been sent to the plaintiff's office on the previous Saturday the 25th :—

"*Bombay, 27th April 1896.*

"Our letter was issued on Saturday by noon and through our peon's neglect it was refused when presented on that day about 2 P. M. or a little later.

"Your own man had called at our office at 11 A. M. this day after the same being offered, for a little correction of the date of 'Castlemoor,' and nothing was mentioned then.

"We have not heard of the 'Eastby Abbey's' loss, and you yourself admit that she may probably be lost . . . . . .

"We have every day the broker's gup to suit each man's purpose.

"The other day it was also reported that the S. S. 'Glomin' was lost when she was a little late in arrival, and it may be the case with the 'Eastby Abbey.'

[192] "Unless you give us the proof of the total loss of the vessel, the declaration stands good."

To that letter the plaintiff replied as follows:—

"*Bombay, 28th April 1896.*

"We are in receipt to-day of your letter of yesterday's date.

"We are not prepared to admit that your letter purporting to bear date the 25th instant was not delivered to us until the 27th owing to any neglect on the part of your peon. As far as we are concerned, we may state that no letter was tendered to us on the 25th and refused by us. Our senior did not leave the office before 6 o'clock in the evening on that day.

"We shall be glad if the reported loss of the 'Eastby Abbey' turns out to be false; but if it does not, we shall hold you bound to deliver us the coal, as we have reason to believe that the name of the steamer was delivered by you after you had heard of her reported loss. You cannot make us believe that as one in the trade, and moreover having coal in the vessel, you were ignorant of the reported loss of the vessel until receipt of our letter of the 27th instant. Our information in regard to the loss was not a broker's gup, but was delivered from the firm who are the consignees of the steamer."

On the 11th May 1896, the plaintiff wrote to the defendants as follows:—

"By particulars to hand by the mail which came in yesterday we learn that the 'Eastby Abbey' was sunk as far back as the 16th ultimo, which was within two days after she had passed the canal. We also learn that in all probability the steamer is breaking up.

"Under these circumstances, and you having failed to declare us the name of any steamer under your contract save that of the "Eastby Abbey" which, as we told you before, we are satisfied was declared after the loss of the vessel was made known, we hold you liable for the damages we have suffered by reason of your failure to deliver the 1,376 tons, and now enclose our statement of claim which, unless paid within two days, will be handed to our attorneys with instructions to take prompt action for recovery of same."

In the plaint the plaintiff charged that the defendants' letter declaring the ship was not written on the 25th April, but was in fact written on the 27th April after the defendants had heard of the reported loss of the ship. The plaintiff contended that the defendants' declaration was not made *bona fide* and that he ought not to be held bound thereby.

At the hearing it appeared that the coal sold to the plaintiff by the defendants was part of a lot of 4,000 tons which they had purchased from Messrs. Killick Nixon and Co. All this coal had [193] been duly delivered to them by Messrs. Killick Nixon and Co. except 846 tons, which by letter dated the 14th April addressed to the defendants they had declared as on board the "Eastby Abbey." The coal, therefore, actually belonging to the defendants on board this ship was only 846 tons and not 1,376 tons.

The S. S. "Eastby Abbey" ran on a reef in the Red Sea on the 16th April. Some of her cargo was thrown overboard and she was subsequently got off the reef and taken to Suez, where the rest of her cargo was sold, and the ship being unable to proceed to Bombay eventually returned to England to be repaired.

The plaintiff claimed Rs. 3,455-7-9 as damages. The defendants did not dispute the amount of damages, but contended, as above stated, that the ship having been lost they were exempt from liability under the terms of the contract.

The principal issue raised at the hearing was "whether the defendants' declaration purporting to be of the 25th April, and communicated to the plaintiff on the 27th April, was a good and sufficient declaration."

*Russell* (*Anderson* with him), for the Defendants :—The vessel was lost and the defendants are exempt from liability under the terms of the contract. We rely on *Nusservanji J. Khambata* v. *Volkart Brothers*, I. L. R., 13 Bom., 15. We say the loss must be held to have taken place about the 10th May, *i.e.*, when it was finally ascertained that the vessel could not proceed to Bombay. The declaration of the ship was made on the 25th April. The evidence shows it was made on that day in good faith and before the defendants had heard of the accident to the ship.

*Kirkpatrick* (with *Lang*, Advocate-General, and *Macpherson*) :—The ship was lost for the purpose of the voyage to Bombay on the 16th April. It was, therefore, already lost when the declaration is said to have been made, *viz*., on the 25th April. A declaration of a lost ship is not a good declaration whether the fact of the loss is known to the declarant or not. In this case the declaration of the ship was the appropriation of the goods on board. There had been no previous appropriation as in *Nusservanji* v. *Volkart Brothers*, I. L. R., 13 Bom., 15. The plaintiff refused to assent to the appro-[194]priation knowing that the goods were lost, and no assent to the appropriation could be implied in such a case—Contract Act (IX of 1872), Sec. 83. Further, the declaration of 1,376 tons was bad, as the defendants had only 846 tons on board —*Reuter* v. *Sala*, 4 C. P. D., 239. Lastly, it is clear that the declaration was really written on the 27th April after the defendants had heard that the ship was lost, although they dated it the 25th April.

**Fulton, J.** :—The plaintiff sues under a contract dated the 10th January 1896, to recover damages for non-delivery of 1,376 tons of coals sold to him by the defendant.

The defendant relies on the clause of the contract " In the event of the ship being lost, this contract to be null and void " and alleges that the contingency therein contemplated has arisen.

It appears that on the 14th April 1896, Messrs. Killick Nixon and Co. declared to the defendant 846 tons of West Hartley coal ex " Eastby Abbey " then on her voyage to Bombay and due about the 28th. On Sunday the 26th the firm received a telegram stating that the " Eastby Abbey " was probably lost, and next morning the news was communicated at their office to a number of brokers. On the same day, namely, Monday the 27th, the plaintiff received a letter dated the 25th in which the defendant declared to him 1,376 tons ex " Eastby Abbey."

The evidence shows that on the 16th April the steamer ran on the Jujub reef in the Red Sea receiving serious damage. Eventually after throwing overboard about 1,000 tons of coal she was got off the reef with the assistance of two small steamers, and returned to Suez with about 15 feet of water in the forehold and lesser quantities in the other parts of the ship. At Suez the vessel

was patched up, but could not be permanently repaired. Part of the cargo was damaged and the whole was sold. In the captain's opinion it was impossible to take the cargo to Bombay with the temporary repairs effected at Suez, and eventually the steamer returned to England for permanent repairs.

On these facts it was faintly argued on behalf of the plaintiff that the ship was not lost within the meaning of the contract. But I cannot accept this view. In *Nusservanji* v. [195] *Volkart Brothers*, I. L. R., 13 Bom., 15, Mr. Justice SCOTT decided in 1888 that under a similar contract a ship must be held to have been lost when she was rendered useless for the purpose required, that is, for a voyage in fulfilment of the specified contract. That doubtless was a liberal construction of the clause in the contract, but it has apparently satisfied the coal merchants concerned, as it has not led to any modification of the form of contract. In these circumstances I must hold that in the contract now under consideration the expression "the ship being lost" was used in reference to the interpretation put on it in that judgment and was intended by the parties to cover a casualty such as occurred to the "Eastby Abbey" which completely prevented her from accomplishing her voyage. The previous clause about the vessel "putting back or putting into any port through stress of weather" evidently refers to a temporary interruption of the voyage, but not to its total abandonment. This was the view apparently at first taken by the plaintiff when he filed the plaint admitting the loss of the ship.

For the purposes of the contract it seems clear that the "loss of the ship" occurred on the 16th April when she ran on the reef. Mr. Russell argued that the loss should be deemed to have occurred on some date later on when the captain finally decided the voyage to Bombay to be impracticable. But this contention cannot be accepted. The defendant's case is that the completion of the voyage was impracticable, and accepting this view it is clear that the further continuance of the voyage was impracticable, not when the captain first realized the fact, or the owners became aware of it and admitted it, but when the accident occurred which rendered it impossible to proceed with due regard to safety. That was on the 16th April.

A question then arises whether a declaration made after the loss was of any effect even if made in good faith. It was argued that there was no need to make any declaration at all. Mr. Justice SCOTT held that where certain goods on board a particular ship had been appropriated by the vendor, the clause applied even though such appropriation had not been communicated to the purchaser; and in the particular case before him he held, on [196] the evidence, that there had been such an appropriation. It is unnecessary for me to express an opinion on the correctness or otherwise of this view, for in the present case there is no evidence at all to show any appropriation of any coal on board the "Eastby Abbey" to the purposes of this contract until the declaration of the 25th or 27th April. To contend that without proof of any appropriation at all the clause could be applied, would be to ignore the definite article "the" prefixed in the contract to the word "ship." It would be equivalent to arguing that, on the loss of any ship being proved, the vendor was entitled to treat the contract as void, but this would be an absurd result, certainly not intended by the parties. The article "the" clearly shows that the lost ship means the ship specified, or, in other words, the ship carrying the coals which the vendor intends to deliver to the purchaser, and, therefore, there must be proof at least of his intention having been formed either before the ship was lost, or at any rate before he knew of the loss. To have to form an opinion on an uncommunicated intention, as seems to be necessary in certain cases under Mr. Justice SCOTT'S decision, is difficult and may lead to considerable uncertainty; but, as

I said before, it is unnecessary for me in this case to express an opinion on the correctness or otherwise of the proposition that a declaration of the ship's name to the other party is not essential. Suffice it to say that the decision does not seem to have led to any modification of the form of contract. If the parties to these contracts now desire to make the matter clear they can easily do so by adding to the clause the words "Provided the name of the ship is communicated by the vendor to the purchaser before the loss is known in Bombay."

The question whether the appropriation of the coal to the contract must be made not before the loss is known, but before it actually occurs, is one of some difficulty. But as the contract is at present worded, it seems to me, in the absence of all proof of mercantile practice affecting the construction, that the words "the ship" must mean a specified ship carrying coals to Bombay, and that no ship comes within that category which has not been specified before the loss. If no appropriation of coal in a particular ship has been made before that ship has sunk, or [197] become incapable of conveying her cargo to Bombay, it is difficult, to my mind, to describe that ship as "the ship" carrying appropriated coals to Bombay when as a matter of fact it was never for a single moment of its existence so employed. I am inclined to think, therefore, that the appropriation of coals by the declaration of the ship, whether on the 25th or 27th of April, was useless. It did not render the "Eastby Abbey" that was lost on the 16th "the ship" within the meaning of the contract, and, therefore, the clause had no application.

If this opinion be correct, the question whether the defendant declared the ship before he heard the report of its loss becomes immaterial; but as it is possible that a different view may prevail it is better that I should express my opinion on the evidence as to the time of the declaration.

As the defendant seeks to apply the clause, the burden of proving the facts which render it applicable is on him. Assuming that a declaration or appropriation made *bonâ fide* in ignorance of the loss of the ship is valid, it is for the defendant to show that such ignorance existed. The letter dated the 25th April (Exhibit C1) is the first evidence of any appropriation of coals ex "Eastby Abbey" for the purposes of the contract: and it is for him to prove that it was written before the report of the loss reached him. He swears that he wrote the letter on the 25th and brings forward his letter-book to corroborate his statement. The peon Keshav is called to prove that the letter was taken that afternoon to plaintiff's office and refused. The clerk Narayan says he remembers Keshav bringing back the letter. On the other hand, the deceased plaintiff's son Cowasji Dadabhai, his clerk Pherozshah and another clerk Dadabhai all swear that the office was open till 6 P.M. on Saturday, and that no letter was refused. It is difficult to see why any letter should have been refused on Saturday when there was no rumour of the loss of the "Eastby Abbey."

The letter-book relied on is not conclusive, for it is not satisfactorily proved that any one of the four letters numbered 398, 399, 400 and 401 in that book was delivered on Saturday. Messrs. Killick Nixon's clerk unfortunately cannot say on which [198] day No. 399 was delivered. Letters 398, 400 and 401 were all declarations ex "Eastby Abbey" considerably in excess of the coals then owned by the defendant in that vessel. Of course the defendant might subsequently have bought sufficient quantity to meet his contracts, but the circumstance is suggestive, especially as Ambalal, to whom letter No. 400 was addressed also declaring the "Eastby Abbey," swears that letter was not delivered till the 27th—a statement corroborated by his

solicitor's letter of the 28th. It is not likely that there was collusion at that time between Ambalal and the plaintiff, and it is extraordinary that both should have repudiated the declaration on similar grounds if there was not good reason for their doing so. A good deal of argument was based on the fact of pencil initials in the delivery book being below Pherozshah's red-ink initials; but as letter C was admittedly not accepted in plaintiff's office till the 27th, I do not see that the circumstance is of much importance.

On the whole, looking to the suspicious nature of the circumstances and the impossibility of explaining satisfactorily why the letter Exhibit C1 should have been refused in plaintiff's office on the 25th, I do not think it is established beyond reasonable doubt that the letter was written before the 27th or in ignorance of the reported loss of the "Eastby Abbey" which afterwards turned out to be true. It is accordingly not proved to have been a declaration made in good faith and cannot, therefore, be treated as effective, even supposing that if so made after the actual loss of the ship, it would have brought the case within the meaning of the clause.

As the damages are not disputed, the plaintiff will get a decree for Rs. 3,455-7-9, with interest thereon at 9 per cent. per annum from 30th April 1896, till to-day and costs of the suit; excepting his costs of the commission to England, which was the result of his unwillingness to admit the loss of the ship notwithstanding his averment in the plaint and the information furnished in the numbers which he put in of Lloyd's shipping index in which all the material facts were sufficiently stated. Interest on judgment at 6 per cent.

Attorneys for Plaintiff:—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for Defendant:—Messrs. *Hemming and Peace.*

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## [199] APPELLATE CIVIL.

*The 13th April, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Mahableshvar Fondba............(Original Defendant No. 2) Appellant

*versus*

Durgabai and others............(Original Plaintiffs and Defendant No. 1) Respondents.*

*Hindu law—Adoption—Adoption by widow—Motives of widow in adopting—Adoption from corrupt motives—Presumption.*

In Bombay, according to the authorities, if it can be predicated of an adoption by a widow (in a case where the consent of the husband's kinsmen is not required) that the ceremony has been performed, not as a religious duty, but from sinful and corrupt motives, it is on that account invalid, and the authorities appear to impose upon the Court the duty of inquiring into the motives of the adopting widow where her motives are called in question. Whether the presumption that an adopting widow has performed her duty from proper motives

* Second Appeal, No. 754 of 1894.

ought or ought not to be deemed an irrebuttable presumption, is a question which still remains to be judicially decided.

The fact that the motives of the widow were of a mixed character is not sufficient to rebut the presumption—*Patel Vandravan* v. *Patel Manilal*, I.L.R., 15 Bom., 565.

The fact that the widow has made terms for herself with the father of the boy to be adopted, or that she has solicited a boy whose father will be likely to accede to her wishes, is not sufficient to render the adoption invalid—*Bhasba* v. *Indar*, I.L.R., 16 Cal., 556; *Chitko* v. *Janaki*, 11 Bom. H. C. Rep., 199.

Where a widow had adopted a son, and it was found by the Courts that unless she had been assured by the father and guardian of the adopted boy that she would receive Rs. 4,000 she would not have adopted him, but it was not found that she had not the special benefit of her husband in view when she made the adoption.

*Held*, that the presumption that she made the adoption from motives of duty was not rebutted, and that presumption should be allowed to prevail.

SECOND APPEAL from the decision of E. H. Moscardi, District Judge of Kanara, reversing the decree of Rao Bahadur Gangadhar V. Limaye, First Class Subordinate Judge of Karwar.

One Mangesh Purshotam, a separated Hindu, died on the 18th September 1878, leaving a widow Parvatibai (defendant No. 1), but without issue. Parvatibai subsequently adopted one Mahableshvar Fondba (defendant No. 2).

[200] The plaintiffs, who were the sisters of Mangesh, brought this suit to have the adoption declared invalid, alleging that it had been made from corrupt motives; that they (the plaintiffs) were the reversionary heirs of Mangesh next after his widow Parvatibai; and that, in order to prevent them from succeeding to the property, Parvatibai in collusion with the guardian of Mahableshvar had agreed to make the adoption, and that the guardian had agreed to pay her the sum of Rs. 4,000 for doing so.

The defendant denied the allegation of the plaintiffs.

The Subordinate Judge found that the adoption of defendant No. 2 was not opposed to Hindu law; that he was not adopted by Parvatibai solely in consideration of Rs. 4,000 received by her as alleged, and that the adoption was not invalid. He, therefore, dismissed the suit.

On appeal by the plaintiffs, the Judge reversed the decree and declared that the adoption of Mahableshvar (defendant No. 2) by Parvatibai (defendant No. 1) was illegal and invalid, because it was made from a corrupt motive.

Mahableshvar (defendant No. 2) preferred a second appeal.

*Lang* (Advocate-General with *Ghanasham N. Nadkarni*), appeared for the Appellant (Defendant No. 2).

*Mehta* (with *Chimanlal H. Setalvad*), appeared for the Respondents (Plaintiffs and Defendant No. 1).

**Farran, C. J.**:—This appeal involves the consideration of a question of some importance upon the law of adoption amongst Hindus

The plaintiffs, who are the sisters and next reversionary heirs of one Mangesh Purshotam, deceased, sued to have it declared that the alleged adoption of the defendant Mahableshvar by Parvatibai, the widow of Mangesh, is invalid. The *factum* of the adoption is not disputed. The objection to the adoption which is relied upon is that the guardian and natural father of the boy taken in adoption had agreed to pay the adopting mother Parvatibai Rs. 4,000 after the adoption should have taken place.

The following issue was raised by the Subordinate Judge upon this part of the case:—"Was the defendant No. 2 (Mahablesh-[201]var) adopted by

the defendant No. 1 (Parvatibai) in consideration of Rs. 4,000 received by her as alleged ?"

The payment of the Rs. 4,000 to Parvatibai was admitted. The Subordinate Judge considers that it was paid by Fondba, the father of Mahableshvar, after the adoption, but that the expectation of the payment exercised a very powerful influence on Parvatibai in inducing her to make the adoption. The Subordinate Judge considers that she felt herself unable to manage the property, was badly served by those to whom she entrusted the management, and was continually being thwarted by the kinsmen of her husband; that she was desirous of going on a pilgrimage and performing acts of *dharma*, and that the offer of Fondba to give his son in adoption and to provide her with means of living the life she desired, offered a ready escape from her position. She wished to secure freedom from secular cares and the money required for certain spiritual purposes. "It is conceivable," says the Subordinate Judge, "that a woman whose line of action was thus dictated by prudence and piety should have easily realized the two-fold advantage of Fond's proposal, which, as the proverb goes, had the potency of giving her two eyes when she was seeking only for one." The Subordinate Judge upheld the validity of the adoption.

The District Judge raised the following issues, *viz.*:—"(2) Was the adoption made solely as a means of acquiring Rs. 4,000?" and "(3) Is the adoption invalid?" After discussing the evidence he says:—

"On the whole, therefore, I come to the same conclusion as the Subordinate Judge, *viz.*, that the Rs. 4,000 was paid to defendant No. 1 or at any rate promised to her as an inducement to take defendant No. 2 in adoption, and that she adopted him in consideration of such payment or promise of payment, and that but for such payment or promise she would not have adopted him. Whether the payment formed the sole consideration for the adoption, or whether she also had the spiritual benefit of her deceased husband in view, it is not easy to say, but I altogether dissent from the theory of the lower Court that she must be held to have adopted him from religious motives, because nominally the money was to be devoted to the payment of alleged debts due by the estate, and to religious purposes. I do not consider it proved that a single rupee of the amount was devoted to any but secular purposes, and without believing the evidence of 48, [202] I do not believe, in the absence of better proof than Fondba's word, that any of the money was spent in paying off debts."

He found on the issues "(2) it is not proved that the adoption was made solely as a means of acquiring Rs. 4,000;" and "(3) the adoption is invalid, because it was made from a corrupt motive."

The result would, therefore, appear to be that mixed motives of various kinds impossible to fathom operated upon the mind of this lady, who appears to be of a religious turn of mind and inapt for the duties of an ordinary mundane life, and induced her to make the adoption, but that she would not have made it had she not received the Rs. 4,000 for her own purposes. Is this in law sufficient to invalidate the adoption? It is, we believe, the first occasion which has come before this Court in which an adoption has been set aside on such grounds. It must be at once manifest that, if the view of the District Judge is correct, the Court in every case of disputed adoption may be led into abstruse ethical discussions as to the motives which induce a Hindu widow to adopt, and the validity or invalidity of such an adoption will depend upon a consideration, not of facts, but of the feelings, which actuate the Hindu female mind at the time of adoption—feelings, which, even if truthful, she would herself probably be unable to define. In almost every case of adoption a widow in possession of the estate of her husband must have internal struggles of mind whether she will relinquish it by adopting a son, or retain it by remaining sonless. If the certainty of not being left without the means of support or dependent upon the

caprice of the adopted boy turns the scale, is the adoption to be set aside because she was partially influenced by a consideration of her own future well-being? The problem is a difficult one for a Court of justice to solve. The task would seem to be better fitted for a Court of conscience.

The basis upon which the law upon this subject is founded is the following passage in the judgment of the Privy Council in the *Ramnad Case*, 12 M. I. A., 397. The question which their Lordships there had to consider was what assent of kinsmen was requisite to [203] validate an adoption by a widow in the Dravida Country where there was no father-in-law in existence. Their Lordships say: "It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is that there must be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased, and not *bonâ fide* obtained. The rights of an adopted son are not prejudiced by any unauthorized alienation by the widow, which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption." In subsequently considering this passage in *Rajah Vellanki Venkata* v. *Venkata Rama*, L. R., 4 I. A., p. 14, their Lordships, after observing that the evidence required was not of the widow's motives but of the assent of the kinsmen, say: "Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interests of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. If that be so, there seems to be every reason to suppose that in the present case there was such a consideration, both on the part of the widow and on the part of the sapindas; and their Lordships think that in such a case it must be presumed that she acted from the proper motives which ought to actuate a Hindu female, and that, at all events, such presumption should be made until the contrary is shown."

Mr. Mayne (Hindu Law, Pl. 116) commenting on this passage thinks that even now it is not quite clear whether their Lord-[204]ships are of opinion that a widow's motives in making an adoption, provided she has received the assent of sapindas given *bonâ fide* to the adoption, are material. His view, however, is that the Judicial Committee did not mean to lay down that such evidence would be material or admissible. To us it appears that their Lordships, feeling how dangerous it would be to introduce into the considerations of cases of adoption nice questions as to the particular motives operating on the mind of the widow, have pointed out that the *Ramnad Case* did not decide that such motives would be material, and have not themselves expressed any opinion upon the question. Their guarded language at the end of the passage which we have quoted leaves the question absolutely open. We have not, therefore, the advantage of knowing what conclusion the ultimate tribunal will arrive at upon it when it comes in a concrete form before them.

Turning to the decisions of this Court we find that in *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. Rep., 181 at. p. 191, A. C. J., it was decided that in the Maratha

country a Hindu widow may adopt without the permission of her husband and without the consent of his kindred if (borrowing the language of the Privy Council in the *Ramnad Case*) "the act is done by her in the proper and *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive." The result of this decision is referred to and its terms are repeated in *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. Rep., 241 at p. 257, without comment, and is again referred to in *Narayan Babaji* v. *Nana Manohar*, 7 Bom. H. C. Rep., 153 at p. 172, A. C. J., and again in *Ramji* v. *Ghamau*, I. L. R., 6 Bom., 498 at p. 501.

The first attempt to be found in the reports of this Court to apply the qualification of a widow's power to adopt, and to upset the adoption on the ground of the widow's motive in making it, is to be found in *Vithoba* v. *Bapu*, I. L. R., 15 Bom., 110. That was the case of an undivided family. It was almost admitted that the widow's motives in adopting were malicious, but as she had without deceit obtained the consent of the head of the family to the adoption it was upheld. *Patel Vandravan* v. *Patel Manilal*, I. L. R., 15 Bom., 565, was the case of a divided estate vested in the widow. It was alleged [205] that her motives in making the adoption were corrupt and capricious. The Chief Justice, Sir CHARLES SARGENT, after referring to the *dictum* in the *Ramnad Case* already quoted and its qualification by the Privy Council in the later case, and adopting Mr. Mayne's view of the result of these decisions, says: "Where, however, the assent of sapindas is not required, as in this Presidency where the family is divided, then there will be only the ordinary presumption that the widow has performed a duty from proper motives, and the *onus* lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive." His Lordship then reviewed the evidence as to motive and came to the conclusion that although it was probable * * * that the widow acted from mixed motives there was no sufficient evidence that she acted from corrupt or malicious motives such as would invalidate the adoption.

Such is the state of the authorities upon this difficult question. They doubtless assume that if it can be predicated of an adoption by a widow (in a case where the consent of the husband's kinsmen is not required) that the ceremony has been gone through not in the performance of a religious duty but from sinful and corrupt motives, it is on that account invalid; and they appear to impose upon the Court the duty of inquiring into the motives of such adopting widow where her motives are called in question. Whether the presumption that an adopting widow has performed her duty from proper motives ought or ought not to be deemed to be an irrebuttable presumption, is a question which still remains to be judicially decided. It is unnecessary for us, we think, to consider it in the present case.

As to the nature of the evidence which will rebut the presumption that the act of adoption has been performed as a duty, there is but little authority to guide us. The judgment in *Patel Vandravan* v. *Patel Manilal* (*supra*) establishes that the fact of the motives being of a mixed character is not sufficient to rebut the presumption. It appears also to be clear that the widow's making terms for herself with the father of the boy to be adopted, or selecting a boy whose father will be likely to accede to her wishes, is not sufficient to render the adoption fraudulent or [206] to establish that it has been made for a corrupt purpose or for a purpose foreign to the real object of adoption—*Bhasba* v. *Indar*, I. L. R., 16 Cal., 556, and *Chilko* v. *Janaki*, 11 Bom. H. C. Rep., 199. That is, however, what the evidence in this case in the judgment of the District Judge establishes. He finds that unless she had been assured that she would have received the Rs. 4,000 she would not have

adopted Fondba's son—possibly (it may be) would not have adopted at all; but he does not find that she had not the spiritual benefit of her deceased husband in view when she made the adoption. The presumption that she made the adoption from motives of duty is not, therefore, rebutted, and that presumption should, in our opinion, have been allowed to prevail.

We reverse the decree of the District Court and restore that of the Subordinate Judge, with costs throughout on respondents.

*Decree reversed.*

NOTES.

[ The motives in adoption are irrelevant:—(1896) 22 Bom., 206; (1899) 23 Bom., 789; (1905) 29 Mad., 161.]

[22 Bom. 206]

## APPELLATE CIVIL.

*The 13th July, 1896.*

PRESENT:

MR. JUSTICE PARSONS, AND MR. JUSTICE RANADE.

Bhimawa and others............(Original Defendants) Appellants
*versus*
Sangawa.........(Original Plaintiff) Respondent.*

*Hindu law—Adoption—Motive in adopting—Adoption made by a widow to defeat the claim of her co-widow to a share in her husband's estate—Validity of such adoption.*

An adoption made by a Hindu widow is not invalid merely because it is made with the object of defeating the claim of a co-widow to a share in her husband's property.

SECOND APPEAL from the decision of R. Knight, Assistant Judge, F. P., at Bijapur.

Suit to set aside an adoption.

One Ramangavda died in 1886, leaving three childless widows, Hanmawa, Bhimawa and Sangawa.

On the 27th June 1890, Sangawa applied for leave to sue as a pauper to recover her share of her husband's estate.

[207] On the 23rd October 1890, pending this application Bhimawa with the consent of the eldest widow Hanmawa, took Bhimapa in adoption.

On the 3rd January 1891, Sangawa's application for leave to sue as a pauper was granted, and registered as a plaint.

Bhimapa was added as a party to the suit, and an issue was raised,—whether his adoption was valid.

On this issue the Subordinate Judge held that the adoption was valid, though it was made with the object of defeating Sangawa's right to obtain a third share of her husband's estate. Sangawa's suit was, therefore, dismissed.

On appeal the Assistant Judge reversed the decree of the Subordinate Judge and awarded the plaintiff's (Sangawa's) claim. He held that the adoption of Bhimapa was invalid on the ground that it was made from corrupt and malicious motives, with the manifest object of defeating the plaintiff's

* Second Appeal, No. 706 of 1895.

claim for partition of her husband's property. The following extract from his judgment gives his reasons:—

"Taking all these circumstances together we see that defendant No. 2 did not think of adopting a son until plaintiff began to press her claim; that she opposed her application for permission to sue in *formâ pauperis*; that as soon as that permission was obtained, she hurriedly alienated nearly the whole of the joint property; that she speedily married the adopted son to a near relative of her; that the adoption-deed contains gratuitous and palpable lies introduced with the obvious design of fortifying the adoption; that a similar design is in the construction of the mortgage-deeds; and that the application of the money derived from the mortgages is not satisfactorily proved. If facts can speak, these facts unhesitatingly testify to the corruption of defendant No. 2's motives. The Subordinate Judge, while suspecting that the adoption was made from corrupt and malicious motives, thought that it was not clearly enough established to warrant him in setting aside the deed. I differ from him in his view of the strength of the inferences suggested. For acting on the presumption that defendant No. 2 was actuated by proper and laudable motives, I am wholly unable to account for her actions. Coincidences are very well in their own way, but multiplication is fatal to them. On the first issue, I, therefore, find that the adoption is proved, but that it is not valid.'

Against this decision the defendants appealed to the High Court.

*Macpherson* (with *M. B. Chaubal*), for Appellants.

[208] *Branson* (with *B. A. Bhagvat*), for Respondent.

The following authorities were referred to in argument:—*Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*, I. L. R., 15 Bom., 565; *Vithoba* v. *Bapu*, I. L. R., 15 Bom., 110; *Collector of Madura* v. *Moottoo Ramalinga*, 12 M. I. A., 397; *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. Rep., 181, A. C. J.; *Mahableshvar* v. *Durgabai*, *Ante* p. 199; *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R., 3, I. A., 154.

**Parsons, J.**:—The facts of this case are not disputed. Ramangavda died childless in or about the year 1886, leaving three widows, 1 Hanmawa, 2 Bhimawa (defendant No. 2), and 3 Sangawa (plaintiff). He had not prohibited his widows from adopting a son to him. In 1887 Hanmawa consented to the adoption by Bhimawa of any one she would like to adopt (Exhibit 92). On the 27th June 1890, Sangawa applied for leave to sue as a pauper to obtain her share of her husband's estate. The application was enquired into and was ordered to be registered as a plaint on the 3rd January 1891. On the 23rd October 1890, Bhimawa took Bhimapa (defendant No. 7) in adoption. The Court of First Instance thought that the adoption was made with the object of not allowing the immoveable property of her husband to the extent of a third to go into the hands of Sangawa, but found that there was no corrupt motive for the adoption, and held it valid. The appellate Court found that the adoption was made from corrupt and malicious motives, and, therefore, held that it was not valid. The corrupt and malicious motives by which the Assistant Judge found that Bhimawa was actuated were, as clearly appears from his judgment, nothing more than a desire to defeat the claim of Sangawa to a share in her husband's property.

The point of law before us is whether an adoption effected with that motive is invalid. In determining that point we have been very greatly assisted by the able and exhaustive judgment of the Chief Justice in *Mahableshvar* v. *Durgabai*, *Ante* p. 199. It is clearly laid down in that judgment that an adoption to be invalid must be shown to have been made from sinful and corrupt motives, and not in the performance of a religious duty. Read in connection with the cases cited, that must mean that the widow must

[209] be shown to have acted with an utter disregard for the spiritual benefit of her deceased husband and solely for her own self-interests and her own future well-being. Such a motive would be material. Cases may no doubt arise in which that motive may be capable of proof, but it is impossible to say that the present falls within that category. The immediate and necessary effect of any adoption by Bhimawa would be to divest Sangawa of her estate. To take effect for cause or motive as the Assistant Judge has done would be to place a bar upon Bhimawa's ever exercising the right of adoption that she possessed. Such a motive is clearly immaterial.

If the Assistant Judge had found that Bhimawa had adopted capriciously, corruptly, and with an utter disregard of her husband's spiritual benefit, we might then have had to inquire whether under the law in force in this Presidency these motives were in any way material. We need not do that now, for taking his finding as it stands, it merely amounts to a finding that Bhimawa intended to do exactly what she had a perfect right to do at any time she chose, namely, adopt a son and so divest Sangawa of her inheritance. He does not find that the assent of Hanmawa was in any way tainted, or that Bhimawa herself gained anything by the adoption, or that she was not acting from motives of duty. We cannot, therefore, agree with him in holding the adoption invalid, and we reverse his decree, and restore that of the Subordinate Judge with costs in this and Lower Appellate Court on the respondent.

**Ranade, J.** :—The Assistant Judge in this case has held that the *factum* of adoption was proved, but he set it aside on the ground that it was invalid by reason of its having been effected from corrupt and malicious motives. The respondent, original plaintiff, was the youngest of three widows, and it was found in this case that the appellant No. 1, the second widow, with the assent of the eldest widow, adopted appellant No. 4 after the respondent had instituted proceedings *in formá pauperis* to obtain a partition of her share. It has been further found that this adoption was effected to defeat the respondent's claim. From this circumstance, as also from the delay of four years allowed to intervene, and the registration of the adoption-deed and of other [210] documents (executed by appellants Nos. 1 and 4, mortgaging and otherwise alienating without proper consideration the family property to the other appellants) on the same day that respondent's application to sue as a pauper was granted, and the marriage of appellant No. 4 to a near relation of appellant No. 1, the Assistant Judge has inferred that the motives which prompted appellant No. 1 to adopt appellant No. 4 were corrupt and malicious, and that she was not actuated by a due sense of pure religious duty.

We may at once dispose of the alleged acts of waste and improvidence, and the suspicions about the marriage, and the registration of the adoption-deed. They have no bearing either way, as they are subsequent in date to the adoption, which took place in October 1890, while the documents were all executed in January 1891, and the marriage took place in March 1891. The rights of the parties *inter se* cannot be seriously affected by these subsequent acts, and they may, therefore, be safely left out of account, except as indirect corroborations of the original motive which dictated the adoption.

There can be no doubt, on the facts found, that the adoption was effected with a view to defeat the respondent's claim for partition, and we have, therefore, to see how far such a motive can be regarded as sufficiently establishing the elements of corruption and malice in a manner to invalidate the adoption. In none of the authorities relied upon by the counsel on both sides, has any reference been made to any express ancient texts of Hindu law which bear upon

this point. The doctrine is entirely a creation of general equity as formulated in recent judicial decisions.

The proposition was first laid down in a ruling of the Privy Council in the case of *The Collector of Madura* v. *Moottoo Ramalinga*, 12 M. I. A., 397, where it was observed that the evidence about the assent of the kinsmen should be such as suffices to show that the act of adoption was done in the proper and *boná-fide* performance of a religious duty, and neither capriciously, nor from corrupt motive. The context, however, shows that their Lordships had chiefly in view the corruption represented by the kinsmen giving their consent from mercenary motives, and not from a *boná-fide* [211] sense of their duty. It is not alleged in this case that the eldest widow's consent was purchased in this way. This decision, therefore, does not support the view taken by the Assistant Judge as to the motives of appellant No. 1 being corrupt. The next case in order of time is that of *Rakhmabai* v. *Radhabai*, 5 Bom. H. E. Rep., 181, A. C. J. It is of special value as an authority in this case, because the contest there, as here, was between co-widows, and there was considerable delay in making the adoption. The right of the elder widow to adopt without the consent of the younger widow, even though such adoption deprived her of her own rights, was there upheld, and the Judges further held that the interest of the younger widow could not be regarded in the same light as that of other members of an undivided family. See also on this point *Keshav* v. *Govind*, I. L. R., 9 Bom., 94. This distinction between a co-widow and other heirs was re-affirmed in *Ramji* v. *Ghaman*, I. L. R., 6 Bom., 498, and *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., 114, A. C. J. In the last of these cases, it was held that the younger widow was equally interested with the elder widow in securing the husband's future beatitude, which consideration had no force in regard to other heirs, who could not, without their consent, be deprived of any rights which may have become vested in them.

These decisions show that, though the adoption of appellant No. 4 by appellant No. 1 had the effect of defeating the respondent's rights as co-widow, yet as the law gave the power to appellant No. 1, her exercise of that power cannot be regarded as capricious or malicious, merely because she exercised it after respondent instituted her suit *in formá pauperis*. The right of the elder widow to exercise her power cannot properly be made dependent upon the consent of the younger co-widow, whose interest would in many cases be opposed to its exercise—*Bhagubai* v. *Kalo*, P.J. for 1875, p. 45. The exercise of a valid power by a properly authorized person cannot be held to be capricious or malicious in law solely because it defeated the expectations of others.

In the case of *Vithoba* v. *Bapu*, I. L. R., 15 Bom., 110, the adoption was admittedly effected pending legal proceedings with a view to defeat [212] those proceedings of the rival claimant, and that circumstance was not held sufficient to vitiate the adoption on the ground of caprice or malice, when it had been made with the assent of the head of the family. The next case reported in the same volume—*Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*, I. L. R., 15 Bom., 565,—further shows that the mere existence of alleged ill-will is not by itself sufficient to prove corruption and malice. It was held in this last case that when a widow adopts with the consent of the nearest sapinda, in this case the eldest widow, there is a presumption that she has performed the act from proper motives, and the burden of proving corrupt motives lies heavily on the other side. This qualification of the rather general terms used in the *Ramnad Case* was made on the authority of two later decisions of their Lordships in which the passage was more fully explained—*Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R., 3 I. A., 154; *Rajah Vellanki Venkata Krishna Row* v. *Venkata*

*Rama Lakshmi Narsayya*, L. R., 4 I. A., 1. In the last of these cases, their Lordships observed that it would be dangerous to introduce into the consideration of these adoption cases nice questions as to the particular motives operating on the mind of the widow, and that all that their Lordships meant to lay down was that there should be such evidence of the assent of the nearest sapinda as would suffice to prove that the adoption was not made from capricious or corrupt motives. When such assent is secured, it must be presumed that the widow acted from proper motives until the contrary was shown.

All these authorities were referred to in a recent decision—*Mahabaleshvar* v. *Durgabai*, *ante* p. 199,—passed on 13th April 1896, by the Chief Justice and FULTON, J. In that case, the question at issue was approached from the point of view of what circumstances must be proved to show corrupt motives on the part of the adopting widow, and it was held that the agreement of the natural father to pay Rs. 4,000 to the adopting widow, did not vitiate the adoption, as it did not rebut the presumption that she acted from a proper sense of her duty towards her husband. In the present case there is no question of corruption. The same act [213] of adoption which defeated respondent's rights as a widow was equally prejudicial to the personal interests of the appellant No. 1. She might well regard that the breaking up of the family by partition was undesirable. The eldest widow's claims were somehow settled, and her assent was secured to the adoption several years before the respondent had any open differences with appellant No. 1. Under these circumstances, it is plain that the mere delay in giving effect to the legitimate power possessed by her, and her resorting to its exercise when the respondent threatened to break up the joint family, would not make the act either capricious or malicious, solely because it was effected after the institution of the application to sue in *forma pauperis*. The presumption in favour of the *bona fides* of the act would not be rebutted by this circumstance, or by the subsequent acts of alleged waste.

For these reasons we reverse the decree of the Assistant Judge, and restore that of the Subordinate Judge with costs on respondent.

*Decree reversed.*

**NOTES.**

[This was followed in (1905) 28 Mad., 315; (1896) 22 Bom., 558; (1899) 23 Bom., 789.]

[22 Bom. 213]

## APPELLATE CIVIL.

*The 17th April, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Chunilal Premji Marwadi and others............(Original Plaintiffs) Appellants

*versus*

Ramchandra and others............(Original Defendants) Respondents.*

*Registration—Registration Act (III of 1877), Sec. 50—Notice—Registration is notice only of registered documents, not of unregistered documents under which holders of registered documents derive their title—Priority.*

The plaintiffs sued to recover possession from the defendants of certain land which they had purchased from one Ran by a registered deed of sale dated the 22nd August 1882.

* Second Appeal, No. 651 of 1895.

Ran had been given the land by one Harichand by a registered deed of gift dated 15th November 1881.

Harichand however, had purchased the land from one Vithoba on the 22nd March 1876, and the deed of conveyance to him of that date was not registered.

[215] On the 2nd April 1894, the sons of Vithoba (defendants Nos. 1 and 2) sold the land to the third defendant by a deed of that date which was duly registered.

The third defendant contended that the plaintiffs' title depended on the unregistered deed of the 23rd March 1876, executed by Vithoba (father of his vendors), and that his (defendant's) purchase by registered deed dated 2nd April 1894, had priority.

*Held*, that the plaintiffs' claim must be dismissed. They were mere strangers to the land, unless they could rely on the unregistered conveyance by Vithoba to Harichand of the 23rd March 1876, but this conveyance had no effect when brought into competition with the registered conveyance to the third defendant of the 2nd April 1894.

Though the register is notice of registered documents it is not notice of unregistered documents under which holders of registered documents derive title.

SECOND APPEAL from the decision of Arthur H. Unwin, District Judge of Nasik, confirming the decree of the Subordinate Judge of Malegaon.

Suit for possession of land. The plaintiffs had bought the land in question from one Ran on the 22nd August 1882, by a registered deed of conveyance.

Ran had been given the land by one Harichand and had a registered deed of gift from him dated the 15th November 1881.

Harichand, however, had purchased the land from one Vithoba by an unregistered deed dated the 23rd March 1876.

The first and second defendants were the sons of Vithoba and they sold the land to the third defendant by a registered deed dated 2nd April 1894.

The third defendant contended that the plaintiffs' title ultimately rested on the unregistered deed of the 23rd March 1876, executed by Vithoba (the father of his vendors) and that his (the third defendant's) registered deed of 2nd April 1894, had priority to that previous unregistered deed of March 1876.

The Subordinate Judge held that, under section 50 of the Registration Act, the registered sale-deed of defendant No. 3 (Exhibit 46) was entitled to priority over the plaintiffs' unregistered title-deed (Exhibit 29). He, therefore, dismissed the suit.

On appeal by the plaintiffs the Judge confirmed the decree.

The plaintiffs preferred a second appeal.

[216] *Daji A. Khare*, for the Appellants (Plaintiffs).

*Govardhanram M. Tripathi*, for the Respondents (Defendants).

**Farran, C. J.** :—We confirm the decree of the District Judge in this case on the ground that the registered deed dated 2nd April 1894, (Exhibit 46) executed by Vithoba's sons in favour of the defendant No. 3 under section 50 of the Registration Act (III of 1877) takes effect as regards the property comprised therein, being the property in suit, against the unregistered conveyance dated 23rd March 1876, (Exhibit 29) by Vithoba in favour of Harichand, who by deed of gift on the 15th November 1881, (Exhibit 32) gave the property to Ran, who sold it by deed dated 22nd August 1882, (Exhibit 36) to the plaintiff.

It is contended that the deeds of 2nd April 1894, and 23rd March 1876, Exhibit 46 and Exhibit 29, do not come into competition, as the former was executed by the father Vithoba, and the latter was executed by his sons and heirs. The contention ought not to prevail. The title of Vithoba descended upon his sons, and it is the same title which is conveyed by both documents. That is sufficient—*Makandas* v. *Shankardas*, 12 Bom. H. C. Rep., 241.

It is on this argued that the registered documents, dated respectively 15th November 1881, and 22nd August 1882, Exhibit 32 and Exhibit 36, come into competition with, and being prior in date to the deed of 2nd April 1894, Exhibit 46, take precedence over it. We do not think that is so. The plaintiff and his grantors are mere strangers to the land, unless they can rely upon the unregistered conveyance by Vithoba to Harichand in March 1876, Exhibit 29: but this conveyance, as we have stated, does not take effect upon the property when brought into competition with the registered conveyance of April 1894, Exhibit 46. The grantees of Harichand stand in his shoes, and if he could not succeed against the defendant No. 3, neither, we think, can they.

As to the argument based upon the law as to notice laid down in *Dundaya* v. *Chenbasapa*, I. L. R., 9 Bom., 427, that the defendant No. 3 had notice through the registered documents of November 1881, and August 1882, Exhibit 32 and Exhibit 36, of the unregistered document of March 1876, Exhibit 29, it is ingenious, but, we think, un-**[216]**sound. The register may be notice, and in most cases under the rulings of this Court doubtless is, of the registered documents which it contains, but it would be pushing the doctrine of constructive notice beyond all bounds to hold that it is notice of the unregistered documents under which the holders of registered documents derive their title.

Lastly, it is contended that the alleged constructive possession of Harichand of the premises under the kabulayat, Exhibit 41, gave constructive notice of Harichand's purchase to the defendant No. 3. That kabulayat, however, if genuine, was for a year, and expired in 1879, so that as a fact the sons of Vithoba were not holding as tenants under it in 1894; but even if they were, they were in apparent possession, and the constructive possession, which would be in Harichand or his grantees by reason of the kabulayat, was not possession of such a nature as to be notice to the defendant No. 3 of their prior title—*Moreshwar* v. *Dattu*, I. L. R., 12 Bom., 569.

Decree confirmed with costs.

*Decree confirmed.*

**NOTES.**

[This was followed in (1903) 27 Bom., 406; (1902) 27 Bom., 452.]

**[ 22 Bom. 216 ]**

## APPELLATE CIVIL.

*The 15th April, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Lakshmandas Raghunathdas and others........ ...(Original Plaintiffs) Appellants

*versus*

Jugalkishore............(Original Defendant) Respondent.*

*Trustee—Charity—Suit against* de facto *manager or trustee by* de jure *trustees—Dismissal of such suit as barred by limitation—Subsequent suit against same defendant by Advocate-General under Section 539 of Civil Procedure Code—Such suit not affected by first suit—Civil Procedure Code (Act XIV of 1882), Sec. 539*—Res judicata.

In 1887 certain persons alleging that they had been appointed trustees of a temple and its property by its founder Purshotam, brought a suit to evict Purshotam's son from the

* Appeal, No. 139 of 1895.

premises, alleging that he had been their gumasta, but that they had dismissed him and that he refused to give up the property. The High Court dismissed that suit on the ground that it was barred by limitation.

[217] In 1892 the plaintiffs brought the present suit with the consent of the Advocate-General, under section 539 of the Civil Procedure Code (Act XIV of 1882), against the same defendant, alleging that after Purshotam's death the defendant had entered into possession of the property and for some years had carried out the trusts created by his father Purshotam; but that latterly he had claimed the property as his own and refused to perform the trusts. They prayed that trustees might be appointed and the property made over to such trustees. The defendant contended that the plaintiffs in both the suits were the same, *viz.*, persons representing the same *cestues que trustent i.e.*, the devotees of the temple or the general public; that they sued in the same right, and that as the plaintiffs in the former suit were held barred by limitation the plaintiffs in the present suit were also barred.

*Held*, that the present suit was not barred. The plaintiffs in the former suit had no general warrant, such as is conferred on plaintiffs suing under section 539 of the Civil Procedure Code, to represent the public, the objects of the charity. They based their title to sue on their particular appointment by Purshotam, and when it was found that they had by limitation lost their rights to the title derived from that appointment they ceased to represent the public just as though they had been removed from their office. The *de jure* managers and trustees of a public charity losing their right by limitation to oust the *de facto* trustee does not confer on the latter immunity from suit on the part of the Advocate-General or the temple.

APPEAL from the decision of A. Steward, District Judge of Poona, in Suit No. 6 of 1894.

The plaintiffs sued with the consent of the Advocate-General under section 539 of the Civil Procedure Code (Act XIV of 1882), alleging (*inter alia*) that one Purshotam, the father of the defendant, built a temple of Shri Nivdunga Vithoba in the city of Poona for the use of the public and assigned certain property as a gift in charity for the expenses of the idol and devasthan; that on the 18th December 1859, he executed a deed of gift which was duly registered, and constituted himself trustee for life for the management of the property and also appointed trustees for management after his death; that the defendant was in possession of the property and neglected to perform the duties connected with the idol and devasthan; that the defendant was dealing with the property as owner; that all the trustees appointed by Purshotam were dead; that plaintiff No. 3 was the *pujari* (worshipper) of the idol and that the remaining plaintiffs being its devotees had an interest in the continuance[218] of the devasthan and of its property. The plaintiffs prayed that the property, moveable and immoveable, belonging to the devasthan should be handed over to them, or that the Court should appoint other trustees, &c., &c.

The Judge found that the plaintiffs were not entitled to sue under section 539 of the Civil Procedure Code; that the defendant was in possession of the property as owner; and that the claim for his removal, or to recover the property from him, was time-barred. He, therefore, dismissed the suit. The following is an extract from his judgment:—

"The main point for decision in this suit is whether there was a trust as regards the possession and *vahivat* of certain properties alleged to have been dedicated by one Purshotam Ambaidas to the idol in the temple of Nivdung Vithoba at Poona. Defendant urges that he was the owner of the property. I have declined to take fresh oral evidence on this point, as I think that this and all other questions connected with this case can be decided by a reference to the judgment of Mr. Fernandez, First Class Subordinate Judge, which was confirmed by the High Court in P. J., page 155, of 1892 (Ap. 86 of 1889). The plaintiffs urge that these judgments are not admissible in evidence, but I would hold, on the contrary, that these judgments are admissible as a piece of evidence under section 42 of the Indian Evidence

Act. I would even go further and hold that the decree of Mr. Fernandez, which was confirmed by the High Court, operates as *res judicata* between the parties before us, because the matter in issue has been directly and substantially in issue in a former suit between parties litigating under the same title. The plaintiffs in the former suit called themselves trustees, but as no trust was proved, they were not more than devotees of the idol, and that is what the present plaintiffs allege themselves to be. In the former case to prove that a trust had been created, a deed of gift said to have been passed in June 1859, and a will alleged to have been passed about eight years later were produced. Mr. Fernandez held that the deed of gift was proved, but had never been acted on, and he held that the will had not been proved. He held further that it had not been proved that the property in suit was acquired by Purshotam alone without the aid of any ancestral property. On this point their Lordships did not agree with him, for they assumed that the property had been self-acquired, and they do not expressly record any finding on the *danpatra* or the will. They do not, however, quarrel with his decisions on these points, but confirm the decree, from which I gather that their opinion as to the unreliability of those two documents was the same as that of the Subordinate Judge. The judgment of the High Court goes on to say, 'whether the defendant can be regarded, in fact, as a trustee for the temple, and can be removed for misconduct, is not now before the Court.' But I will show to the best of my ability that neither plaintiffs nor defendant were trustees for the [219] temple,—in fact, there has never been any trust. As regards the defendant, the judgment in appeal of the High Court decides that the defendant has always been in possession of the property adversely to the Panch ever since his father's death. If his possession of the property was adverse, he could not have been a trustee. Then as regards the so-called Panch, if the judgment of the First Class Subordinate Judge holds good,—and I say that it must hold good, as it has been confirmed by the High Court,—the deed of gift was never acted on, and the will has never been proved; therefore, there was no trust as regards them, and it is clear that defendant Bapubhai has all along enjoyed the property in his own right as owner and not as gumasta, as held by Mr. Fernandez. I hold, then, that no trust was created by Purshotamdas, and that no Panch was appointed by him, and that the son of Purshotamdas had *vahivat* in his own right and not as gumasta. I, therefore, decide the first point against the plaintiffs and hold that they are not entitled to sue under section 539, Civil Procedure Code, for the removal of the defendant."

Plaintiffs appealed.

*Narandas T. Marphatia*, for the Appellants (Plaintiffs).

*Shamrav Vithal*, for the Respondent (Defendant).

**Farran, C. J.**:—This is a suit filed by the plaintiffs with the consent of the Advocate-General under section 539 of the Civil Procedure Code (*inter alia*) to have trustees appointed for the management of the property specified in the plaint—a temple and its accessories—and to have the property made over to such trustees.

Their allegation is that Purshotam, the father of the defendant, validly dedicated the property in question to public religious uses, and during his lifetime managed the same, and that after his death the defendant, his son, entered into possession of it, and that for some time the trusts created by his father were recognised and carried out, but that latterly the defendant has claimed it as his own, and refused to perform the trusts or allow them to be carried out. The plaint specifies various documents and makes other allegations, but the above is its substance.

The District Judge has rejected the claim altogether and dismissed the suit without recording evidence, on the ground that it is *res judicata* by the decision in *Kupuswami* v. *Jugalkishore*, P. J. for 1892, p. 155. That was a suit by certain persons alleging that they had been appointed trustees of the

charity by Purshotam, and seeking to [220] evict the defendant from the premises on the ground that he had been appointed by them as their gumasta, and that they had dismissed him, and that he refused to give up the property to them. The High Court, without specifically finding whether the plaintiffs in that suit had been appointed trustees by Purshotam or not, dismissed the suit on the ground that their claim to recover possession of the property from the defendant was barred by limitation. The High Court expressly refrained from deciding whether the defendant could be regarded as, in fact, a trustee of the temple and could, as such, be removed for misconduct. The present suit is framed for seeking relief on that footing. It is contended that the plaintiffs in the former suit being the trustees appointed after his death by Purshotam both by the original deed of gift and by his alleged will represented the *cestues que trustent* the devotees of the temple or the general public, and that the present plaintiffs also represent the same *cestues que trustent*, and are, therefore, suing in the same right as the trustees in the former suit, and that thus the parties to the two suits are the same. It is further contended that as it was held in the former suit that the claim of the trustees to recover the property from the defendant was barred, the claim of the *cestuis que trustent* to recover the same property must also be barred. What, however, was held in the former suit was that the particular plaintiffs in that suit had, by the operation of the law of limitation, lost their right (if they had ever possessed one) to represent the charity and to evict the defendant. The plaintiffs in that suit had no general warrant such as is conferred on plaintiffs suing under section 539 of the Civil Procedure Code to represent the public as the objects of the charity. They based their title to sue on their particular appointment by Purshotam, and when it was found that they had by limitation lost their right to the title derived from that appointment, they ceased to represent the public just as though they had been removed from their office. The *de jure* managers and trustees of a public charity losing their right by limitation to oust the *de facto* trustee does not confer on the latter immunity from suit on the part of the Advocate-General or the public. The present suit is not, therefore, we think, barred by the proceedings in the former suit.

[221] The District Judge by an elaborate process of reasoning based upon the findings of the Subordinate Judge has arrived at the conclusion that it must be held that the judgment of the High Court decides more than is above set out, but when an appellate Court dismisses a suit on the ground of its being barred by the law of limitation it must be taken that the merits of the suit are not dealt with even though the decree of the lower Court is formally confirmed.

It is objected that the relief sought in this suit is not within the provision of section 539. It is not necessary to consider that objection at present. Portion of the relief sought is clearly within the section upon the most limited view of its scope.

We reverse the decree of the District Judge and remit the case for retrial on the merits. Costs, costs in cause.

*Decree reversed and case remitted.*

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**NOTES.**

[See also (1906) 33 Cal., 789; (1901) 6 C.W.N., 178, as regards the binding character of a decision against a predecessor. (1908) 4 N.L.R., 98 as regards the question how far a decision on limitation is a decision on the merits.]

[22 Bom. 221]
# APPELLATE CIVIL.

*The 15th April, 1896.*
PRESENT:
SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Ramchandra Raghunath Kulkarni............ (Original Defendant and Opponent) Appellant
*versus*
Kondaji............ (Original Plaintiff and Applicant) Respondent.*

*Dekkhan Agriculturists' Relief Act (Act XVII of 1879), Secs. 15 (B) and 20†—Redemption suit—Instalment decree—Mortgagee in possession under the decree for a specified time—Mortgagor cannot redeem before the specified time.*

Where under a decree passed in a redemption suit brought under the provisions of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) a mortgagee is continued in possession of the mortgaged property for a definite time, he is [222] entitled to retain possession until the expiration of the specified period, and is not liable to be redeemed before then at the wish of the mortgagor.

SECOND APPEAL from the decision of W. H. Crowe, District Judge of Poona, confirming the order of Rao Saheb Moreshvar N. Ovalekar, Subordinate Judge of Khed, in an execution proceeding.

The plaintiff filed a redemption suit against the defendant and obtained a consent decree on the 1st December 1884. The decree directed the plaintiff to pay Rs. 375 to the defendant by instalments of rupees twenty-five a year, and that the defendant should take the income of the mortgaged property in lieu of interest.

The instalments as they became due were paid by the plaintiff. In 1895, however, he paid the whole of the balance that remained due, and he then applied to recover possession of the mortgaged property.

The defendant objected and contended that under the terms of the decree the last instalment would not become due until Magh, Shake 1821 (1898-99

* Second Appeal, No. 4 of 1896.

† Sections 15 (B) and 20 of the Dekkhan Agriculturists' Relief Act:—

15 (B) (1). The Court may in its discretion, in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section three, clause (y) or clause (z) or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.

(2) If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum.

* * * * * * *

20. The Court may at any time direct that the amount of any decree passed, whether before or after this Act comes into force, against an agriculturist, or the portion of the same which it directs under section nineteen to be paid, shall be paid by instalments with or without interest.

A. D.), and that until then he was entitled to remain in possession of the property and to take the produce in lieu of interest; that if the plaintiff were allowed to recover possession before that time, he (defendant) would be a loser; that he had let the land in dispute to a tenant for a period of five years, and that the Court had no power to alter the terms of a consent decree.

The Subordinate Judge granted the plaintiff's application permitting him to pay off the remaining instalments at once and to recover possession of the land.

[223] On appeal by the defendant the Judge confirmed the order.

The defendant preferred a second appeal.

*Purshotam P. Khare*, for the Appellant (Defendant):—The consent decree was, no doubt, passed under the provisions of the Dekkhan Agriculturists' Relief Act; still even under that Act it is not open to the Court to alter the terms of a decree after it has been passed—*Balkrishna* v. *Abaji*, I. L. R., 12 Bom., 326. A Court executing a decree must execute it according to its terms—*Mahant Ishwargar* v. *Chudasama Manabhai*, I. L. R., 13 Bom., 106; *Lakshman* v. *Shekh Abdulla*, P. J., 1890, p. 154. The defendant has suffered loss by possession being given to the plaintiff earlier than at the due date. He has lost interest on his money for which he should be recouped. Further, relying on the decree he has already let the land, and the period of tenancy is yet to run. If the tenant be evicted, he will sue the defendant for damages.

*Trimbak R. Kotwal*, for the Respondent (Plaintiff):—The order for the payment of the decretal debt by instalments was in the interest of the plaintiff, who is an agriculturist, and not for the benefit of the defendant. The defendant has, therefore, no right to refuse to receive the balance of the debt at once. The decree does not prevent the plaintiff from paying the debt at once if he can. It is not open to the defendant to say that because he has leased the land for a period which has not expired, the plaintiff is not entitled to recover possession.

**Farran, C.J.**:—The decree in this case provides that its amount (Rs. 375) shall be paid by the plaintiff by annual instalments of Rs. 25 each and that until the decree is paid off in Shake 1821 the defendant is to remain in possession of the mortgaged property and to receive the produce in lieu of interest, he paying the assessment. The suit in which the decree was passed was for redemption and was brought under the provisions of the Dekkhan Agriculturists' Relief Act. The decree was the result of a compromise and was passed by consent, but presumably after the Judge had satisfied himself that the mutual obligations of the parties had been equitably determined. Section 15 (B) of [224] the Act enabled the Court in its discretion to pass the decree in the above form.

The plaintiff has paid several instalments in pursuance of its terms. The question is whether he is now entitled at once to pay the residue of what is due under the decree and redeem the property. The matter is of importance, as section 15 (B) enables the Court in its discretion to continue the mortgagee in possession of the mortgaged property for a fixed period as a means of liquidating the debt, and the question is likely often to recur.

The general rule is that when the mutual rights and obligations of the plaintiff and defendant have been determined by a decree, the decree affords the measure of those rights and obligations, and a Court executing the decree can only execute it in accordance with its terms—*Lakshman* v. *Shekh Abdulla*, P. J., 1890, 154; *Mahant Ishwargar* v. *Chudasama Manabhai*, I. L. R., 13 Bom., 106, and *Balkrishna* v. *Abaji*, I. L. R., 12 Bom., 326. In the last mentioned case it was held that when a decree was made payable

by instalments, the whole becoming due in default of payment of an instalment, the Court had no power, even under the Dekkhan Agriculturists' Relief Act, to make a further order for the payment of the decree by instalments. Section 20 of the Act now confers that power upon the Court, but no general power to vary the terms of a decree once passed is thereby given.

The decree in the present case determines the mode in which the plaintiff is entitled to redeem and the defendant is liable to be redeemed, and we think that, in the absence of consent, the executing Court cannot compel the defendant to allow himself to be redeemed except in accordance with the mode provided by the decree. To allow the plaintiff to redeem now would be a hardship on the defendant. As each instalment is paid to the defendant, the stipulation as to interest contained in the decree becomes more and more favourable to him. When half the debt is paid, he receives as much interest on the unpaid half as he originally obtained on the whole, and so, as each instalment is paid, he gets an increasingly high rate of interest on the unpaid balance. This must be presumed to have been in [225] the mind of the Judge when he passed the decree, and he must have struck, or the parties must have done so with his approval, a fair average rate for the whole period. The defendant, moreover, alleges that on the strength of the terms of the decree he has let the land to tenants and thus incurred obligations towards them. It would be manifestly unfair to expose him to risk at the suit of such tenants. We think that when a mortgagee is, under a decree, continued in possession of the mortgaged property for a definite time he is entitled to retain that possession until the expiration of the specified period and is not liable to be redeemed before then at the wish of the plaintiff. His position otherwise would be most anomalous.

We reverse the orders of the Courts below and dismiss the Darkhast No. 377 of 1895 with costs throughout.

*Order reversed.*

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[ 22 Bom. 225 ]

## APPELLATE CIVIL.

*The 16th April, 1896.*

PRESENT:

SIR C. FARRAN KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Maluji and others............(Original Plaintiffs) Appellants

*versus*

Fakirchand and others............(Original Defendants) Respondents.*

*Limitation Act (XV of 1877), Sch. II, Art. 134—Purchaser for value—Mortgage—Mortgage in 1842—Subsequent mortgage in 1872 by mortgagee representing himself to be owner—Decree on second mortgage—Sale in execution—Purchaser at auction sale—Right of original mortgagor in 1892 to redeem mortgaged property.*

In 1842 Andoji, the grandfather of the plaintiff, mortgaged the land in question to one Manekchand with possession. On 9th May 1872, Manekchand's son Lakhmichand, who

* Second Appeal, No 340 of 1894.

was then still in possession, representing himself to be the owner mortgaged the property with possession to Tuljaram (defendant No. 2) and Sarupchand, the grandfather of Lakmichand Gulabchand (defendant No. 3). These defendants sued upon their mortgage of May 1872, and obtained a decree and sold the property in 1881 in execution, purchasing it themselves, Defendant No. 3 subsequently sold his share to one Fulchand (defendant No. 4). In 1892 the plaintiff, (who was the grandson of Andoji, the original mortgagor in 1842), sued the first defendant (the grandson of the original mortgagee Manekchand under the mortgage of 1842) for redemption, making Tuljaram and Lakhmichand and Fulchand (defendant Nos. 2, 3 and 4) party-defendants.

[226] The defendants contended that they were purchasers for value and that the suit was barred by article 134 of the Limitation Act.

*Held*, that the plaintiff was entitled to redeem. By the sale in 1881 the interest of defendant No. 1 (grandson of original mortgagee under the mortgage of 1842) became vested in defendants Nos. 2 and 3. The plaintiff could then have redeemed them on paying off the amount due under the mortgage of 1842, disregarding the mortgage of 9th May 1872, altogether. But when the defendants Nos. 2 and 3 had held possession under that mortgage for twelve years (*i.e.* on 9th May 1884) that mortgage, under article 134* and section 28 of the Limitation Act became a valid mortgage as regards the plaintiffs, and they could not after that date recover possession without redeeming it also. The purchase by defendants Nos. 2 and 3 at the auction sale in 1881 could not avail them, as the present suit was brought within twelve years from that date.

Though a mortgagee is a purchaser for value he is not an out-and-out purchaser, but only a purchaser *sub modo*. He purchases a mortgagee's interest in the land, *viz.*, a right to hold the mortgaged property until the debt is paid.

A mortgagee is *pro tanto* a purchaser for value within the meaning of article 134 of the Limitation Act (XV of 1877).

SECOND APPEAL from the decision of S. Hammick, District Judge of Ahmednagar, confirming the decree of Rao Saheb B. Y. Gupte, Subordinate Judge of Karjat.

Suit for redemption. In 1842 one Andoji, the grandfather of the plaintiffs, mortgaged the land in question to one Manekchand with possession.

In May 1872, Manekchand's son Lakhmichand Manekchand, who was then still in possession representing himself to be the owner, mortgaged the land with possession to Tuljaram (defendant No. 2) and Sarupchand, the grandfather of Lakhmichand Gulabchand (defendant No. 3) and on 17th September 1878, these mortgagees obtained a decree on their mortgage, and in April 1881, sold the land in execution and bought it themselves, duly obtaining a certificate of sale. Subsequently to their purchase they held possession prior to this suit for nearly eleven years, and Lakhmichand Gulabchand (defendant No. 3) had sold his share to one Fulchand (defendant No. 4) and had given him possession.

In 1892 the plaintiffs, who were the grandsons of Andoji, the original mortgagor, brought this suit against the first defendant Fakirchand (grandson of Manekchand the original mortgagee) for redemption of the mortgage of 1842, making Tuljaram and [227] Lakhmichand and Fulchand (defendants Nos. 2, 3 and 4) party defendants.

* [ Art. 134 :—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. | Twelve years ... | The date of the purchase.] |

The defendants alleged that in 1872 the land was the property of Lakhmichand Manekchand, who had mortgaged it in May 1872, to defendants Nos. 2 and 3 representing himself to be the owner. They pleaded that they were purchasers for value, and that the suit was barred by limitation under article 134 and section 28* of the Limitation Act (XV of 1877).

The Subordinate Judge relying on the decision in *Yesu Ramji* v. *Balkrishna*, I.L.R., 15 Bom., 583, held that the claim was time-barred and dismissed the suit.

On appeal by the plaintiffs the Judge confirmed the decree.

The plaintiffs having then preferred a second appeal, the High Court (FARRAN, C. J., and PARSONS, J.), on the 6th September 1894, sent down the following issue for the findings of the lower Courts:—

"Whether when the defendants Nos. 2 and 3 took the mortgage from defendant No. 1 in 1872 they did so with notice that defendant No. 1 was himself a mortgagee, or whether they took the mortgage on the representation and in the belief that his was an absolute title?"

The findings of both the lower Courts on the issue were that when defendant No. 1 mortgaged the land to defendants Nos. 2 and 3 he put himself forward as the absolute owner of the property.

*Ghanasham N. Nadkarni*, appeared for the Appellants (Plaintiffs):—The defendants are, no doubt, purchasers for value under article 134, Schedule II, of the Limitation Act. But we submit that they are purchasers in a limited sense. What the defendants Nos. 2 and 3 purchased at the auction sale was the interest of the mortgagee under the mortgage of 1842. That interest would have become an absolute ownership under article 134 in twelve years. But this suit is brought within twelve years. They are, therefore, only mortgagees and not owners, and the plaintiffs are entitled to redeem.

*Mahadeo V. Bhat*, appeared for the Respondents (Defendants):—We rely on *Yesu Ramji* v. *Balkrishna*, I. L. R., 15 Bom., 583; Shephard on Limitation, [228] p. 103; Vol. XVI, p. 466, of the Proceedings of the Legislative Council. The first adverse act on the part of the defendants took place in the year 1872, when defendant No. 1, professing himself to be the owner, mortgaged the land to defendants Nos. 2 and 3. The present suit not being brought within twelve years from that date is clearly time-barred.

**Farran, C.J.**—We have considered, and are not prepared to dissent from the ruling in *Yesu* v. *Balkrishna*, I. L. R., 15 Bom., 583, that mortgagees are (*pro tanto*) purchasers for value within the meaning of article 134 of the Limitation Act. "A purchaser for value" is an expression well known to lawyers, used in contradistinction to a mere volunteer; and we do not find that there are sufficient indications afforded in the Limitation Act to lead us to feel confident that it has not been used by the Indian Legislature in article 134 in that sense. It is so used in the English Statute (3 and 4 Will. IV, clause 27, section 25), the cases decided under which may, we think, be resorted to as a guide to the meaning of the expression. They will be found collected in Lewin on Trusts, page 876.

This is not, however, decisive, as held by the lower Courts, against the plaintiffs' right to redeem altogether. It only, we think, imposes upon them the necessity of redeeming the mortgage created by the father of defendant No. 1 before they can recover possession of the property. Though a mortgagee is a purchaser for value he is not an out-and-out purchaser, but only a purchaser *sub modo*. He purchases a mortgagee's interest in the land, *viz.*, a right to hold the mortgaged property until his debt is paid.

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Extinguishment of right to property.

*[Sec. 28:—At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.]

The dates and facts as alleged or found are these. The plaintiffs' ancestor, it is alleged, in 1842 mortgaged the land with possession to the grandfather of the defendant No. 1. On the 9th May 1872, the father of the defendant No. 1, representing himself to be the owner, mortgaged the property with possession to the defendant No. 2 and to the ancestor of defendant No. 3. On an issue sent down it has been found that the mortgagees (defendants Nos. 2 and 3) in taking the last-mentioned mortgage **[229]** were led to believe that defendant No. 1 was the full owner of the mortgaged property and as such executed the mortgage in their favour. They did not merely take an assignment of defendant No. 1's mortgage interest. In 1878 the defendant No. 2 sued the defendant No. 1, and in that suit obtained a decree upon the mortgage of 9th May 1872, and in execution of the decree caused the mortgage property to be sold in 1881. It was purchased by the defendant No. 2 on behalf of himself and his co-mortgagee, defendant No. 3. The latter subsequently sold his interest in the property to the defendant No. 4. The plaintiffs filed the present suit for redemption in 1892.

As none of the defendants have held possession as out-and-out purchasers for the statutory period of twelve years, the plaintiffs have not, we think, under article 134 lost their right to redeem. All the interest of defendant No. 1 has now centred in the other defendants. The plaintiffs would, therefore, be entitled to redeem them on paying off the amount of the alleged mortgage of 1842, unless the law of prescription has validated the mortgage of 9th May 1872. Until the defendants held possession under that mortgage for the full period of twelve years, the plaintiffs could have disregarded it and recovered possession, notwithstanding its existence, by paying off the amount due on the original alleged mortgage of 1842. When, however, the defendants Nos. 2 and 3 had held possession under it for twelve years (which would be on the 9th May 1884), article 134 coupled with section 28 of the Limitation Act gave, we think, legal validity to it, and the plaintiffs from that date were barred by article 134 from recovering possession of the property, disregarding the mortgage of 9th May 1872. The possession of the defendants Nos. 2 and 3 was, however, only that of mortgagees, and like all other mortgagees they were, of course, liable to be redeemed at suit of the person entitled to the equity of redemption, and still are, we think, liable to be redeemed, as the out-and-out ownership, which their purchase of 1881 might (it was a Court sale, and we express no opinion as to its effect) have conferred on them, if twelve years had elapsed from its date at the time of suit brought, does not avail them. The suit was brought within twelve years of the purchase. As, however, the defendants' purchase in 1881 does not avail **[230]** them, we think that they can fall back upon their position of mortgagees under their mortgage of 9th May 1872, which, as we have said, became by prescription a valid mortgage on the 9th May 1884. The plaintiffs must, therefore, redeem that mortgage before they can recover possession of the mortgaged premises. For these reasons we must reverse the decree of the Courts below and remand the case for determination of the remaining issues. Costs hitherto incurred to be costs in the cause.

*Decree reversed and case remanded.*

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**NOTES.**

[For '*purchase*,' the word '*transfer*' has been substituted in the Limitation Act, 1908, Art. 134; see also (1909) 36 Cal., 1003; (1905) 2 C.L.J., 546; (1911) 15 C.W.N., 417; (1899) 23 Bom., 614; (1911) 36 Bom., 146; (1898) 20 All., 482; (1899) 21 All., 277; (1907) 29 All., 471; (1905) 8 O. C., 233; (1906) 9 O.C., 373.]

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[22 Bom. 230]

## APPELLATE CIVIL.

*The 16th April, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Patel Panachand Girdhar and others............(Original Plaintiffs) Appellants

*versus*

The Ahmedabad Municipality............(Original Defendant) Respondent.*

*Municipality—Suit against municipality for injunction—Notice of action—Bombay Act VI of 1873, Secs. 17, 33 and 42—Discretion of municipality to take action under Section 33, clause 3 of Bombay Act VI of 1873—Court's power to interfere with such discretion—Bombay Act II of 1884, Sec. 48.*

A suit for an injunction to restrain a municipality from removing a certain building or construction is not an action "for anything done, or purporting to have been done in pursuance of the Act" within the meaning of section 48 of Bombay Act II of 1884. Such a suit can, therefore, be brought without giving previous notice to the municipality.

Apart from the provisions of section 33 of Bombay Act VI of 1873, it is only if the site of a building is vested in a municipality under section 17, that this body is empowered, whether by section 42 or by any other section, to take steps for the removal of the building.

The discretion of taking action or otherwise under the 3rd clause of section 33 is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of section 33 is or is not a measure likely to promote the public convenience. If the municipality adopt the proper procedure, no Court can review its decision on the ground that in the opinion of the Court the removal of the building is not likely to promote public convenience. The Legislature has confided to the municipality, and the municipality alone, the duty of deciding what measures within its legal powers are for the public convenience, and its discretion is not subject to control by the Courts.

[231] SECOND APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad, in Appeal No. 242 of 1893.

The plaintiffs sued for an injunction restraining the municipality of Ahmedabad from removing a *chora* and a *parabdi*, alleging that the *chora and parabdi* stood on a site belonging to the inhabitants of Hanuman Street in Ahmedabad; that the *parabdi* was recently rebuilt on the foundation of an old *parabdi*; and that the municipality had attempted to remove the same without giving proper notice.

The defendant municipality pleaded (*inter alia*) that the site of the *chora* and *parabdi* was part of a public street and as such was vested in the municipality; that the municipality had authority to remove the structures under section 33 of the Bombay District Municipal Act (VI of 1873); and that the suit was bad for want of notice under section 48 of Bombay Act II of 1884.

The Subordinate Judge disallowed these pleas, and passed a decree granting the injunction sought.

On appeal the District Judge reversed this decree, holding that the suit was bad for want of notice under section 48 of the Bombay Act II of 1884, and that the ground upon which the *chora* and *parabdi* stood did not belong to the plaintiffs but to the municipality.

* Second Appeal, No. 544 of 1895.

Against this decision the plaintiffs preferred a second appeal to the High Court.

*Nagindas Tulsidas* (with *Ganpat S. Rao*), for Appellants.

*C. H. Satalvad*, for Respondent.

**Fulton, J.**:—The objection to this suit based on section 48 of Bombay Act II of 1884 was not pressed in argument by Mr. Chimanlal. It is clear that a suit for an injunction to restrain a municipality from removing a certain building or construction is not an action "for anything done, or purporting to have been done, in pursuance" of the Act.

We turn then to the merits. Apart from the provisions of section 33 of Bombay Act VI of 1873 it cannot, we think, be disputed that it is only if the site of the *chora* and *parabdi* are vested in the municipality as a public street that this body is empowered, whether by section 42 or by any other section, to [232] take steps for their removal. Section 17 specifies the property vested in the municipality, and it is contended that the ground in dispute—namely, the site on which the *chora* and *parabdi* are erected—forms part of a public street. The question, then, to be determined is whether such site forms part of a public street. The learned District Judge has discussed the question whether the recess in which the *chora* and *parabdi* stand is a public street, though he has not arrived at any very clear decision on the point. But he has not considered whether, supposing the recess to be a public street, the site of the *chora* and *parabdi* forms part of such street. *Primâ facie* the site is the property of the persons who by building the *chora* have occupied it to the exclusion of the public—*The Secretary of State for India in Council* v. *Jethabhai*, I. L. R., 17 Bom., 293. They have apparent possession, and are presumably the owners till the contrary is proved (section 110, Evidence Act). But it may be shown that previous to the recent construction or reconstruction of the *chora* the site on which it now stands formed part of the public street. That is a question of fact on which we can come to no decision. It is alleged that there was an old *chora* of which only foundations remained. It is also alleged that the post on which the *parabdi* stands has always been there. If these allegations are sustained, there can be no doubt the difficulty of proving the site to be part of the public street will be increased. The site of an old *chora* which had been abandoned for a number of years might possibly be found to have been left so long unoccupied by its owners as to raise a presumption of dedication to the public or the public might have acquired a right of way over it; but facts necessary to support either of these conclusions would have to be established, and in the case of a small plot of land the proof of acts of user by the public would probably be difficult. However this may be, as the site is now covered by a *chora*, it is for the municipality, which alleges it to form part of the public street, to prove facts from which it can be inferred that the allegation is correct.

There are other points, too, in regard to which findings are necessary to enable us to dispose of the case. In the lower Court it was contended for the municipality that the *chora* had [233] been recently constructed without notice under section 33, and that, therefore, irrespective of title to the ground, it had a right to remove it. The Subordinate Judge held that the *parabdi* did not interfere with the public safety, health or convenience, and that, therefore, the municipality were not justified in exercising the discretionary power given them by clause 3 of section 33. He also held that as upon the evidence on record it appeared that the disputed *parabdi* and *chora* had been built upon the site of the old *parabdi* and *chora*, no notice was necessary under section 33, clause 1, and the municipality was consequently not justified under that

section in ordering their removal—*Krishnaji* v. *The Municipality of Tasgaon*, I. L. R., 18 Bom., 547. Against this decision no very distinct objection was taken in the points of appeal to the District Court; but as the question was apparently raised in the 3rd issue, and decided in the affirmative, we have to determine it. We are unable to agree with the Subordinate Judge that, assuming the plaintiff to have built without notice, and assuming that under the circumstances of the case notice was necessary under section 33 before building, it was not within the discretion of the municipality to order the removal of the *chora* if it thought a proper case had been made out. The discretion of taking action or otherwise under the 3rd clause of section 33 is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of section 33 is or is not a measure likely to promote the public convenience (*vide* section 24, clause 21). If the municipality adopts the proper procedure, no Court can review its decision on the ground that in the opinion of the Court the removal of the building is not likely to promote public convenience. The Legislature has confided to the municipality, and the municipality alone, the duty of deciding what measures within its legal powers are for the public convenience, and its discretion is not subject to control by the Courts—*vide Allcroft* v. *Lord Bishop of London*, [1891] A. C., 666. As to the second ground on which the Subordinate Judge considered that no order for removal could be made under section 33—namely, that the *chora* was built entirely on old foundations—we refrain from expressing any opinion until the District [234] Judge has formed his conclusions as to the facts and the application to them of the law.

Assuming that notice under clause 1 of section 33 ought to have been given to the municipality before the *chora* was constructed, the question remains whether the municipality has given due notice of removal under clause 3. Mr. Chimanlal contended that the notice to Vithal Panachand had been accepted as sufficient; but until it is found either that the notice to Vithal has been accepted as sufficient or for some reason is sufficient, or that notice has been duly served as provided in section 76, it is impossible to see how the municipality can be justified at present in removing the *chora*. We do not know the facts, which must be ascertained by the District Judge. They may be important in determining whether, in case an injunction is granted, it should be of permanent effect or merely of temporary effect until the municipality has followed the procedure prescribed by law.

Lastly, supposing the procedure in section 33 to be inapplicable, and supposing it to be found that site of the *chora* is part of a public street, it has to be found whether the municipality has given sufficient notice of removal to satisfy the requirements of section 42. But as no form of notice is prescribed, it is probable that, if there was sufficient notice of removal for purposes of section 33, it would equally suffice for the purposes of section 42. We shall, however, be in a better position to decide the whole case when the facts are before us.

We now send down the following issues :—

1. Whether it is proved that the site of the *chora* and *parabdi* forms part of a public street?

2. Whether, before the recent construction or reconstruction of the *chora*, notice to the municipality was required under the first clause of section 33?

3. Whether notice by the municipality requiring removal of the *chora* and *parabdi*, whether (*a*) under section 33, clause 3, or (*b*) under section 42, has been duly given or accepted as sufficient?

[235] As on the first of these issues neither the parties nor the Courts appear to have noticed the necessity for determining whether the actual site (as distinguished from the recess in which it is situated) was part of a public street, we think it fair to allow fresh evidence to be given.

The findings of the District Court should be returned within four months.

*Case remanded.*

**NOTES.**

[See also (1902) 27 Bom., 221; (1913) 20 I. C., 572 (Sindh); (1913) 23 I. C., 317 (Punjab).]

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[22 Bom. 235]

## APPELLATE CRIMINAL.

*The 28th May, 1896.*

PRESENT:

MR. JUSTICE STRACHEY AND MR. JUSTICE FULTON.

Queen-Empress
*versus*
Nagla Kala.*

*Evidence Act (I of 1872), Sec. 26—Confession—Confession made to a Magistrate of a Native State—Admissible—Evidence.*

The words "police officer" and "Magistrate" in section 26 of the Indian Evidence Act (I of 1872) include the police officers and Magistrates of Native States as well as those of British India.

A confession made by a prisoner, while in police custody, to a First Class Magistrate of the Native State of Muli in Kathiawar, and duly recorded by such Magistrate in the manner prescribed by the Code of Criminal Procedure (Act X of 1882), is admissible in evidence.

*Queen-Empress* v. *Sundar Singh*, I. L. R., 12 All., 595, followed.

APPEAL from the conviction and sentence recorded by Gilmour McCorkell, Sessions Judge of Ahmedabad.

The accused was tried for murder.

The evidence for the Crown consisted (*inter alia*) of a confession made by the accused while in police custody.

The confession was made to a First Class Magistrate of the Native State of Muli in Kathiawar. It was recorded by the Magistrate in the manner prescribed by the Code of Criminal Procedure (Act X of 1882) and signed by the accused in the presence of the Magistrate.

At the trial the Magistrate was called as a witness for the Crown; and he deposed that he had taken down the prisoner's statement with his own hand in the prisoner's own words. [236] The statement was read and recorded as evidence against the accused.

The jury found the prisoner guilty of murder by a majority of 3 to 2.

The Sessions Judge concurring with the majority of the jury convicted the accused of murder and sentenced him to transportation for life.

Against this conviction and sentence the accused appealed to the High Court.

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* Criminal Appeal, No. 50 of 1896.

There was no appearance either for the Crown or for the Accused.

*Per Curiam*:—The papers in this case were called for to consider the admissibility, in evidence, of a confession by the prisoner recorded by a First Class Magistrate of the Muli State in Kathiawar. The accused while making the confession was in the custody of a police sepoy, who was present in the room. The confession was regularly recorded in the manner usual under the Criminal Procedure Code in British districts: it was signed by the mark of the accused in the presence of the Magistrate, who also signed it and added the usual certificates. At the trial the Magistrate was examined as a witness and deposed that he was a First Class Magistrate in the Muli State, and that he had taken down the accused's statement with his own hand in the accused's own words. The statement was then read as evidence.

The only question that arises is whether section 26 of the Evidence Act renders the confession inadmissible. Section 26 is as follows: "No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Explanation:—In this section Magistrate does not include the heads of a village discharging magisterial functions in the Presidency of Fort St. George or in Burmah or elsewhere, unless such headman is a Magistrate exercising the powers of Magistrate under the Code of Criminal Procedure, 1882." There was no appearance for either the prisoner or the Crown, but in another case in which judgment will be delivered to-day we have had the advantage of hearing on this very point the arguments of [237] Mr. Branson for the prisoners and the Government Pleader for the prosecution, and had our attention called to the cases reported in Weir's Reports, page 800, and *Queen-Empress* v. *Sundar Singh*, I. L. R., 12 All., 595.

We have then to consider whether the words "police officers" and "Magistrate" as used in this section are applicable only to British officials, or whether they apply also to the officials of Native States. In our opinion the words include the police officers and Magistrates of Native States as well as those of British India. In regard to the police, it would be unreasonable to hold that a confession made to a Native State policeman should be more admissible than one made to a British policeman. We agree with the opinion of GARTH, C. J., in the *Queen* v. *Hurribole Chunder Ghose*, I. L. R., 1 Cal., 207, that in the Evidence Act the term police officer should be read "not in any strict technical sense, but according to its more comprehensive and popular meaning," and can see no justification for declaring that the officials ordinarily described as police officers in Native States, and performing in such States the functions of police, are not police officers within the meaning of sections 25 *, 26 † and 27 ‡ of the Evidence Act.

Turning, then, to the word Magistrate in section 26 we think that it must equally include Magistrates in Native States. The statement in the General

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Confession made to a Police officer not to be used as evidence.

* [Sec. 25:—No confession made to a Police officer, shall be proved as against a person accused of any offence.]

Confession made by accused while in custody of Police not to be used as evidence.

† [Sec. 26:—No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.]

So much of statement or confession made by accused as relates to fact thereby discovered, may be proved.

‡ [Sec. 27:—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.]

Clauses Act (I of 1868) that Magistrates shall include all persons exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure suggests that there may be Magistrates not belonging to the class included. In the *Empress* v. *Ramanjiyya*, I. L. R., 2 Mad., 5, the Madras High Court held that the word "Magistrate" in section 26 included village Munsifs. This was thought objectionable, and by Act III of 1891 the section was amended so as to exclude village headmen; but when making this amendment the Legislature must have been acquainted with the decision of the Allahabad High Court in the *Queen-Empress* v. *Sundar Singh*, I. L. R., 12 All., 595, (1890), and if it had desired to limit the meaning of the term Magistrate in section 26 to Magistrates under the Code of Criminal Procedure, nothing would have been easier than to say so. Such a limitation, however, which would exclude the use, in British Indian Courts, of a confession made [238] by a person while in police custody to a Magistrate in England or in a Foreign country, does not appear to have been intended.

In these circumstances we think we may safely follow the decision of the Allahabad High Court above referred to in so far as it admits in evidence a confession made in the presence of a Magistrate of a Native State. That decision, it is true, deals with the question of the admissibility of the record of the proceedings of a Magistrate of a Native State under section 80 of the Evidence Act, but as it is based on the construction of the word "Magistrate" in that section as including a Magistrate in a Native State it is an authority for a similar construction of the word in section 26; for it would, we think, be unreasonable to hold that the Legislature used the same word in different senses in the same Act. We, therefore, reject the appeal, which raises no other point open to argument under section 418 of the Criminal Procedure Code.

NOTES.

[As regards admissibility of confessions before foreign Police Officers, see also (1912) 11 M. L. T., 407; 16 Bom. L. R., 261; (1907) P. R., 8; (1909) P. R., 2.]

[22 Bom. 238]

APPELLATE CIVIL.

*The 8th June, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Motiram Balkrishna Rajmane............(Original Plaintiff) Appellant

*versus*

Yesu and others...........(Original Defendants) Respondents.*

*Civil Procedure Code (Act XIV of 1882), Sec. 375—Compromise—Court cannot refuse to record a compromise except where unlawful.*

The terms of section 375 of the Civil Procedure Code (Act XIV of 1882) are imperative, and a Court cannot refuse to record a lawful agreement of compromise, and to pass a decree in accordance therewith, merely because in its view it is too favourable to one of the parties.

SECOND APPEAL from the decision of Rao Bahadur N. G. Phadke, First Class Subordinate Judge of Sholapur with appellate powers, confirming the decree of Rao Saheb G. B. Laghate, Subordinate Judge of Karmala.

* Second Appeal, No. 34 of 1895.

The plaintiff sued to recover possession of certain land.

The defendant claimed that the property was his, alleging that the plaintiff had purchased the property *benami* for him (the defendant).

[239] At the first hearing the parties stated to the Court that the suit had been compromised in the terms that the defendant should pay to the plaintiff Rs. 225 within six months, and that the plaintiff should give up his claim to the land, and they applied that a decree should be passed in the terms of the compromise. The Subordinate Judge, however, refused to grant the application, but went into the merits of the case and found that the plaintiff had purchased the land for the defendant and that the defendant was the rightful owner. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge confirmed the decree. The following is an extract from his judgment:—

"The wording of section 375 of the Civil Procedure Code is certainly imperative in the matter of recording the compromise come to by the parties to the suit in respect of the subject-matter thereof; but it must be borne in mind that the Court is bound to adopt the procedure laid down in that section on the condition that the compromise is lawful and not otherwise. Exhibit No. 14, which embodies the compromise, bears the signatures of both the parties thereon, and the plaintiff therein admits himself to be a *benami* purchaser. In these circumstances the compromise cannot be said to be just and lawful, inasmuch as the plaintiff is thereby receiving some benefit at the sacrifice of the just interest of the defendant. The plaintiff is according to the compromise to get Rs. 225 from defendant for nothing. The defendant agreed to pay that sum at the suggestion of the panch only because he thought that he would otherwise be losing his beloved land."

*Ganesh K. Deshamukh*, appeared for the Appellant (Plaintiff):—The compromise was effected under section 375 of the Civil Procedure Code. The Judge refused to give effect to the compromise on the ground that the plaintiff was deriving an advantage to which he had no right. The Judge was wrong in refusing to record the compromise on that ground. The only ground on which the Court can refuse to record a compromise is that it is unlawful. Under section 375 the Court cannot go into the question of the compromise being just and equitable. The plaintiff's giving up all further litigation was a sufficient consideration.

*Mahadeo B. Chaubal*, appeared for the Respondents (heirs of the original defendant, deceased):—It is not now open to the plaintiff to insist upon the compromise, because after it was stated to the Court, the parties proceeded with the suit tendered evidence and [240] allowed the case to be decided on the merits. The application was made on the 14th November 1892. The whole evidence was recorded after that date and the case was decided on the 10th March 1893. The conduct of the parties shows that they decided not to be bound by the suggested compromise and, therefore, it is ineffectual—*Shankar Venkatpataya* v. *Gopal Mahableshwar*, P. J., 1893, p. 286. The Subordinate Judge was of opinion that the defendant did not really understand the effect of the compromise. The parties reside in the Sholapur District to which the Dekkhan Agriculturists' Relief Act applies. Reference to arbitration was made while the suit was pending; therefore such a reference would not be legal taking into consideration the object and scope of that Act.

**Farran, C.J.**:—In this case we think that the Court was bound under section 375 of the Civil Procedure Code to record the compromise and pass a decree in accordance therewith. The case has not been brought within the special provisions of the Dekkhan Agriculturists' Relief Act, and must, therefore, be determined by those of the Civil Procedure Code alone. The terms of

section 375 are imperative, and the lower Courts could not refuse to act upon the agreement of compromise, merely because, in their view, it was too favourable to the plaintiff. In no sense was the compromise unlawful.

The case of *Shankar Venkatpataya* v. *Gopal Mahableshwar*, P. J., 1893, p. 286, has no application here, as the Subordinate Judge, when reserving his decision as to whether he would record the compromise, ordered the defendant to proceed with his evidence.

We must, therefore, reverse the decrees of the lower Courts and pass a decree in accordance with the terms of the compromise of the 14th November 1892. The time for the payment by the defendant of the Rs. 225 must be extended for a period of six months from this day. As the cost of the subsequent proceedings has been caused by the error of the Subordinate Judge, we direct each party to bear his own costs throughout.

*Decree reversed.*

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## [241] APPELLATE CIVIL.

*The 16th June, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Kikabhai Gandabhai............(Original Plaintiff) Appellant

*versus*

Kalu Ghela and others............(Original Defendants) Respondents.*

*Landlord and tenant—Yearly tenancy—Notice to quit—Notice to make a fresh agreement with the landlord or to quit at the end of the year—Sufficient notice.*

On the 28th September 1891, the plaintiff gave defendants, who held his land as annual tenants, a notice in the following terms:—

"Therefore, within two days from the receipt of this notice, meet us, increase the rent and give us a legal writing, or in default, on the 31st March 1892, we shall keep present two good men and take full possession of the said land with all trees, &c., on that day, and no contention of yours in that matter will avail; and if you raise a contention we shall have recourse to a regular suit to obtain possession, and you will be responsible, &c."

*Held* that the notice was a good and valid notice to terminate the tenancy.

SECOND APPEAL from the decision of T. Hamilton, District Judge of Surat, reversing the decree of Khan Saheb Jahangir E. Modi, Subordinate Judge of Olpad.

The plaintiff sued to recover possession of certain lands, alleging that the defendants were yearly tenants; that he served them with a notice on the 28th September 1891, to pay enhanced rent or to give up possession on the 31st March 1892, and that they refused either to pay the enhanced rent or to vacate the lands.

The following is the material portion of the notice referred to in the plaint:—

"We have very often told you and sent you word that you are not giving us a rent-note and you are putting us off from time to time. Besides, people are ready to give

* Second Appeal, No. 709 of 1895.

us more rent; therefore, we are now not willing to keep you for good. Therefore within two days of the receipt of this notice meet us, increase the rent and give us a legal writing, or in default on the 31st March 1892, we shall keep present two good men and take full possession of the said land with all trees, well, &c., on that day, and no contention of yours in that matter will avail, and if you raise a contention, we shall have recourse to a regular suit to obtain possession, and you will be responsible for the expenses."

The defendants pleaded *(inter alia)* that the notice given by the plaintiff was not a good legal notice.

**[242]** The Subordinate Judge found that the notice served by the plaintiff on the defendants was sufficient. He, therefore, allowed the claim.

On appeal by the defendants the Judge held that the notice given to the defendants was not sufficient, and he reversed the decree.

The plaintiff preferred a second appeal.

*Govardhanram M. Tripathi*, appeared for the Appellant (Plaintiff):—The notice was good. It was given more than six months before 31st March 1892. Sections 83 and 84 of the Land Revenue Code (Bombay Act V of 1879) were complied with. The notice is clear and unambiguous and sufficient in law to entitle the plaintiff to maintain an action in ejectment. The Judge has relied on *Mohamaya* v. *Nilmadhab*, I. L. R., 11 Cal., 533, and *Bradley* v. *Atkinson*, I. L. R., 7 All., 899. In the former case there was no question as to the sufficiency of notice, and the latter case is not applicable, because the notice in that case expired in the middle of the month of tenancy. In support of our contention we rely on *Hem Chunder* v. *Radha Pershad*, 23 Cal. W. R., 440; *Ahearn* v. *Bellman*, 4 Ex. D., 201; *Bury* v. *Thompson*, (1895) 1 Q. B., 231; and Woodfall on Landlord and Tenant, page 316 (14th edition).

*Motilal M. Munshi*, appeared for the Respondents (Defendants):—The decision in *Hem Chunder* v. *Radha Pershad*, 23 Cal. W. R., 440, is based on the decisions in *Janoo Mundur* v. *Brijo Singh*, 22 Cal. W. R., 548, which is dissented from in *Mohamaya* v. *Nilmadhab*, I. L. R., 11 Cal., 533. The notice in dispute being a notice in the alternative is not sufficient—*Bradley* v. *Atkinson*, I. L. R., 7 All., 899. The test is what was the intention of the landlord. In the present case the intention of the landlord was to continue the tenancy in case we paid the enhanced rent.

**Farran, C.J.**:—The District Judge in this case has dismissed the plaintiff's suit on the ground that the notice which the plaintiff gave to the defendants, his alleged tenants, was not in law a notice which could determine the tenancy. The Subordinate Judge on that point had come to a different conclusion.

**[243]** Apart from authority, and reading the notice as a person not a lawyer would understand it, we agree with the Subordinate Judge that it expresses the intention of the plaintiff to enter upon and take possession of the land on the 31st March 1892, and requires the defendants to deliver up possession on that day. "Therefore," the notice states, "within two days from the receipt of this notice meet us, increase the rent, and give us a legal writing, or in default on the 31st March 1892, we shall keep present two good men and take full possession of the said land with all trees, &c., on that day, and no contention of yours in that matter will avail, and if you raise a contention we shall have recourse to a regular suit to obtain possession and you will be responsible, &c." The defendants were by that notice allowed two days to make a fresh agreement with their landlord, failing which the notice to them to quit at the end of the year became an absolute notice. Two days after the defendants received that notice, when they knew that they had not made an agreement with the plaintiff, they had before them a written notice which had then become unconditional

that they must give up possession on the 31st March 1892. The terms of the notice could not possibly, we think, have left them in doubt as to what was required of them. That to an ordinary mind would appear to be sufficient to terminate the defendants' existing tenancy on the day specified, assuming it to have been a tenancy which the plaintiff had the right to terminate by notice.

Is there, then, anything in the authorities which prevents us from holding such a notice to be a good and valid notice to terminate the tenancy? We think that there is not. In *Bradley* v. *Atkinson* relied on by the District Judge the notice dated 11th December was "If the rooms you occupy are not vacated within a month from this date I will file a suit against you for ejectment as well as for recovery of rent due at the enhanced rate." The notice in the judgment of the Court delivered by PETHERAM, C. J., was held insufficient, as it was not an intimation to terminate the tenancy *on the 31st December*, the date on which the tenancy could be legally determined. The essential condition that there must be no uncertainty as to the date upon which the tenancy is to terminate, and that such date must be a **[244]** date on which the tenancy can legally be determined, was wanting and, therefore, the notice was held bad. The judgment of STRAIGHT, J., makes the reason of the decision very plain. The case is totally unlike the present, where the legal date on which the tenancy is to terminate is stated with particularity. In *Mohamaya* v. *Nilmadhab*, I. L. R., 11 Cal., 533, all that was decided was that a notice to quit or pay an enhanced rent did not entitle the landlord to a decree for both rent and in ejectment—rent for the first quarter after the notice and ejectment thereafter.

The judgment of GARTH, C. J., in the last mentioned case raises a doubt whether a notice to quit upon a certain date or pay an enhanced rate from that date is valid. Such a notice was treated as a good notice in *Janoo Mundur* v. *Brijo Singh*, 22 Cal. W. R., 548, followed in *Hem Chunder* v. *Radha Pershad*, 23 Cal. W. R., 440. And a majority of the Judges in *Ahearn* v. *Bellman*, 4 Ex. D., 201, held that a notice to quit was not invalidated by the addition of the further clause "and I hereby further give you notice that, should you retain possession of the premises after the day before-metioned, the annual rental of the premises now held by you from me will be £160 payable quarterly in advance." We do not think it necessary in this case to decide whether the doubt expressed in *Mohamaya* v. *Nilmadhab* (*supra*) is well-founded or not. There the alternative presented to the tenant continued to be presented to him until the date specified in the notice. Here the alternative ceased to be an alternative two days after the service of the notice whereafter the notice to quit left the tenant no other option than to deliver up possession on the day named. In *Bury* v. *Thompson*, [1895] 1 Q. B., 231, confirmed in appeal at 696, a notice by a tenant that he would leave the leasehold premises on a certain day unless the landlord agreed in the meantime to a reduction of rent, was held to be a good notice. It bears a close resemblance to the notice in the present case.

We do not think, therefore, that the authorities prevent us from acting upon our own view as to the validity of the notice before us and, therefore, hold that the notice is a good and effectual notice, and reverse the decree of the District Judge and **[245]** remand the appeal for trial of the remaining issues. Costs of the appeal will be costs in the cause.

*Decree reversed and case remanded.*

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**NOTES.**

[This was followed in (1904) P.R., 5; (1913) 19 I.C., 758 (Allahabad).]

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[22 Bom. 246]

## APPELLATE CIVIL.

*The 16th June, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Bapu............(Original Defendant No. 5) Appellant

*versus*

Bhavani and others............(Original Plaintiff and Defendants Nos. 1 and 2).*

*Mortgage—Mortgage or sale—Test of mortgage—Practice—Procedure—Finding on unnecessary issue between co-defendants*—Res judicata.

In an instrument dated the 30th June 1886, styled a sale-deed, it was recited that in consideration of Rs. 2,500 certain specified properties (already mortgaged to the so-called vendees and in their possession) were "given in sale" to them and were to be enjoyed by them for ten years in any manner they liked. At the expiration of that time the vendors were to pay the Rs. 2,500 and take back the property. In 1893 the plaintiff (a son of the so-called vendor) brought this suit treating the above instrument as a mortgage and praying for redemption. The main question in the suit was whether the instrument sued on was a mortgage or a deed of sale with the option of repurchase after ten years.

*Held*, that the instrument was a mortgage. The test was whether after the execution of the deed there continued to be a debt from the so-called vendors to the vendee, or whether the pre-existing debt became extinguished on the execution of the deed.

A finding between co-defendants unnecessary for the determination of the suit, or the rights of the parties involved in the suit, is not *res judicata*.

SECOND APPEAL from the decree of G. Jacob, District Judge of Sholapur-Bijapur, reversing the decree of the Subordinate Judge of Barsi.

Suit for redemption. The land in question was the property of one Gunaji and his two sons, *viz.*, the plaintiff Bhavani and Raoji (defendant No. 4). This land had been mortgaged to members of the Mundhe family, and the mortgagees' interest had become vested in one Nani, who was in possession.

On the 21st October 1885, Gunaji mortgaged this same land to Pandurang and Nana (defendants Nos. 1 and 2) for Rs. 2,000, [246] and subsequently, *viz.*, on the 30th June 1886, he executed a further deed (called a sale-deed) to them for Rs. 2,500 made up of the previous Rs. 2,000 and a further sum of Rs. 500. The material part of this deed was as follows :—

"In consideration of this amount (Rs. 2,500) there have been given in sale the undermentioned properties (describing them). The abovementioned properties have been in your enjoyment up to this day since the aforesaid date the 7th, on which day the properties were given in writing in mortgage to you and delivered into your possession. The said properties have been sold to you for the abovementioned amount, and they have been by virtue of the previous mortgage-deed in your possession, and they have also been given into your possession by this sale deed. You are, therefore, to enjoy the properties for ten years in any manner you like. After the expiration of the ten years I (Gunaji) will redeem my properties on payment of Rs. 2,500 (*or* more literally 'having made payment of Rs. 2,500 I will take back my properties'). Consent to this is given by us, Raoji, aged 40 years, and Bhavani, aged 35 years * * * who state in writing that our said father will, on payment of the amount as aforesaid, redeem the properties which have been as aforesaid given to you in writing. Should he fail to do so, we, having paid the amount, will redeem them without pleading the excuse of each other's absence."

* Second Appeal, No. 646 of 1895.

On the 8th January 1887, Gunaji and Raoji (the plaintiff Bhavani did not join) again sold it to one Bapu Ambadas (defendant No. 5) for Rs. 3,000. About the same time Bapu (defendant No. 5) purchased Nani's interest in the land and obtained possession from her.

In 1888 Pandurang and Nana (defendants Nos. 1 and 2) sued (Suit No. 125 of 1888) to redeem Nani's mortgage and to recover possession. Bapu Ambadas (defendant No. 5) was then in possession, and he was, therefore, made a party defendant to that suit, as were also Gunaji and his two sons, Bhavani (present plaintiff) and Raoji (defendant No. 4).

Bapu Ambadas filed a written statement in that suit in which he alleged that by the sale to him he had also acquired the interest of the plaintiff Bhavani. Bhavani denied this and an issue being raised on the point, it was decided in Bhavani's favour. The suit itself, however, was decided in favour of Pandurang and Nana (defendants Nos. 1 and 2), who recovered possession of the land from Nani and Bapu.

[247] In 1893 the present plaintiff Bhavani brought this suit against Pandurang and Nana (defendants Nos. 1 and 2) for redemption, alleging that the deed of the 30th June 1886, was a mortgage and not a sale.

Pandurang and Nana (defendants Nos. 1 and 2) contended that the plaintiff had no right to sue, he as well as his brother Raoji being bound by the sale to Bapu Ambadas in January 1887; that in any case he could not sue before the expiration of the ten years mentioned in their sale-deed; and that as they had purchased the land, no account could be ordered against them. Bapu Ambadas (defendant No. 5) pleaded that he had bought the land from Gunaji as head of his (Gunaji's) family, and that, if plaintiff had any right to sue, he (Bapu) should be made a co-plaintiff.

The Subordinate Judge passed a decree for redemption in favour of plaintiff and defendant No. 5 (Bapu).

On appeal the Judge reversed the decree and dismissed the suit. He held that the deed of 30th June 1886, was not a mortgage, but that the transaction was a sale with a right of repurchase; but that the land could not be recovered from defendants Nos. 1 and 2 before the expiration of ten years. He held, however, that the plaintiff had a right to sue, being of opinion that that question had been decided in Suit No. 125 of 1888 and was *res judicata*.

Bapu Ambadas (defendant No. 5) filed a second appeal.

*Shivram V. Bhandarkar*, for the Appellant (Defendant No. 5):—The first question is whether the document executed by Gunaji to defendants Nos. 1 and 2 on the 30th June 1886, shows a mortgage or a sale. If the transaction is a mortgage, then under the provisions of the Dekkhan Agriculturists' Relief Act we can redeem before the expiration of the term mentioned therein. In order to determine whether a transaction is a mortgage or not, the test is whether there is still a subsisting debt. The document clearly shows that there was a subsisting debt. The creditors deposed that on the day the document was executed, they debited the amount to the debtor Gunaji. It is, therefore, manifest that the parties themselves treated the transaction as a mortgage. The document, no doubt, begins [248] with the expression *Mudatiche* sale-deed. But the name given to a document does not determine its character. Other circumstances in connection with it must be considered. In the present case, looking to the conditions in the document, the creditors could have sued for the recovery of the debt and, therefore, the transaction is a mortgage —*Subhabhat* v. *Vasudevbhat*, I. L. R., 2 Bom., 113; *Bapuji Apaji* v. *Senavaraji*, I. L. R., 2 Bom., 231; *Govinda* v. *Jesha Premaji*, I. L. R., 7 Bom., 73; *Ram Saran Lal*

v. *Amirta Kuar*, I. L. R., 3 All., 369; *Mahipatrav* v. *Gambhirmal*, P. J., 1886, p. 141; *Lakhmichand* v. *Chatur Dewchandshet*, P. J., 1884, p. 162; *Rama* v. *Yesu*, P. J., 1896, p. 284. The inclination of the Courts is always in favour of holding a transaction to be a mortgage rather than a sale.

The next point is as to whether Bhavani's interest passed to us under our sale-deed. It is contended that this question was decided in the previous suit of 1888. We submit that we are not bound by that decision. The issue raised on the point in that suit was superfluous and was not necessary for the decision of that suit. The High Court in second appeal held that the determination of those questions was unnecessary. Therefore, the finding in the former suit that Bhavani was not barred by the sale-deed passed to us by his father and brother is not *res judicata*—*Ghela Ichharam* v. *Sankalchand Jetha*, I. L. R., 18 Bom., 597.

*Manekshah J. Taleyarkhan*, for Respondents (Defendants Nos. 1 and 2):—We contend that the transaction in dispute is a sale with a right of repurchase. In order to determine the nature of the transaction in dispute the previous transaction of the 21st October 1885, has to be taken into consideration. The transaction in dispute recites the previous debt and states that for the additional sum of Rs. 500 the property was sold for a term of years. Another test is that we could not have sued for the recovery of the money, because in the document there is no promise to pay Under the document we had no right to call back the money. Only the option is given to the vendor to pay us the money and to recover the property—*Alderson* v. *White*, 2 De G. and J., 105; *Bhagwan Sahai* [249] v. *Bhagwan Din*, I. L. R., 12 All., 387; *Manchester, Sheffield and Lincolnshire Railway Co.* v. *North Central Waggon Co.*, 13 App. Ca., 554 at p. 568.

**Farran, C. J.**:—We think that in this case the District Judge ought to have inquired into the title of the plaintiff upon the merits, and was wrong in holding that his right to sue was *res judicata* as having been established by the finding upon the issues in Suit No. 125 of 1888. We must remand the case for a further finding upon the first issue. The question arises under the following circumstances:—

Before the dealings between the parties to this suit in respect of the land which the plaintiff seeks to redeem, the land was subject to a mortgage or mortgages in favour of certain members of the Mundhe family whose interests eventually became centred in one Nani. It is unnecessary to refer to these mortgages in detail. The equity of redemption in the mortgaged property, which was ancestral, was vested in the defendant Gunaji and his two sons, the plaintiff Bhavani and the defendant Raoji.

On the 30th June 1886, Gunaji and his two sons executed the instrument (Exhibit 50) in favour of the defendants Pandurang and Nana, which, treating it as a mortgage, the plaintiff seeks to redeem. One of the questions in the suit—the main question—is whether it is a mortgage or a sale with the option of repurchase. Subsequently the defendants Gunaji and Raoji, on the 8th January 1887, sold the land to the fifth defendant Bapu for Rs. 3,000. The plaintiff Bhavani was not a party to that deed, and claims that it is not binding upon him.

In 1888 the present defendants Nos. 1 and 2 Pandurang and Nana, filed a redemption suit against Nani to recover possession of the lands, alleging that the mortgage, which she held, had been paid off. The present defendant Bapu had then acquired the interest of Nani in the lands and was in possession of them. Accordingly he was made a defendant to the suit, as were also the present defendants Gunaji and Raoji and the present plaintiff Bhavani.

The defendant Bapu in his written statement in that suit alleged that under the sale-deed executed in his favour by Gunaji and Raoji he had also acquired the interest of the plaintiff [250] Bhavani. This the plaintiff Bhavani denied. An issue was raised upon that question in the Court of First Instance, which was decided in favour of the plaintiff Bhavani. The suit itself was decided in favour of the present defendants Pandurang and Nana, who recovered possession of the lands from Nani and her assignee, the present defendant Bapu. There was an appeal against that decision, but it was confirmed both in the District Court and on second appeal in the High Court. The defendant Bapu did not appeal in respect of the finding on the issue in favour of the plaintiff Bhavani.

Now it will be observed that the finding upon the issue in favour of the plaintiff Bhavani was a finding upon an issue which did not properly arise in the suit. The title of the plaintiffs in that suit (the present defendants Pandurang and Nana) to represent *pro tem.* the interests of Gunaji and his sons Bhavani and Raoji under the terms of the document, Exhibit 50, was clear and undisputed. The only question, which properly arose in the suit, was whether they were entitled to redeem Nani and her assignee Bapu and upon what terms. The determination of the issue between Bhavani and Bapu was not connected with the suit. It does not appear why the Subordinate Judge allowed it to be raised, or why he found upon it; but as we have said, there was no appeal from the finding. Had there been, the District Judge must have refused to consider it beyond declaring that the issue was improper and ought not to have been raised or decided. However, there having been no appeal, the finding on the issue remained, and the District Judge in this case has treated that finding as decisive of the respective rights of the plaintiff Bhavani and the defendant Bapu in the suit. The question is whether he was correct in so treating it. We are of opinion that he was not. It was a finding between co-defendants unnecessary for the determination of the suit or the rights of the parties involved in the suit. It cannot, therefore, operate as a *res judicata*—*Ramchandra Narayan* v. *Narayan*, I. L. R., 11 Bom., 216; *Ghela* v. *Sankalchand*, I.L.R., 18 Bom., 597; *Ahmad Ali* v. *Najabat Khan*, I. L. R., 18 All., 65.

[251] We have next to consider whether the instrument sued upon is a mortgage or a deed of sale with an option or right on the part of the vendors to repurchase the land after ten years. The solution of that question depends upon the terms of the instrument and the intention of the parties. The Subordinate Judge considered it to be a mortgage by way of conditional sale, and under the provisions of the Dekkhan Agriculturists' Relief Act allowed redemption, though the mortgage term had not expired. The District Judge held it to be a sale outright, with a right of repurchase reserved. He, therefore, dismissed the suit.

The transaction is in the body of the instrument styled a sale; but that, though a circumstance to be taken into consideration, is not conclusive. The test is whether after its execution there continued to be a debt from the so-called vendors to the vendee, or whether the pre-existing debt became extinguished on the execution of the instrument—*Govinda* v. *Jesha*, I.L.R., 7 Bom., 73. The material portions of the instrument are these:

"In consideration of this amount (Rs. 2,500) there have been given in sale the under-mentioned properties (describing them). The abovementioned properties have been in your enjoyment up to this day since the aforesaid date the 7th, on which day the properties were given in writing in mortgage to you and delivered into your possession. The said properties have been sold to you for the abovementioned amount and they have been by virtue of the previous mortgage-deed in your possession and they have also been given into your

possession by this sale-deed. You are, therefore, to enjoy the properties for ten years in any manner you may like. After the expiration of the ten years I (Gunaji) will redeem my properties on payment of Rs. 2,500 (*or* more literally ' having made payment of Rs. 2,500 I will take back my properties'). Consent to this is given by us, Raoji, aged 40 years, and Bhavani aged 35 years * * * who state in writing that our said father will, on payment of the amount as aforesaid, redeem the properties which have been as aforesaid given to you in writing. Should he fail to do so, we, having paid the amount, will redeem them without pleading the excuse of each other's absence."

The effect of that instrument appears to us to be that the creditors are to hold the property for ten years and are not to be answerable for what they do with it, nor have they any claim to interest. At the end of ten years, however, or at any time thereafter the vendor Gunaji undertakes that he having paid the money (Rs. 2,500) "will take back the land," which [252] amounts, we think, to a covenant on his part to repay the money and redeem the land. This is made still more clear by what the sons are to do if the father fails to redeem. It is not, it appears to us, an option which the sons are given of repurchasing, but an express covenant on their part, which it is intended that the creditors can enforce, and in answer to which the sons are not to plead the non-joinder of one another. They are to repay the Rs. 2,500 and take back the land.

Mr. Manekshah in support of the opposite view relied on *Bhagwan Sahai* v. *Bhagwan Din*, I. L. R., 12 All., 387, where the Lords of the Privy Council held (citing the cases of *Alderson* v. *White*, 2 DeG. and J., 105, approved in *The Manchester, Sheffield and Lincolnshire Railway Co.* v. *The North Central Waggon Co.*, 13 App. Ca., 568) that the instrument before them was one of conditional sale and not of mortgage, but there the only agreement was one on the part of the vendee to accept the purchase-money and cancel the sale. Here the undertaking is on the part of the so-called vendors to pay the debt and redeem. The words can bear no other meaning. The debt is recognised as an existing debt, payment of which is postponed for ten years. If we were doubtful as to the true effect of the instrument, the conduct of the creditors would, we think, make the matter clear. In their books they entered the Rs. 2,500 as a debt due from the so-called vendors, and Pandurang in his evidence in the former suit stated that the vendees enjoyed the profits in lieu of interest.

We set aside the decree and remand the appeal for retrial having regard to this judgment. The respondent to pay the costs in this Court. All other costs will be dealt with by the Judge who hears the appeal.

*Decree set aside and case remanded.*

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**NOTES.**

[1. As regards when a finding concerning parties arrayed on the same side becomes *res judicata*, see also (1903) 5 Bom. L. R., 97 ; (1911) 36 Bom., 207 ; (1912) 17 C.W.N., 128.

As regards the test as to the character of the deed, see also (1900) 2 Bom. L. R., 1058.]

## [253] APPELLATE CIVIL.

*The 17th June, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Arjun Ramchandra Shet Karpe............(Original Defendant) Appellant

*versus*

Shankar Vishram Shenvi Ghuraye............(Original Plaintiff) Respondent.*

*Practice--Procedure—Dismissal of case in first Court without hearing all the witnesses—Appeal -Duty of appellate Court to call the remaining witnesses before reversing the decree of first Court.*

The Subordinate Judge having heard all the witnesses for the plaintiff and some of the witnesses for the defendant intimated that he did not consider it necessary for the defendant to call any more evidence. He then dismissed the suit. On appeal by the plaintiff the Judge upon the recorded evidence reversed the decree and allowed the plaintiff's claim. The defendant appealed to the High Court, contending that the lower Court ought not to have found against him without allowing him an opportunity to call the witnesses whose evidence had been dispensed with by the Subordinate Judge.

*Held* (reversing the decree of the lower appeal Court and remanding the case), that the Lower Appellate Court ought not to have reversed the decree of the first Court without allowing the defendant to give the evidence which the first Court declined to take.

SECOND APPEAL from the decision of Rao Bahadur V. V. Vagle, First Class Subordinate Judge of Ratnagiri, with appellate powers, reversing the decree of Rao Saheb Vishvanath Vaikunth Wagh, Subordinate Judge of Vengurla.

The plaintiff had attached certain property in execution of a decree obtained by him. This attachment had been removed on the application of the defendant, and the plaintiff now brought this suit for a declaration that the property was liable to attachment.

The defendant resisted the plaintiff's claim.

The Subordinate Judge examined all the witnesses tendered by the plaintiff, and after examining only three of the witnesses adduced by the defendant dispensed with the rest of his witnesses and dismissed the suit.

On appeal by the plaintiff, the Judge reversed the decree and allowed the claim. The following is an extract from his judgment :—

[254] "On the other hand the defendant adduced no evidence beyond examining three persons as witnesses Nos. 56, 64 and 65 on his behalf. * * This is all the evidence adduced by the defendant. The defendant's vakil contended that as the lower Court thought it unnecessary to examine all his witnesses in view of the plaintiff's evidence he should be allowed a fresh opportunity of examining his witnesses. No doubt there is a passage in the lower Court's judgment that it did not consider it necessary to examine all witnesses called by the defendant; but on referring to the *rosnama* of the case, I find that the defendant himself dispensed with the rest of his witnesses (*vide* Exhibit 9). We may have done so at the suggestion of the lower Court, but he took the risk of it upon himself. I, therefore, hold that the defendant has no right to examine those witnesses whom he himself dispensed with."

The defendant preferred a second appeal.

*Scott* (with *Vasudeo G. Bhandarkar*) for the Appellant (Defendant):—As the plaintiff's attachment had been removed, the burden of proof lay heavily upon

* Second Appeal, No. 754 of 1895.

him to prove his right to attach it, and he has failed to do so. The first Court, without examining all our witnesses, came to the conclusion that the plaintiff had failed to make out his case. But on the evidence on the record, the Judge in appeal came to a contrary conclusion. The Judge ought to have given us an opportunity to produce all our evidence, especially as the evidence was dispensed with by the first Court, before he decided in plaintiff's favour—*Khuda Bakhsh* v. *Imam Ali*, I. L. R., 9 All., 339; *Ram Jewun Singh* v. *Radha Pershad Singh*, 16 Cal. W. R., 109. We submit that the inquiry has been defective.

*Lang* (Advocate-General with *Gangaram B. Rele*), for the Respondent (Plaintiff):—It appears that the defendant himself dispensed with the rest of his evidence. He considered that it was not necessary for him to examine the rest of his witnesses having regard to the evidence adduced by the plaintiff. The defendant must take the consequence of his own act.

**Farran, C. J.**:—It is in our opinion undesirable to have a case disposed of without hearing the evidence of all witnesses whom the parties desire to call. Here the Subordinate Judge during the progress of the case intimated to the parties that, having regard to the view which he took of the evidence called by the plaintiff, he did not think it necessary to examine all the witnesses called for the defendant. We think that after that intimation **[255]** the defendant was not bound to go on calling witnesses, which the Subordinate Judge thought it unnecessary to examine. Though his pleader in his endorsement on the darkhast of 10th July 1893, made long afterwards stated that "it was not necessary to examine the remaining witnesses having regard to the evidence produced by the plaintiff," we do not see more in that than an acquiescence in the course adopted by the Subordinate Judge. When the Judge in appeal was inclined to take a different view of the effect of the plaintiff's evidence, we think that he ought to have given the defendant an opportunity of calling the evidence which the Subordinate Judge in effect declined to take.

We are fortified in this view by the cases of *Khuda Bakhsh* v. *Imam Ali*, I. L. R., 9 All., 339, and *Ram Jewun Singh* v. *Radha Pershad Singh*, 16 Cal. W. R., 109.

We reverse the decree and remand the case for a rehearing of the appeal after the defendant has been given an opportunity of having the witnesses, whom he proposed to examine, examined either in the Court of the Subordinate Judge or by the appellate Court as the appellate Court may think fit. Costs, costs in the cause.

*Decree reversed and case remanded.*

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[22 Bom. 256]
## APPELLATE CIVIL.

*The 24th June, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Nana Mansaram Shet............(Original Plaintiff) Appellant

*versus*

Rautmal Tarachand Shet............(Original Defendant) Respondent.*

*Fraudulent conveyance—Colourable sale—Sale of property to defraud creditors—Indicia of fraud—Execution of decree—Attachment—Application to raise attachment—Suit to establish right to the attached property.*

Where in a suit to establish plaintiff's right to property purchased by him it was found that his vendor, who had many debts to pay, had sold to the plaintiff all his property, reserving nothing to himself; that the plaintiff bought the property without seeing it or valuing it; that the consideration for the sale consisted of time-barred debts or debts which were not payable at the time; that the property sold remained in the possession of the vendor who paid its assessment, and that the consideration was grossly inadequate,

[256] *Held*, that there was no *bonâ fide* or valid sale, but a mere colourable transaction without consideration not intended to transfer the property to the plaintiff.

SECOND APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Dhulia, reversing the decree of Rao Saheb G. N. Gokhale, Subordinate Judge of Jalgaum.

The defendant having obtained certain money decrees against one Bapu Vithoba Patel and his brothers attached certain lands and houses in execution.

The plaintiff claimed the property as his, alleging that he purchased it from Bapu Vithoba Patel and his brothers under a sale-deed dated 2nd January 1891. He applied to have the defendant's attachment removed, but his application was rejected and he then brought this suit to establish his right to the property.

The defendant alleged that the purchase of the property by the plaintiff was merely colourable and that the property was liable to his (the defendant's) attachment.

The Subordinate Judge allowed the plaintiff's claim, holding that this purchase of the property was a valid purchase.

On appeal by the defendant the Judge found that the plaintiff's sale-deed was fraudulent and colourable and reversed the decree. The following is an extract from his judgment:—

"It appears that the judgment-debtors have sold the whole of their property to the plaintiff, and this is a badge of fraud. The conduct of the plaintiff is not that of a *bonâ-fide* purchaser. He had not seen the property which he purchased. He did not take care to ascertain the value of the property. He says his gumasta Gopal knew everything about it, and he purchased the property, because his gumasta advised him to do so. Now that gumasta, though examined in the case, has not been asked a word on this point. Some of the debts due to the plaintiff had been time-barred and a portion of them had not become then due. The two sons of Vithoba who were not parties to the bonds, appear to have joined in the sale without any hesitation. The dealings between the plaintiff and the three sons of Vithoba had been very old, and on not a single occasion had the other two sons of Vithoba

* Second Appeal No. 732 of 1895.

been called upon to join in passing a bond to the plaintiff. Notwithstanding the sale, the houses included in the sale have been in possession of the vendors without rent, and the only explanation offered by the plaintiff on this head is that [257] houses in villages could fetch no rent. As regards the lands, the plaintiff had taken a rent-note from his debtor Rampuri, a guru of the vendors, but the evidence on the records shows that the vendors have been in possession of the lands, and Rampuri is a mere nominal tenant. Government assessment for the lands in suit has been paid by the vendors except on one solitary occasion when it was paid by Rampuri and that was on 23rd January 1894 (Exhibits Nos. 71, 72, 73). Rampuri says he ploughs the fields by means of bullocks belonging to the vendors, and that one of the vendors is his saldar (servant) for ploughing the fields. All these circumstances go to show that the sale is a fraudulent transaction made with a view to defeat the claims of creditors. It is true that the sale was made for consideration. A time-barred debt is, no doubt, a good consideration, and similarly a debt still to become due is also a good consideration ; but in *Twyn's case* there was a good consideration, but the sale was declared void and fraudulent, because of the existence of other circumstances irrespective of want of good faith.

"The stamp-paper for the sale-deed was purchased on 1st January, and the deed was passed on 2nd January,—that is to say at a time when the Courts were closed for Christmas Holidays ; perhaps the Courts might have re-opened on the very date of the sale. As regards the adequacy of the consideration, it appears that the plaintiff is unwilling to part with the property for even Rs. 3,000. At the Court's sale, some portion of the property was not sold, but that which was sold fetched about Rs. 2,481. The lower Court says that this price cannot be taken to be the true value of the property. But when we find that a greater portion of the property has been purchased by Jagannath Navalram, we cannot refuse to attach due weight to the circumstance that Jagannath is a debtor of the plaintiff to the extent about of Rs. 6,000, and it was the plaintiff's gumasta who paid the purchase-money on behalf of Jagannath. It is reasonable under the circumstances to presume that Jagannath was simply a man on behalf of the plaintiff, and it is improbable in the highest degree to suppose that a man of the plaintiff should have acted as a puffer at the auction-sale. The only other bidder at the sale was a man on behalf of the defendant. Jagannath purchased property of the value of about Rs. 1,600, whilst the defendant's man purchased property of the value of about Rs. 800. The value paid by the plaintiff is, therefore, inadequate."

The plaintiff preferred a second appeal.

*Branson* (with *Vasudeo G. Bhandarkar* for *Narayan G. Chandavarkar*) appeared for the Appellant (Plaintiff) :—The Judge has not found that the transaction was not intended to convey the rights in the property or that the debtors still continued to be the owners of the property. In the absence of such findings, and our sale-deed being registered, it lay on the defend-[258]ants to show that no property passed to us—*Rajan Harji* v. *Ardeshir*, I. L. R., 4 Bom., 70 ; *Motilal* v. *Utam*, I. L. R., 13 Bom , 434.

*Lang* (Advocate-General, with *Gangaram B. Rele*) for the Respondent (Defendant) :—The finding of the Judge is quite clear. He found that the transaction was fraudulent and colourable. The only conclusion for such a finding is that there was no intention to convey the property—*Rangilbhai* v. *Vynayak*, I. L. R., 11 Bom., 666.

**Ranade, J.** :—Mr. Branson, the counsel for the appellant, admitted that if the Lower Appellate Court had found that the deed of sale was only a paper transaction, and the property in the lands sold did not pass to the appellant purchaser, that would have been a finding of fact which he could not question in second appeal. As we read the judgment in appeal, we think the Judge meant to say that in his opinion there was no *bona fide* or valid sale. He found that the sale-deed was colourable and fraudulent. He notices the several *indicia* of fraud and collusion, *viz.*, (1) that the debtor sold all his

property reserving nothing to himself; (2) that the appellant bought the property without seeing it or taking care to value it; (3) that the consideration consisted of time-barred debts which were not payable at the time; (4) that the properties sold remained in the possession of the vendor, who paid the assessment of the same; (5) and that the consideration was grossly inadequate. The judgment indeed stated in one place that the sale was made for consideration, but this consideration is described immediately after as being time-barred debts, or debts which were not repayable at the time.

It was on all these accounts, and not merely because the sale was intended to defeat other creditors, that the Lower Appellate Court held the sale-deed to be fraudulent and void. This clearly amounts to a finding that it was a mere colourable transaction without consideration, and one which was not intended to transfer the property to the appellant. The present case clearly falls within the ruling in *Rangilbhai* v. *Vinayak*, I L. R., 11 Bom., 666, and not within the class of cases covered by *Motilal* v. *Utam*, I. L. R., 13 Bom., 434, and *Rajan Harji* v. *Ardeshir*, I. L. R., 4 Bom., 70. We must, therefore, confirm the decree, and reject the appeal with costs.

*Decree confirmed.*

**NOTES.**

[See also (1900) 25 Bom., 202; (1900) P. R., 6.]

## [259] APPELLATE CIVIL.

*The 30th June, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Jivanbhat ...........(Original Plaintiff) Appellant

*versus*

Anibhat............(Original Defendant) Respondent.*

*Hindu law—Partition—Suit for partition—Exclusion—Burden of proof.*

In a suit for partition of joint family property, the defendants pleaded that the plaintiff's branch of the family had been separated more than thirty years ago. The plaintiff proved that the family property was joint, and that he had a share in it.

*Held*, that under the circumstances it lay on the defendants to prove plaintiff's exclusion from the joint estate for more than twelve years and an exclusion known to the plaintiff.

SECOND APPEAL from the decision of M. H. W. Hayward, Assistant Judge of Belgaum, in Appeal No. 191 of 1893.

Suit for partition.

The plaintiff sought to recover his one-fourth share of certain property, which he alleged was the joint family property of the parties to the suit.

The defendants pleaded that the plaintiff's branch of the family had separated more than thirty years ago, and that the suit was barred by limitation.

The Court of First Instance held that the parties were members of a joint Hindu family, that the suit was not time-barred, and that the plaintiff was entitled to recover his share by partition of the property in dispute.

* Second Appeal, No. 865 of 1895.

This decision was reversed, on appeal, by the Assistant Judge who held the claim to be time-barred. He remarked as follows:—

"The plaintiff was bound to prove that he first became aware of his exclusion within twelve years of the suit under article 127* of Act XV of 1877, and this would include proof of possession as well as title within that period. This he appears to me to have failed to do. His suit is, therefore, time-barred under article 127 of Limitation Act."

**[260]** Against this decision the plaintiff appealed to the High Court.

*Daji Abaji Khare*, for Appellant (Plaintiff) :—The lower Court has laid the burden of proof on the wrong party. The plaintiff has proved that his branch of the family is not separated from that of the defendants. The parties are still joint. That being so, it lies on the defendants to show that plaintiff has been excluded to his knowledge from the joint property for twelve years before suit.

Unless and until the defendants prove this fact, the plaintiff is entitled to a decree for partition—*Krishnabai* v. *Khangowda*, I. L. R., 18 Bom., 197 at p. 202; *Dinkar* v. *Bhikaji*, I. L. R., 11 Bom., 365.

*N. G. Chandavarkar*, for Respondent :—It is found that defendants have been in possession of the property in dispute for over thirty years. Possession is *prima facie* exclusive. It is for the plaintiff, who has been out of possession for so many years, to prove that his title was ever acknowledged by the defendants during this period, or that they held the property on his behalf. This he has not done. His claim is, therefore, barred by limitation—*Ramchandra Narayan* v. *Narayan Mahadev*, I. L. R., 11 Bom., 216 at p. 219.

**Parsons, J.** :—The Assistant Judge was wrong in placing the *onus* on the plaintiff of proving possession within twelve years of suit as well as title. Plaintiff sued to enforce a right to a share in joint family property. The defendants pleaded that the plaintiff belonged to a branch of their family which had separated more than thirty years ago. It was, therefore, necessary for the plaintiff to prove title,—that is, to prove that the property was joint, and that he had a share in it. This he did in the opinion of the Subordinate Judge. The Assistant Judge has recorded no finding on this point, and it still remains to be decided.

Assuming, however, for the purposes of this appeal, that this proof has been given, then clearly the *onus* of proving exclusion would lie on the defendants who assert it, and it is not merely **[261]** an exclusion that must be proved, but an exclusion known to the plaintiff. This is distinctly laid down in *Krishnabai* v. *Khangowda*, I. L. R., 18 Bom., at p. 202. See also *Hari* v. *Maruti*, I. L. R., 6 Bom., 741, and *Dinkar* v. *Bhikaji*, I. L. R., 11 Bom., 365.

We reverse the decree of the Lower Appellate Court, and remand the appeal for a fresh trial. Costs to abide the result.

*Decree reversed.*

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* [ Art. 127 :—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| By a person excluded from joint-family property to enforce a right to share therein. | Twelve years. | When the exclusion becomes known to the plaintiff. ] |

[22 Bom. 261]

## TESTAMENTARY JURISDICTION

*The 9th December, 1897.*

PRESENT:

MR. JUSTICE STRACHEY.

Chotalal Chunilal............Plaintiff

*versus*

Bai Kabubai............Defendant.*

*Practice—Procedure—Contentious matter—Duty of Registrar—When a petition for probate or letters of administration becomes contentious—Non-appearance of caveator—Form of order.*

So long as a petition for probate or letters of administration is "non-contentious" it is to be dealt with by the Registrar. As soon as it becomes "contentious" it is to be treated as a plaint in a suit, and the suit is governed, so far as practicable, by the procedure prescribed by the Civil Procedure Code.

The petition becomes contentious not upon the entry of a caveat, but upon the filing of the affidavit in support of the caveat.

Where, in consequence of the filing of the affidavit, the matter becomes a suit, the whole suit must be disposed of by the decree of the Court. Where, therefore, at the hearing of the suit the defendant does not appear in support of the caveat, it is not a correct procedure for the Court merely to dismiss the caveat, leaving it to the Registrar to dispose of the petition as a non-contentious matter. The proper form of order is that the caveat be dismissed and that probate or letters of administration issue, provided that the Court is satisfied that the papers are in order.

THE plaintiff presented a petition praying for probate of the will of his father Chunilal Motilal.

The defendant filed a caveat against probate being granted to the plaintiff.

[262] The matter thereupon, in accordance with the practice, became a suit, was duly numbered as such, and was included in the list of testamentary cases "for hearing."

No affidavit, however, was filed in support of the caveat, and it now appeared on the day's list "for dismissal under Rule 42 †" of the High Court Rules.

*Macleod* appeared for the Petitioner:—This matter has been improperly set down for dismissal under Rule 42. That rule does not apply. The caveatrix has filed no affidavit, and I, therefore, ask that her caveat be dismissed, and probate be granted by the Court to the petitioner. There is now no opposition to his petition.

[STRACHEY, J.:—I am informed by the Registrar that in such a case as this, *i.e.*, where no affidavit has been filed in support of the caveat, the practice is for the Court merely to dismiss the caveat, and for the Registrar to grant probate.]

If so, that practice is wrong. The matter has become a suit, and the Court must deal with it. It is for the Court, and not the Registrar, either to

* Suit, No. 27 of 1897.

† 42. All writs of summons to appear and answer shall show in the margin the date of the filing of the plaint, and of any order to amend the summons, and shall be delivered to the Sheriff—for service within the local limits of the jurisdiction of this Court—or to the Prothonotary for transmission elsewhere, within twenty-one days from the filing of the plaint, or the date of such amendment; otherwise the suit will be set down on the Trial Board to be dismissed unless otherwise ordered.

grant or refuse the relief prayed for. The defendant (*i.e.*, the caveatrix) fails to support her case by making the necessary affidavit Why should that fact make it necessary for the petitioner to present a fresh application to the Registrar instead of having his case decided now by the Court? The matter was some time ago on the board for hearing. If it had been reached, and had been called on for hearing, the Court would have dealt with it and have granted probate. It was not reached, and not called on, and now improperly appears on the list "for dismissal." I submit that it is the caveat that must be dismissed. The petition of the plaintiff for probate should be granted. His petition has become a suit (Succession Act, X of 1865, section 261; Probate and Administration Act, V of 1881, section 83*). A suit is not dismissed because no written state-**[263]**ment is filed. This petition ought not to be dismissed because no caveat is filed.

There was no appearance for the caveatrix. The Court dismissed the caveat, and reserved judgment on the point whether the Court or the Registrar should grant probate. Subsequently the following **judgment** was delivered:—

**Strachey, J.**:—I have to decide a question of practice in the Testamentary and Intestate Jurisdiction of this Court which has arisen lately in several cases, and which I have taken time to consider. It relates to the course which should be adopted where a caveator fails to file an affidavit in support of the caveat within eight days after its entry under Rule 483 of the Rules of the Supreme Court (Ecclesiastical) which is still in force.

In one of the cases in which the question has arisen, the suit was according to the usual practice put up for dismissal of the caveat for non-compliance with this rule, and Mr. Macleod, who appeared for the petitioner, asked me not only to dismiss the caveat, but to direct probate to issue to his client. The Registrar, however, informed me that the practice was for the Court to confine itself to dismissing the caveat, and for the case upon such dismissal to be treated as a non-contentious matter in which under Rule 3 of the Testamentary and Intestate Rules made on the 1st December 1882, the grant of probate is made, not by the Judge, but by the Registrar. On the other hand, Mr. Macleod contended that the Court being seized of the case, the more reasonable and expeditious course would be to avoid taking two steps where one was sufficient, and that where a petition for probate had become contentious by the entry of a caveat, and by the proceedings being converted into a suit, it should be completely disposed of by the decree of the Court.

The Registrar has kindly furnished me with a note, from which I gather that the course adopted in most of the few cases on the subject of which there is any record has been to dismiss the caveat, leaving the grant of probate to be made by the Registrar. Only six cases have been found, and in three the order was simply "caveat dismissed with costs." In one the Judge added to these words "application to be dealt with by the Registrar." In another the Judge on the consent of the defendant decreed **[264]** administration to the guardian of an infant plaintiff; and in the sixth the order was "caveat dismissed with costs. Probate to issue to both plaintiffs."

There is thus nothing that can be called a long, continuous and uniform practice on the subject. It is, however, desirable that a uniform practice should

* [ Sec. 83 :—In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.]

Procedure in contentious cases.

be adopted. The question is what practice would be most in keeping with the Indian Succession Act, 1865, the Probate and Administration Act, 1881, the Code of Civil Procedure (Act XIV of 1882) and, so far as applicable, the rules of practice and procedure of the Probate Division of the High Court in England. The effect of Rule 8 of the Rules of the 1st December 1882, of sections 238 and 261 of the Indian Succession Act, and sections 55 and 83 of the Probate and Administration Act is that, so long as a petition for probate or letters of administration is "non-contentious," it is to be dealt with by the Registrar: as soon as it becomes "contentious" it is to be treated as the plaint in a suit, and the suit is governed as far as practicable by the procedure prescribed by the Civil Procedure Code. It appears to me that the existing practice does not conform to this distinction as accurately as it might. What it does is to treat the filing of a caveat as the point at which a petition for probate or letters of administration becomes contentious. Immediately upon the caveat being filed, a notice is issued by the Registrar to the "attorney for the plaintiff" in which the proceedings are described and numbered as a suit between the petitioner as plaintiff and the caveator as defendant: this notice states the filing of the caveat, and that "the petition became a suit" upon a date specified, and that "you are required to apply for, and deposit for service a summons within twenty-one days from such last mentioned date under Rule 64 of the High Court Rules" —that is, Rule 42 of the Rules as now revised. The next step where an affidavit is filed in support of the caveat, is that the Registrar gives notice of the fact to the attorney for the plaintiff. If the affidavit is filed within eight days after the entry of the caveat, it becomes the written statement in the suit. If no affidavit is filed within eight days, the suit is put on the board for dismissal of the caveat, and the petition is dealt with by the Registrar in the manner already described. It appears to me that the more [265] correct procedure would be to treat, not the entry of a caveat, but the filing, within eight days of such entry, of an affidavit in support of the caveat, as the point at which the petition becomes contentious. The form of caveat prescribed by section 252 of the Succession Act, and section 71 of the Probate and Administration Act, and the judgments of the Court of Appeal in *Moran* v. *Place*, (1896) P., 214, and *Salter* v. *Salter*, (1896) P., 291, show that the entry of a caveat is not necessarily a contentious proceeding, and does not necessarily imply any intention to oppose the grant: it is merely a request that nothing be done in the matter of the estate of *A B*, deceased, without notice to the caveator. The caveator may only want time to make enquiries and obtain information. In the cases just mentioned, it was held that in England the contention or litigation commences not with the caveat, nor with the warning of the caveat, nor with the caveator's appearance to the warning, but with the writ of summons which the person warning the caveat and intending to propound the will must then issue, and by which under section 100 of the Judicature Act an action is commenced. In India, though there is a caveat there is no warning, no appearance to the warning, and no writ of summons commencing an action; but a suit is here commenced by the filing of a plaint, and the question is at what point the petition for probate or letters of administration should be treated as having become the plaint in a suit. I think that the point at which this should be done is the filing of the affidavit in support of the caveat, because under the Rules the affidavit must state "the right and interest of the caveator, and the grounds of objection to the application" and that does imply opposition to the grant. Up to the filing of the affidavit, nothing need be done by the Registrar. If within eight days from the entry of the caveat no affidavit is filed, the caveat simply drops, the matter never becomes contentious, and the Registrar can proceed

to grant probate or administration as if no caveat had been entered. That is, in my opinion, implied by the Rule which provides that, unless the affidavit is filed within eight days, "such caveat shall not prevent the granting of probate or letters of administration.' If within the eight days an affidavit is filed, [266] then, but not before, notice should be given to the petitioner that the petition has become the plaint in a suit, and that he must proceed under Rule 42. This course will prevent any such question as that raised by Mr. Macleod from arising in the future; for until the affidavit is filed, there will be no suit, and if it is not filed in time, the case will not be put on the board for dismissal of the caveat, but the Registrar will ignore the caveat and dispose of the petition.

Where, in consequence of the filing of the affidavit, the matter becomes a suit, the whole suit must, in my opinion, be disposed of by the decree of the Court. In England there is a machinery by which, even after a writ of summons has issued, an order may be obtained for discontinuance of contentious proceedings, and for the grant of probate in common form. In India there is no such machinery, and a probate matter which has once become a suit can only be disposed of like other suits. A relief prayed for in the plaint can only be granted by the Court, and in a petition for probate or letters of administration the relief prayed for is that probate or administration may be granted. It follows that where at the hearing of the suit the defendant does not appear in support of the caveat, it is not, in my opinion, a correct procedure for the Court merely to dismiss the caveat, leaving it to the Registrar to dispose of the petition as a non-contentious matter. In such a case I think that the proper form of order is that the caveat be dismissed, and that probate or letters of administration issue, provided that the Court is satisfied that the papers are in order, and, in the case of probate, of the due execution of the will. In a case decided in 1860, SAUSSE, C. J., directed probate to issue out of the office, "if there is no objection on the part of the officer," and I think that will be the most convenient form of order, except where the Registrar has already minuted.

In the case in which Mr. Macleod appears, and which in accordance with the existing practice has been treated as a suit, I have already dismissed the caveat, and I now direct that probate issue to the plaintiff subject to any objection on the part of the Registrar.

*Order that probate issue.*

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## [267] APPELLATE CIVIL.

*The 29th June, 1896.*
PRESENT:
MR. JUSTICE RANADE AND MR. JUSTICE HOSKING.

Madhavrao............(Original Plaintiff) Appellant
*versus*
Ramrao and another............(Original Defendants) Respondents.*

*Civil Procedure Code (Act XIV of 1882), Sec. 244, Cl. (c)—Decree—Declaratory decree—Execution of decree raising question of mismanagement of property—Execution.*

In a partition suit brought by the plaintiff a decree was passed in 1882 which provided (*inter alia*) that the defendant should manage certain *devasthan* lands and apply the income thereof to *devasthan* purposes ; and that if he failed to manage the lands properly, or alienated them by sale or mortgage the plaintiff and his younger brother should enjoy the lands and apply the proceeds towards the maintenance of the *devasthan*.

In execution of this decree, plaintiff presented an application on the 28th November 1894, praying that he should be put in management of the *devasthan* lands, on the ground that the defendant was guilty of mismanagement and misapplication of the *devasthan* property.

This application was rejected by the Court of First Instance on the ground that the question of mismanagement did not fall within section 244, clause (c), of the Code of Civil Procedure (Act XIV of 1882). This order was confirmed on appeal on the ground that the decree was a declaratory decree and, therefore, incapable of execution.

*Held*, on second appeal that the decree was not declaratory only, and that it could be enforced in execution under section 244 of the Code of Civil Procedure (Act XIV of 1882).

SECOND APPEAL from the decision of S. Tagore, District Judge of Satara, in Appeal No. 15 of 1895.

In a partition suit the decree dated 31st October 1882, directed (*inter alia*) that the plaintiff's elder brother Ramrao should have the management of certain lands which were set apart for the maintenance of a *devasthan*, so long as he carried on the management properly ; and that if he failed to perform this duty, or alienated the *devasthan* lands by sale or mortgage, the plaintiff and his younger brother should manage the lands, and apply the income to *devasthan* purposes.

On the 28th November 1894, plaintiff made an application for execution of the above decree, praying that he should be put in [268] management of the *devasthan* lands, as his brother Ramrao had alienated the lands on permanent *mirasi* leases, and failed to apply the income to the purposes of the *devasthan*

The Court of First Instance rejected this application, on the ground that the question of mismanagement did not fall within section 244, clause (c), of the Code of Civil Procedure (Act XIV of 1882), and referred the plaintiff to a separate suit.

On appeal the District Judge held that the decree, so far as it related to *devasthan* lands, was a declaratory decree, and as such incapable of execution. He, therefore, confirmed the order of the first Court.

Against this decision the plaintiff appealed to the High Court.

*B. A. Bhagvat*, for Appellant.

*M. R. Bodas*, for Respondents.

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* Second Appeal, No. 286 of 1896.

The following authorities were referred to in argument:—*Ramapa* v. *Krishnaya*, P.J. for 1885, p. 22; *Koshee Kishore Roy Chowdhry* v. *Noor Khan*, 7 Cal. W. R., 45; *Roy Luchmeeput Singh* v. *Adoyto Churn Mulliok*, 24 Cal. W. R., 452; *Mukund Harshet* v. *Haridas Khemji*, I. L. R., 17 Bom., 23.

**Ranade, J.**:—In this case the appellant-plaintiff is brother of the respondents Nos. 1, 2. There was a partition dispute between them, which was settled by an agreement effected by a conciliator, and the award of the conciliator was made on 29th September 1882, and had the effect of a decree when the award was filed on 31st October 1882.

The fourth clause of this conciliation decree related to the *devasthan* lands, and it directed that respondent No. 1 should have the management of these lands for *devasthan* purposes as long as he carried on the management properly. If respondent failed to perform this duty, or if he mortgaged or sold *devasthan* lands, the appellant-plaintiff and his brother respondent No. 2 should enjoy the inam lands of the *devasthan*, and apply the proceeds to *devasthan* purposes.

The present darkhast was filed by the appellant, in continuation of previous darkhasts of 1885, 1888 and 1891, on 28th November [269] 1894, and it was stated therein that respondent No. 1 had let out the lands on permanent *mirasi* leases, and failed to apply the income to *devasthan* purposes, and that, therefore, the appellant should be placed in management of the lands as provided for by the decree. As the other brother of plaintiff refused to join in this proceeding, he was made co-defendant. The Court of First Instance held that the question of the alleged mismanagement and alienation did not fall within clause (*c*) of section 244, and that plaintiff should bring a separate suit. This order was confirmed in appeal by the District Judge on the ground that the decree in respect of the *devasthan* property was declaratory only, and not capable of execution.

It was contended in the appeal before us that the decree was not declaratory only, and that the question of mismanagement fell within clause (*c*) of section 244. We took time to consider our judgment, as the points raised in this appeal have never been formally decided in this Court. There can be no doubt that the portion of the decretal order now sought to be executed was not declaratory only, and incapable of execution. The authority quoted by the District Judge, apparently from O'Kinealy's Code,* cannot be found in I. L. R., 1 All., p. 154. The ruling in *Nawazish Ali Beg* v. *Vilaytee Khanum*, 2 Agra, 23, however, is an instance of a declaratory decree incapable of execution. In that case execution was sought of a decree declaring plaintiff's right to a monthly allowance, and it was very properly held that plaintiff's remedy was by suit, and not in execution under section 244. The appellant's pleader referred to *Ramapa* v. *Krishnaya*, P. J. for 1885, p. 22, which is more in point, as an authority in the present case. In that case the decree was passed in 1869 in accordance with the terms of a compromise, and directed that the tenant should retain possession of the land as long as he paid the rent fixed, but on default in payment the tenant should make over the land into plaintiff's possession. Plaintiff sought in 1882 [270] to enforce this last portion of the decree on the allegation that there had been a default in payment. It was held by this Court that such a decree was capable of execution, and its execution was not barred by reason of the lapse of more than three years from the date of the decree. There is an earlier ruling of the Madras High Court—*Ranganasary* v. *Shappani Asary*, 5 Mad. H. C. Rep., 375, which is to the same effect, and the landlord was required to seek possession of the land in execution, and not by a separate suit, when the decree

* *Reporter's Note*:—The case cited in O'Kinealy's Code at p. 22 and also at p. 261 is *Jugurnath* v. *Balgobind*. This case will be found reported in 1 N. W. P. at p. 154 of part V of the Edition of 1869 and at page 154 of the Edition of 1873, and not in I. L. R., 1 All.

awarded him possession on default in the payment of rent. It is true that in *Kashee Kishore Roy Chowdhry* v. *Noor Khan*, 7 Cal. W. R., 45, clause (c), section 244, was held to relate to matters immediately connected with or arising out of the execution of decrees, and that the question of damages caused to attached property was held not to fall under this clause. So also where the judgment-debtor sought to impeach a decree or an execution sale on the ground of fraud, it was held that such a claim could only be established by a separate suit—*Roy Luchmeeput Singh* v. *Adoyto Churn Mulliok*, 24 Cal. W. R., 452; *Mussamut Rajbansee Koomaree* v. *Bhugwatee Koomaree*, 1 Cal. W. R., Mis. Appeals, 29; *Hemmo Moyee* v. *R. Watson and Co.*, 14 Cal W. R., 299. An agreement not to execute the decree was similarly held to be not a matter relating to execution within the meaning of section 244—*Mukund Harshet* v. *Haridas Khemji*, I. L. R., 17 Bom., 23.

These rulings do not apply to the circumstances of the present case, which is clearly governed by the Madras ruling, *Ranganasary* v. *Shappani Asary*, 5 Mad. H. C. Rep., 375, and the similar decision in *Ramapa* v. *Krishnaya*, P. J. for 1885, p. 22. We must, therefore, reverse the orders of both the lower Courts, and direct the Khatav Court to proceed with the execution of the decree by permitting the parties to give evidence in regard to the alleged default of respondent No. 1. The costs of these proceedings will be governed by the final decision.

*Orders reversed.*

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## [271] APPELLATE CIVIL.

*The 3rd July, 1896.*

PRESENT:

MR. JUSTICE FULTON AND MR. JUSTICE HOSKING.

Genu and another............(Original Defendants Nos. 2 and 3) Appellants

*versus*

Sakharam and others............(Original Plaintiffs and Defendant No. 1) Respondents.*

*Land Revenue Code (Bombay Act V of 1879), Sec. 182†—Civil Procedure Code (Act XIV of 1882), Secs. 244, 294—Mortgage with possession—Default by mortgagee in payment of assessment—Sale for arrears of revenue—Certified purchasers—Purchase for mortgagee—Purchasers or mortgagee trustees for mortgagor—Suit by mortgagor for redemption—Execution—Sale in execution—Purchase by judgment-creditor without leave of Court—Remedy of judgment-debtor.*

In 1872 the plaintiffs' father mortgaged three plots of land (Nos. 303, 304 and 305) to the first defendant with possession. In 1880 and 1881 the first defendant having made default

* Second Appeals, Nos. 892 and 944 of 1895.

† Section 182 of the Land Revenue Code (Bombay Act V of 1879) :—

"182. The certificate shall state the name of the person declared at the time of sale to be the actual purchaser; and any suit brought in a civil Court against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed."

in paying the assessment, plots Nos. 303 and 305 were sold by the Revenue authorities and were bought respectively by defendants Nos. 2 and 3. In the latter year (1881) plot No. 304 was sold in execution of a money decree obtained by the mortgagee (defendant No. 1) against the mortgagor and was purchased by his (the first defendant's) undivided brother without leave of the Court. In 1892 the plaintiffs (heirs of the mortgagor) brought this suit against defendants Nos. 1, 2 and 3 to redeem the said three plots of land from the mortgage of 1872.

Defendant No. 1 pleaded that he had inherited plot No. 304 from his brother, who had become the owner of plot No. 304 by his purchase at the execution sale in 1881. He disclaimed all interest in plots Nos. 303 and 305. Defendants Nos. 2 and 3 answered that they had become absolute owners by the purchase at the revenue sales. As to these latter, it was alleged that defendants Nos. 2 and 3 were in possession of the said two plots for the first defendant. Defendants Nos. 2 and 3 contended that by section 182 of the Land Revenue Code (Bombay Act V of 1879) the plaintiffs were precluded from raising this point.

*Held*, that though section 182 forbade the Court to entertain a suit against defendants Nos. 2 and 3 on the ground that they had bought the land for defendant No. 1, it did not debar it from entertaining a suit against them on the ground that subsequently to the sale they were holding on behalf of defendant No. 1 or against defendant No. 1 on the ground that he was himself really in [272] possession through defendants Nos. 2 and 3 as his agents or tenants. The same principle of equity which would make defendant No 1 a trustee for the mortgagors if he had bought in his own name, would make defendants Nos. 2 and 3 trustees for them if subsequently to the sale they held the land on behalf of defendant No. 1 and would also make defendant No. 1 himself a trustee if subsequently to the sale the property came into his possession as beneficially entitled thereto owing to an agreement between him and the certified purchasers.

Where a judgment-creditor without leave of the Court buys the property of his judgment-debtor at a Court sale, the remedy of the latter is by application under section 294 of the Civil Procedure Code (Act XIV of 1882) and not by separate suit.

SECOND APPEAL from the decision of Rao Bahadur N. G. Phadke, Joint First Class Subordinate Judge of Sholapur, A. P.

Suit for redemption of certain plots of land (Survey Nos. 303, 304, 305) which had been mortgaged to defendant No. 1 (Motiram Fulchand) on 11th March 1872, by the plaintiffs' father.

Defendant No. 1 alleged that as to plot No. 304, it had been purchased by his brother at a sale held in execution of a decree obtained against the mortgagor; that his brother was dead and that he had inherited plot 304 from him. He disclaimed all interest in plots Nos. 303 and 305.

As to plot No, 303, defendant No. 2 alleged that he had purchased it at a revenue sale in 1880 held in consequence of the mortgagee's default in paying assessment.

As to plot No. 305, defendant No. 3 claimed also as a purchaser at a revenue sale held in 1881.

The first Court held that defendants Nos. 2 and 3 had become full owners of plots Nos. 303 and 305, and as to them rejected the plaintiffs' claim, but as to plot No. 304 he passed a decree for the plaintiffs.

The plaintiffs appealed and the defendants filed cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

The appellate Court raised a further issue (No. 7) as follows :—

"(7) Are Survey Nos. 303 and 305 purchased by defendants Nos. 2 and 3 for the defendant No. 1 ?"

[273] The Judge (First Class Subordinate Judge, A. P.) found that defendants Nos. 2 and 3 had purchased these plots of lands for defendant No. 1 and allowed the plaintiffs' claim as to them. He rejected the claim as to plot

No. 304, holding that as to it no suit would lie, the plaintiffs' remedy being in execution or by an application to set aside the sale under section 294 of the Civil Procedure Code.

From his decision defendants Nos. 2 and 3 filed a second appeal (No. 892 of 1895).

One of the plaintiffs also filed a second appeal (No. 944 of 1895).

*Mahadeo B. Chaubal*, for Appellants in Appeal No. 892 (Defendants Nos. 2 and 3):—We purchased the lands at the revenue sales, and sale certificates were granted to us. We thus became certified purchasers and no suit could lie against us on the ground that we purchased the lands for defendant No. 1. Section 182 of the Land Revenue Code (Bombay Act V of 1879) is quite clear on the point—*Balkrishna* v. *Madhavrav*, I. L. R., 5 Bom., 73. Further, there is absolutely no evidence to support the finding that our purchase was for defendant No. 1. We contend that we purchased the lands in our own right and have become full owners.

*Gangaram B. Rele*, for the Appellant (Plaintiff No. 3) in Appeal No. 944 of 1895:—Our appeal relates to Survey No. 304 only. We contend that as the property was purchased at a Court sale by the undivided brother of defendant No. 1 without the sanction of the Court, it was a purchase by the defendant himself (the mortgagee) without sanction. The Court sale was, therefore, voidable, and a suit to set aside such a sale can be brought within twelve years from the date of the sale—*Erava* v. *Sidramapa*, I. L. R., 21 Bom., 424.

**Fulton, J.**:—The plaintiffs sued to redeem three fields, Survey Nos. 303, 304 and 305, which had been mortgaged to the first defendant with possession. The Lower Appellate Court held that they were entitled to recover Nos. 303 and 305, but not No. 304, their right to which had been extinguished by a Court sale, which took place in 1881.

[274] In regard to Nos. 303 and 305 the appellate Court found that in 1880 or 1881 the occupancy right in the two numbers had been sold by the Collector in consequence of the default of defendant No. 1, who was bound to pay the assessment; that defendants Nos. 2 and 3 bought these numbers at the sale for defendant No. 1; and that there was none of the mortgage-debt remaining due on these numbers.

The defendants Nos. 2 and 3 have appealed, and it has been contended on their behalf that having regard to section 182 of the Land Revenue Code, the allegation that they bought for defendant No. 1 cannot be put forward, and that the finding is not supported by the evidence and should not have been arrived at, having regard to the issues tried by the Second Class Subordinate Judge. It was also urged that the fields were not free from the mortgage-debt.

On the first of these points we are of opinion that although section 182 of the Land Revenue Code does prevent the plaintiffs from proving that defendants Nos. 2 and 3 purchased on behalf of defendant No. 1, it does not determine the subsequent position of the parties. The section is as follows :—

"The certificate shall state the name of the person declared at the time of sale to be the actual purchaser; and any suit brought in a civil Court against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed."

The section is very similar to the first clause of section 317 of the Civil Procedure Code, but does not contain a proviso like the second clause. Hence it may be contended that the decisions under this section, which have been cited in *Subha Bibi* v. *Hara Lal Das*, I. L. R., 21 Cal., 519, are no guide to the construction of the section under consideration. It seems to us, however, that the

same principles of equity which would make the first defendant a trustee for the mortgagors if he had bought in his own name (see *Balkrishna* v. *Madhavrav*, I. L. R., 5 Bom., 73 at p. 76), would render defendants Nos. 2 and 3 trustees for them if subsequently to the sale they held the land on behalf of defendant No. 1, and would also make defendant No. 1 himself a trustee if **[275]** subsequently to the sale the property came into his possession as beneficially entitled thereto owing to an agreement between him and the certified purchasers. The section apparently forbids the Court to entertain a suit against defendants Nos. 2 and 3 on the ground that they bought for defendant No. 1, but does not debar it from entertaining a suit against them on the ground that subsequently to the sale they were holding the land on behalf of defendant No. 1 or against No. 1 on the ground that he was himself really in possession through defendants Nos. 2 and 3 as his agents or tenants. If it were otherwise, it would be open to a mortgagee, who was bound to pay the revenue and had been entered in the revenue books as occupant, to perpetrate a fraud by allowing the occupancy to be sold for default of payment of assessment (of which sale the mortgagor might under the circumstances have no notice) and getting it bought in by his servant or friend, who might then either continue to hold it on behalf of the mortgagee or at once make it over to the mortgagee's possession. But the principle of equity is, that if subsequently to the valid transfer of an estate (whether by the sale in England of the legal estate without notice of an equitable incumbrance, or by the sale in this country of the occupancy to realize the paramount charge of land revenue) it again becomes vested in the person whose conscience is charged by the meditated fraud, the original equity attaches to it in his hands or in that of his agents. (See Kerr on Frauds, p. 356; Story on Equity Jurisprudence, section 410; and *Kennedy* v. *Daly*, 1 Sch. and Lef., 379.) This principle is clearly laid down in *Balkrishna* v. *Madhavrav*, in regard to which case it must be noted that Sir M. WESTROPP'S allusion to the Land Revenue Code was made not with a view to limiting the applicability of the equitable principle to revenue sales prior to the enactment of the Code, but merely to show that his remarks about the paramount nature of the charge for land revenue, which had previously been determined on other grounds, would thereafter be governed by the express provisions of the Code.

We think, then, that the form of the 7th issue raised by the Lower Appellate Court was wrong. The real question was not whether the defendants Nos. 2 and 3 had purchased at the revenue **[276]** sale for the defendant No. 1. Such an issue could not be raised in a suit against the defendants Nos. 2 and 3 consistently with the provisions of section 182 of the Land Revenue Code. The point for determination was whether at the time of the institution of this suit the defendant No. 1 was in possession through his agents, defendants Nos. 2 and 3, or the defendants Nos. 2 and 3 were by agreement holding the land on his behalf. As this issue was not raised in either of the Courts in a distinct form which would bring to the minds of the parties exactly what they would have to prove, we think the fairest way will be to send it down for determination leaving it to the Lower Appellate Court after taking such further evidence as the parties may tender or it may call for to decide what is the reasonable inference to be drawn from the various circumstances that may be proved. It may be well to look at the receipt-books in order to ascertain by whose hand the land revenue has been paid, to find out why the defendants Nos. 2 and 3 did not appear at the previous hearings, and whether they are or are not connected in their dealings with defendant No. 1, and generally to make a full enquiry into the circumstances calculated to throw light on the case.

We think the lower Court was right in holding that no mortgage-debt remained due on these fields for the reasons which it has given. If defendants Nos. 2 and 3 are holding them on their own account, they are entitled to retain them. If they are holding them for defendant No. 1, or he is otherwise in possession, the plaintiffs are entitled to recover them.

We now send down the following issue:—" Whether at the time of the institution of this suit the defendant No. 1 was in possession of Nos. 303 and 305 or either of them through his agents, defendants Nos.2 and 3, or otherwise, or whether defendants Nos. 2 and 3 were by agreement holding them on his account ? "

The finding should be returned within three months.

With regard to Survey No. 304 we think the finding of the First Class Subordinate Judge, A. P., was correct. Mr. Rele referred us to *Erava* v. *Sidramapa*, I. L. R., 21 Bom., 424, but that case does not support the contention that a judgment-debtor whose property [277] has at a Court sale been bought by the judgment-creditor without leave of the Court can sue within twelve years to set aside the sale and recover possession. It shows that when after the death of a judgment-debtor his property is sold without notice to the heirs, those heirs can sue within twelve years to recover it. But the reasoning cannot be applied by analogy to the present case. There the auction-purchaser was not a party to the suit. Here it is only on the ground of his being a party that the sale can be avoided. The case, therefore, clearly falls under section 244, and no separate suit will lie. Section 294 provides expressly a remedy by application. See *Chintamanrav* v. *Vithabai*, I. L. R., 11 Bom., 588.

We, therefore, dismiss Appeal No. 944 of 1895 with costs on the appellant.

*Issue sent down in Appeal No. 892.*
*Appeal No. 944 dismissed.*

**NOTES.**

[This was followed in (1901) 23 All., 478.]

[22 Bom. 277]

APPELLATE CIVIL.

*The 7th July, 1896.*

PRESENT:

SIR FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Fakirgauda............(Original Plaintiff) Appellant
*versus*
Gangi............(Original Defendant) Respondent.*

*Hindu law—Marriage—Lingayets—Marriage between members of different sects of Lingayets—Burden of proof of invalidity of marriage—Evidence.*

According to the Lingayet religion, as well as according to Hindu law, marriages between members of different sects of the Lingayets are not illegal, and where it is alleged that such a marriage is invalid, the *onus* lies upon the persons making such allegation, of proving that such marriage is prohibited by immemorial custom.

SECOND APPEAL from the decision of T. Hamilton, District Judge of Dharwar, confirming the decree of Rao Bahadur Gangadhar V. Limaye, First Class Subordinate Judge.

* Second Appeal, No. 854 of 1895.

The plaintiff sued to obtain possession of his wife, the defendant. The parties were Lingayets and resided in Dharwar.

The defendant contended that she and the plaintiff belonged to different sects of the Lingayet caste and that there could be no lawful marriage between them.

[278] The Subordinate Judge found that the defendant was not the lawfully married wife of the plaintiff, the parties belonging to different sects of the Lingayet caste, and there being no evidence of any custom sanctioning such marriages. He also held that the claim was time-barred under articles 34* and 35,† Schedule II of the Limitation Act (XV of 1877).

On appeal by the plaintiff the Judge summarily dismissed it, under section 551 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff preferred a second appeal.

*Dhondu P. Kirloskar*, for the Appellant (Plaintiff) :—The parties are Lingayets who have been held to be Sudras — *Gopal* v. *Hanmant*, I. L. R., 3 Bom., 273 ; *Basava* v. *Lingangavda*, I. L. R., 19 Bom., 428 at p. 457. Marriages between different sections of the Sudra class are not invalid—*Inderun* v. *Ramasawmy*, 13 Moore's I. App., 141; *Pandaiya Telaver* v. *Puli Telaver*, 1 Mad. H. C. Rep., 478. In the present case the parties, no doubt, belong to different sects. The evidence shows that the plaintiff is a member of the Adibanjigar sect and the defendant a member of the Panchamsali sect. But the circumstance that they belong to different sects is not by itself sufficient to invalidate a marriage if it has taken place. The marriage having taken place, every presumption must be drawn in its favour, unless and until it is clearly shown that marriages among members of different sects are strictly prohibited. If the conscience of the caste does not revolt against such a marriage, it must be upheld—*Patel Vandravan Jekison* v. *Patel Manilal Chunilal*, I L. R., 16 Bom., 470.

Among Hindus marriage is a *sanskar* and if it once takes place, the doctrine of *factum valet* applies and nothing can undo it. Defendant admits the fact of marriage. She must, therefore, prove that it is invalid.

*Daji A. Khare*, for the Respondent (Defendant):—Both the lower Judges have found, on the evidence, that marriages cannot take place among members of the different sub-divisions of the Lingayet caste. That being so, the marriage alleged by the plaintiff is invalid—*Narain Dhara* v. *Rakhal Gain*, I. L. R., 1. Cal., 1.

[279] *Dhondu P. Kirloskar*, in reply :—The decision relied on is not applicable, because in that case the parties belonged to different castes and not to two sub-sections of the same caste

**Hosking, J.** :—This action was instituted by Fakirgauda to obtain possession of his wife Gangi. The parties reside in the Dharwar District, and are

*[ Art. 34 :—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
| --- | --- | --- |
| For the recovery of a wife ... | Two years ... | When possession is demanded and refused. ] |

†[ Art. 35 :—

| | | |
| --- | --- | --- |
| For the restitution of conjugal rights. | Do ... | When restitution is demanded and is refused by the husband or wife, being of full age and sound mind. ] |

Lingayets. The lower Courts have both found that the parties are members of different sects of Lingayets, but neither Court has given in its judgment the names of the sects. From the evidence there can be no doubt that they found plaintiff to be a member of the Adibanjigar sect, and defendant to be a member of the Panchamsali sect.

The Subordinate Judge framed, as the only issue on the merits of the case, the question whether defendant is the lawfully married wife of plaintiff. He held that, in the absence of evidence of custom sanctioning a marriage between persons of different castes of the Lingayets, such a marriage must be held to be invalid. The District Judge, who has dealt with the case rather summarily under section 551 of the Civil Procedure Code, also appears to have placed on plaintiff the *onus* of proving that the marriage was valid.

It has been contended in this Court that the fact of marriage having been admitted, it must be presumed to be valid, and that it was for defendant to prove that the marriage was invalid. We are of opinion that both these contentions are correct.

The status of Lingayets as Sudras was determined by the judgment of this Court in *Gopal* v. *Hanmant*, I. L. R., 3 Bom., 273. In *Upoma Kuchain* v. *Bholaram Dhubi*, I. L. R., 15 Cal., 708, the Calcutta High Court, after reviewing previous decisions on the question whether marriages between persons in different sections or sub-sections of the Sudra caste are valid* held that there is nothing in Hindu law prohibiting such marriages. In *Basava* v. *Lingangauda*, I. L. R., 19 Bom., at p. 457 Mr. Justice RANADE says: The Lingayets are admittedly a heretical sect, and are not subject to Brahmin religious laws............The liberty of widow re-mar-[280]riage, and even of wife re-marriage, has been allowed to this Lingayet community." The only authorities we have been able to consult as to the religion of the Lingayets are Steele on Hindu Castes and Campbell's Gazetteer of the Dharwar District. The former work throws no light on the point at issue in this suit. Mr. Campbell says that according to the Lingayets the practice of wearing the *ling* was introduced by Basav (A.D. 1100-1160), who reformed the Lingayet religion. Mr. Campbell lays down among the leading doctrines and rules of Basav's faith that as all *ling* wearers are equal, the Lingayet woman is as high as the Lingayet man, and that, therefore, she should not marry till she comes of age, and should have a voice in choosing her husband, and that as all *ling* wearers are equal, all caste distinctions cease. Mr. Campbell says that many of these rules are not observed, and he states that in Kolhapur neither eating together nor inter-marriage is allowed among the different classes of Lingayets. A Jangam, that is, a Lingayet priest, may in Dharwar marry the daughter of a pure Lingayet, a Shilvant or a Banjig. The customs of the Lingayets apparently vary in different districts.

Upon this authority we hold that according to the Lingayet religion, as well as according to Hindu law, marriages between members of different sects of the Lingayets are not illegal, and where it is alleged that such a marriage is invalid, the *onus* lies upon the persons making such allegation, of proving that such marriage is prohibited by immemorial custom.

The way in which plaintiff put forward his case, attempting, unsuccessfully, to prove that he and defendant are both Panchamsalis, weakens his contention that intermarriages are not prohibited, and one of his own witnesses, Lingangauda (Exhibit 31), has directly asserted that marriages do not and cannot take place between Panchamsalis and Adibanjigars, but the cross-examination

* *Narain Dhara* v. *Rakhal Gain*, I. L. R., 1 Cal., 1; *Inderun* v. *Ramasawmy*, 13 Moore's I. A., 141; *Ramamani Ammal* v. *Kulanthai Natchiar*, 14 Moore's I. A., 346.

of defendant's witnesses shows that the present contention was raised in the Court of First Instance, and plaintiff is entitled to have the case tried on a proper issue, if the suit is not barred by limitation. The District Court has recorded no finding on that point. Should it be necessary to decide the issue as to prohibition by custom, the question being one of great importance to the Lingayet community in the Dharwar District, it is very [281] desirable that there should be a thorough enquiry and that persons of standing in the community should be examined. We reverse the decree of the Lower Appellate Court and remand the case for a fresh decision. Costs to follow final decision.

*Decree reversed and case remanded.*

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**NOTES.**

[As regards inter-caste marriages, see also (1909) 33 Bom., 693; (1909) 33 Mad., 342; (1908) P. R., 72, (1903) P. R., 49.]

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**[22 Bom. 281]**

## APPELLATE CIVIL.

*The 8th July, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Abaji............(Original Plaintiff) Appellant

*versus*

Bala and another............(Original Defendants) Respondents.*

*Oaths Act (X of 1873), Sec. 9—Offer by one party to be bound by oath of other party if taken in a certain form—Acceptance of the offer—Subsequent retractation of the offer—Administering of the oath discretionary with the Court.*

The plaintiff offered, under section 9 of the Indian Oaths Act (X of 1873), to be bound by the oath or affirmation of the defendant in a prescribed form upon a certain point. The defendant accepted the offer and took the oath.

*Held*, that the plaintiff could not retract his offer to be bound by the oath.

SECOND APPEAL from the decision of S. Tagore, District Judge of Satara, confirming the decree of Rao Saheb K. H. Kirkire, Subordinate Judge of Khatav.

The plaintiff claimed as the adopted son of one Gopal (deceased) to recover certain property which he alleged was in the hands of his adoptive mother (defendant No. 2), who in collusion with her son-in-law (defendant No. 1) had wrongfully taken possession of it.

The defendants denied the plaintiff's adoption.

At the hearing the plaintiff offered, under section 9 of the Indian Oaths Act (X of 1873), to be bound by the oath of the second defendant upon the point of his adoption if she took it before a certain idol in a certain form. She agreed to do so and the Court appointed a commissioner to administer the oath.

The plaintiff subsequently retracted his offer and applied that the case might be disposed of by the Court on its merits. The Judge, however, rejected his application, and the commissioner administered the oath to the second defendant as proposed originally by the plaintiff.

[282] The Subordinate Judge then decided the suit in defendants' favour and rejected the claim.

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* Second Appeal, No. 891 of 1895.

On appeal by the plaintiff the Judge confirmed the decree, holding that it was not competent for the plaintiff to revoke his offer under the circumstances of the case, and that the Subordinate Judge was fully justified in holding him bound by it after it had been accepted and acted upon.

The plaintiff preferred a second appeal.

*Balaji A. Bhagvat*, for the Appellant (Plaintiff):—It is true that the Oaths Act (X of 1873) makes no provision for retracting such a proposal; still section 12 of the Act provides that if a party refuses to make the oath, the Court may presume against him. A similar presumption may be drawn in the case of a person retracting the proposal. But the Act does not lay down that, if a man makes the proposal, he is finally bound by it and cannot afterwards retract. The provisions of the Act are not peremptory; they are merely permissive.

*Vasudeo R. Joglekar*, for the Respondents (Defendants):—The plaintiff could not retract, inasmuch as defendant No. 2 was ready and willing to take the oath proposed by him. The lower Courts were justified in not allowing him to retract, because the reasons assigned by him for doing so were frivolous and vexatious.

**Farran, C. J.**:—The question in this case is, whether the Subordinate Judge rightly decided this suit upon the oath of the second defendant, that she had not adopted the plaintiff. The plaintiff offered, under section 9 of the Indian Oaths Act, 1873, to be bound by the oath or affirmation upon that point of the second defendant, if she took it before a certain idol in a prescribed form. The second defendant agreed to take the oath before the idol in the prescribed manner, and subsequently did so in the presence of a commissioner appointed by the Court. The Court thereupon treated the oath of the second defendant as conclusive proof of the non-adoption of the plaintiff by the second defendant and dismissed the suit.

The plaintiff appealed on the ground that he had retracted his offer before the oath was taken by the second defendant, though [283] after she had agreed to take it, and that, therefore, he was not bound by the oath. The Act, however, makes no exception of the case in which a party who makes such an offer which his adversary accepts subsequently retracts it. What it does is to make the administering of the oath or the appointment of a commissioner to administer it discretionary with the Court. If a party after making such an offer satisfies the Court that he has good grounds for retracting it, the Court would probably exercise a wise discretion in refusing to administer the oath; but when (as in this case) the party puts forward frivolous reasons for his retractation, the Court is, we think, justified in administering the oath notwithstanding the retractation. We confirm the decree with costs.

*Decree confirmed.*

NOTES.

[These are similar decisions:—(1899) 22 Mad., 234; (1906) 29 All., 49; (1907) 17 M.L.J., 536; (1912) 16 I. C., 733.]

[22 Bom. 283]

## APPELLATE CIVIL.

*The 1st July, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Kashinath Keshav Joshi............(Original Plaintiff No. 1) Appellant

*versus*

Gangabai and others............(Original Defendants) Respondents.*

*Municipality—District Municipal Acts (Bombay Act II of 1884), Sec. 48†, and Bombay Act VI of 1873, Sec. 86‡—Purchase from mortgagee by Municipality—Suit by mortgagor to recover possession—Ejectment—Limitation—Notice.*

A mortgagee (defendant No. 1) refused to give up part of the mortgaged land when the mortgage was paid off in 1881. He remained in possession and in 1888 [284] he sold this land to the Municipality of Mahad (defendant No. 2). The mortgagor subsequently sued the Municipality and its vendor to recover possession. The Municipality contended that the suit was barred by limitation under section 48 of the District Municipal Act (Bombay Act II of 1884).

*Held*, that the suit was not barred by section 48. That section does not apply to actions of ejectment brought against a Municipality. Such an action brought to try the title to land is not an action for anything done or purporting to be done in pursuance of the Act.

*Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, distinguished.

SECOND APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Thana with appellate powers, reversing the decree of Rao Saheb A. V. Purohit, Subordinate Judge of Mahad.

Suit for possession of certain lands against Gangabai (defendant No. 1) and the Municipality of Mahad (defendant No. 2), the latter being in possession as purchaser from Gangabai.

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* Second Appeal, No. 872 of 1895.

† Section 48 of the District Municipal Act Amendment Act (Bombay Act II of 1884):—

48. No action shall be commenced against any Municipality, or against any officer or servant of a Municipality, or any person acting under the orders of a Municipality, for anything done, or purporting to have been done, in pursuance of this Act, or of the principal Act, without giving to such Municipality, officer, servant or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of;

and in the case of any such action for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered and shall pay all costs incurred by the defendant after such tender.

‡ Section 86 of Bombay Act VI of 1873:—

86. No action shall be brought against the Municipality, or any of their officers, or any person acting under their direction, for anything done or intended to be done under this Act, until the expiration of one month next after notice in writing shall have been delivered or left at the office of the Municipality, or at the place of abode of the intended defendant, stating with reasonable particularity the cause of action, and the name and place of abode of the intended plaintiff;

and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so delivered, and unless such notice be proved, the Court shall find for the defendant; and every such action shall be commenced within three months next after the passing of the final order by the Municipality or officer having power to pass such order, and not afterwards.

And if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

The plaintiff alleged that he had mortgaged the land in question with other land to the first defendant; that he paid off the mortgage on 27th July 1881, and got back the rest of the property, but the portion now sued for remained in possession of the first defendant, who had built a shed on it and refused to give it up, and on the 8th May 1888, sold it to the Municipality (defendant No. 2).

The Subordinate Judge allowed the plaintiff's claim.

**[285]** On appeal by the Municipality (defendant No. 2) the Judge reversed the decree and dismissed the suit on the ground that the Municipality had wrongfully taken and held possession of the land, and that under section 48 of the District Municipal Act (Bombay Act II of 1884) the suit should have been brought within three months of the act complained of. The following is an extract from his judgment:—

"The plaintiffs admitted in the plaint that the Municipality took wrongful possession of the property when it purchased the same from the defendant No. 1. In the plaint it is also admitted that the defendant No. 1 was also in wrongful possession. When the Municipality took wrongful possession of the property, the legal possession was with the plaintiffs. This being so, the plaintiffs treated the Municipality as trespassers and sought to eject the Municipality. This act of taking wrongful possession was committed by the Municipality long after the amending Act of 1884 came into operation. Under section 48 of that Act this suit should have been brought within three months of the trespass complained of. The decision in I. L. R., 18 Bom., 19, shows that the suit as against the appellant is barred by that section."

Plaintiff appealed to the High Court.

*Ganesh K. Deshamukh*, for the Appellant (Plaintiff No. 1):—The case of *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, does not apply. That case applies only where the act done is in pursuance of the object of the District Municipal Act. That is not so here. Section 48 of the District Municipal Act is not applicable to ejectment suits. It relates to actions for money. Our contention is strengthened by the language of section 86 of the old Municipal Act (Bombay Act VI of 1873). See also *Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay*, 12 Bom. H. C. Rep., 250.

*Daji A. Khare*, for Respondent No. 2 (Defendant No. 2):—The plaint distinctly states that we had taken wrongful possession. Under the District Municipal Act, a Municipality has the right to possess property and to purchase property. Therefore the present suit is an action for an act done by us as a Municipality under the Act.

**Farran, C. J.**:—This was a suit to recover possession of vacant land in the town of Mahad. The second defendant (the Municipality of Mahad) are in possession under a purchase from the **[286]** first defendant. The plaintiffs allege that they mortgaged the land in suit and other property to the first defendant, and that when they finally paid off the mortgage on the 27th July 1881, and got back the rest of the mortgaged property, the land in question remained in possession of the first defendant, who had built a shed on it and refused to give it up. The first defendant being thus in possession sold it to the Municipality on the 8th May 1888. The Subordinate Judge awarded the plaintiffs' claim.

This decision was—without entering upon the merits—reversed by the First Class Subordinate Judge, A. P., at Thana, on the ground that the suit was barred by limitation under the provisions of section 48 of Bombay Act II of 1884. The learned Judge relied upon the decision in *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, in support of his judgment. That decision can be distinguished from the present on the ground that the facts in each of the cases are essentially different. There the Municipality pulled down certain

huts and entered upon the land which the plaintiff claimed as his, thus dispossessing him. This dispossession may be said to have been "something done or purporting to have been done in pursuance of" the Act. In the present case the vendor of the Municipality had according to the plaintiffs' case entered upon the land lawfully, and continued in possession of it until he sold to the Municipality. If the plaintiffs' case be true, the defendant No. 1 could, of course, only assign to the Municipality such possessory right as he enjoyed and such right only the Municipality could purchase. The plaintiffs doubtless say that the possession of defendant No. 1 was wrongful, and that the possession of the Municipality obtained from him was wrongful, but the facts as alleged by the plaintiffs are, as we have said, that the defendant No. 1 entered lawfully, and being in possession sold to the Municipality. The Municipality, therefore, committed no wrong in purchasing the land from the first defendant. They simply bought land with a defective title. The facts of the two cases as stated by the plaintiffs, respectively, are, therefore, by no means on the same or even on parallel lines. Here there has been no dispossession of the plaintiffs by the defendant, the Municipality.

**[287]** We are thus led to consider whether the decision in *Nagusha* v. *Municipality of Sholapur (supra)* was intended to extend beyond a state of facts similar to those in that case so as to embrace all actions of ejectment; and whether if not we ought so to extend it. When the judgment is carefully read it will be found that it in terms applies only to actions of ejectment in which the defendant is dispossessed by the Municipality. Omitting the reference to the section of the former Act the judgment is in these words: "A suit in ejectment * * * being an 'action for an act done'—(*that act being the dispossession by the defendant*)—with a view to being restored to possession must be held to fall under the provisions of the first paragraph of the section (48) of the Act of 1884." That passage plainly does not expressly embrace, nor do we think that by implication it necessarily embraces actions in ejectment in which the plaintiff does not complain of being dispossessed by the Municipality, and having regard to its extremely guarded language we are not disposed to think that it was intended to extend beyond the actual case which the learned Chief Justice was dealing with. That being so we are at liberty, we think, to consider the broader facts before us and see whether they bring the present case within the purview of the section. Are actions in ejectment generally governed by its provisions ?

The language of section 48 of Bombay Act II of 1884 differs so widely from that of section 86 of Bombay Act VI of 1873 that no inference as to the intention of the Legislature can be drawn from the change of expressions contained in the later section. The Legislature departing from the technical language of the earlier section copied from English statutes has used in its stead simpler and more popular language. The concluding paragraph of section 86 of the earlier Act would appear to have limited its application to actions for damages. The concluding paragraph of section 48 of the later Act evidently has not that operation. It shows, on the contrary, that the earlier paragraph of the section embraces other actions than actions for damages ; but as besides actions of ejectment there are various other actions which can be brought against a Municipality which do not sound in damages, *e.g.*, the familiar one to recover money illegally demanded and **[288]** paid under protest, this consideration does not bring us any nearer to an answer to the question whether actions of ejectment are within the scope of section 48 of Bombay Act II of 1884.

It appears to us that it would be a straining of language to say that an ordinary action of ejectment against a Municipality to try the title to land is

an action for anything done or purporting to be done in pursuance of the Act. What in such an action is the act done or purporting to be done in pursuance of the Act? Suppose the case in which the Municipality comes in under a title at the time valid, but which subsequently fails, as when it purchases from a tenant for life and the remainderman after his death sues for its recovery. How does the remainderman sue for an act done by the Municipality? He sues for his land. The Municipality defend, not because they have acted or purported to act under the Act, but because they allege that the land is their land. When in such a case is the act complained of done? The cause of action of the plaintiff dates from the death of the tenant for life, but at that time the Municipality has done nothing either in pursuance of the Act or otherwise. Is then the act complained of the refusal of the Municipality to restore the land to the plaintiff when he demands it? If it is, the answer is:—That is not an act done in pursuance of the Act. The Act does not enable or purport to enable the Municipality to keep land which does not belong to them.

These and other considerations of weightier import in addition to the technical arguments founded upon the exact language of the concluding paragraph of the section led the Court in *Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay*, 12 Bom. H. C. Rep., 250, to come to the conclusion that an action in ejectment did not fall within the scope of the section with which they were dealing. A similar conclusion was arrived at by the Judges in the Queen's Bench Division in England in *Foat* v. *The Mayor, &c., of Margate*, 11 Q. B. D., 299. "This," says WATKIN WILLIAMS, J., speaking of an action of ejectment, "is not an action of tort or for anything done under the provisions of the Act." And MATHEW, J., at the close of his judgment adds: "An action for the recovery of land is something [289] wholly different." The decisions upon the section of the earlier and differently worded statutes did not depend solely upon the argument based upon the concluding paragraph as to making amends, but upon the broader ground that an action of ejectment was not an action for anything done or intended to be done under the Act. They are, we think, still valuable as guides to the interpretation of the present Act.

For these reasons we reverse the judgment of the Subordinate Judge, A.P., and remand the case for retrial of the appeal upon the merits. Costs, costs in the cause.

*Decree reversed and case remanded.*

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**NOTES.**

[ See also (1896) 22 Bom., 289; (1900) 25 Bom., 142; (1913) 23 I. C., 317 (Punjab.) ]

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[22 Bom. 289]

## FULL BENCH.

## APPELLATE CIVIL.

*The 1st December, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS, MR. JUSTICE RANADE, MR. JUSTICE STRACHEY, AND MR. JUSTICE HOSKING.

Manohar Ganesh Tambekar............(Original Plaintiff) Appellant

*versus*

The Dakor Municipality............(Original Defendant) Respondent.*

*Municipality—Ejectment suit against Municipality—Notice of action —Bombay District Municipal Act (II of 1884), Sec. 48—Notice.*

The plaintiff was the inamdar of the village of Dakor. He filed an ejectment suit against the Municipality of Dakor, alleging that the Municipality had illegally and wrongfully encroached upon a portion of the Gomti Lake at Dakor by laying the foundations of a building which they intended to erect for the purpose of a *dharmshala.*

The Municipality pleaded (*inter alia*) that the suit was bad for want of notice of action under section 48 of the Bombay District Municipal Act II of 1884

*Held* (by a majority of the Full Bench) that the provisions of section 48 of Bombay Act II of 1884 do not apply to actions for the possession of land brought against a Municipality.

*Per* PARSONS, J.:—The provisions of section 48 apply only to actions for the possession of land whereof the plaintiff has been dispossessed by the Municipality acting or purporting to act under some section of the Municipal Act, which empowers them to take possession of, or oust any one from, that land.

[290] *Per* RANADE, J.:—Section 48 does not generally apply to suits for the possession of land, except in those cases where the claim arises on account of some act or omission of the Municipality when it acts in pursuance of its statutory powers, and encroaches upon private rights.

*Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, overruled.

SECOND APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad, in Appeals Nos. 198 and 209 of 1893.

The plaintiff, who was the inamdar of the village of Dakor, and hereditary trustee of the temple of Shri Ranchodraiji, sued the Municipality of Dakor to recover possession of Survey No. 1588 and part of Survey No. 1584 situate in the village of Dakor.

Survey No. 1588 is the *Bet* or island in the Gomti Lake at Dakor. Survey No. 1544 comprises the lake and some land adjoining it.

The plaintiff alleged that the *Bet* had been in the occupation of certain Bawas under a revocable permission or licence from his ancestors, and that the Municipality of Dakor had recently purchased it from the Bawas, and taken possession of it without his authority or consent.

As to the portion of the Gomti Lake which was included in the present suit, the plaintiff alleged that the Municipality had illegally and wrongfully encroached on the same by laying the foundations of a building which they intended to erect for the purpose of a *dharmshala*.

The plaintiff in this suit sought to have the encroachment removed, and to recover possession of the *Bet* and part of the lake in dispute. Before filing

* Second Appeals, Nos. 16 and 207 of 1896.

the suit he gave notice to the Municipality, under section 48 of Bombay Act II of 1884, of his intention to sue them for the recovery of the *Bet*, but made no reference to the lake.

Both the lower Courts dismissed the suit *in toto*, holding that the plaintiff's claim to the *Bet* was time-barred by reason of adverse possession on the part of the Bawas for over fifty years, and that the suit, so far as it related to the lake, was bad for want of notice under section 48 of the Bombay District Municipal Act (Bombay Act II of 1884).

**[291]** Against this decision plaintiff preferred a second appeal (No. 16 of 1896) to the High Court.

This appeal, as well as Appeal No. 207 of 1896 which involved the same points, were heard at first by a Division Bench (FARRAN, C.J., and HOSKING, J.), who referred the following question to a Full Bench :—

" Whether the provisions of section 48 of Bombay Act II of 1884 apply to all or any actions for the possession of land brought against a Municipality."

The order of reference was in the following terms : -

" As to that portion of the lake which the defendants, the Municipality of Dakor, have encroached upon, the District Judge has held that the suit is not maintainable, as due notice of it had not been given under section 48 of the Municipal Act (Bombay Act II of 1884). In support of that view he has relied on *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, the circumstances of which are indistinguishable from those of the present case. The correctness of that decision has been questioned with much force before us by counsel for the appellant. In *Kashinath* v. *Gangabai*, see *ante* p. 283, we have held that section 48 of Bombay Act II of 1884 does not apply to all actions of ejectment, and the reasoning in the judgment goes, we think, far to show that it does not apply to any. The subject is one of great importance, and we think it advisable to refer to a Full Bench the question—Whether the provisions of section 48 of Bombay Act II of 1884 apply to all or any actions for the possession of land brought against a Municipality ?"

The reference was argued before FARRAN, C.J., PARSONS, RANADE, STRACHEY and HOSKING, JJ.

*Ganpat Sadashiv Rao*, for the Appellant in Appeal No. 16 of 1896.

*C. H. Setalvad*, for the Appellant in Appeal No. 207 of 1896.

Rao Saheb *Vasudev J. Kirtikar*, for Respondents in Appeals Nos. 16 and 207 of 1896.

**[292]** *Setalvad*, (for the Appellant) :—The question turns on the construction of section 48 of Bombay Act II of 1884. The corresponding section of the old Act (VI of 1873) has been held not to apply to actions in ejectment—*Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay*, 12 Bom. H. C. Rep., 250: *Joharmal* v. *The Municipality of Ahmednagar*, I. L. R., 6 Bom., 580 ; so, too, a similar construction has been put on section 87 of Bengal Act III of 1864 by a Full Bench of the Calcutta High Court—*Chunder Sikhur* v. *Obhoy Churn*, I.L.R., 6 Cal., 8. To the same effect is the ruling of the Madras High Court under section 156 of Madras Act V of 1884—*President of the Taluka Board, Sivaganga* v. *Narayanan*, I. L. R., 16 Mad., 317, and *Mayandi* v. *McQuhae*, I. L. R., 2 Mad., 124. The English decisions on section 264 of the Public Health Act of 1875 also lay down that notice is only necessary in the case of actions for compensation or damages for wrongful acts on the part of Municipal or Local Boards. The section does not apply to actions of ejectment—*Foat* v. *Mayor, &c., of Margate*, 11 Q. B. D., 299. An action of ejectment cannot be said to be an action for anything done or purporting to be done in pursuance of the

Act. It is not alleged or pretended that the encroachment complained of was authorized by any section of the Act. That being so, no notice is necessary under section 48 of Bombay Act II of 1884. No doubt the decision of this Court in *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, is opposed to my contention. That decision is based on the ground that there is a change in the language of section 48 of the Amending Act. But the change in the wording of section 48 does not make it applicable to actions of ejectment. The general scope and intention of the Act must be taken into consideration, and not merely the language of a particular section. Take the case of a minor or of a person who has gone abroad. Suppose that the Municipality were to take wrongful possession of his land without his knowledge and consent. Is he to lose his land altogether if he does not sue the Municipality within three months from the date of his dispossession, though he has full twelve years under the [293] general Limitation Act to bring an ejectment suit against a trespasser? The Legislature could not have intended to inflict such a hardship on private individuals in favour of municipal bodies. The decisions under the old Act must have been present to the mind of the Legislature, and if it had been the intention of the Legislature to change the existing law as settled by those decisions, it would have done so in clear and express terms. I submit, therefore, that the Legislature has not made any change in the law and that section 48 of Bombay Act II of 1884 has no application to ejectment suits.

Rao Saheb *Vasudev J. Kirtikar*, for the Respondents :—The defence of the Municipality in this case is that the Gomti Lake is public property and, as such, vested in the Municipality under section 17 of the District Municipal Act. If the Municipality took possession of any portion of the lake, it did so under the authority vested in it by law. The alleged dispossession was an act done in pursuance of the Act. The suit is, therefore, bad for want of notice. The language of section 48 of the Amending Act differs materially from that of section 86 of the old Act. Section 86 of the old Act contemplates actions for damages only, and so does section 87 of Bengal Act III of 1864 and section 156 of Madras Act V of 1884. But under section 48 of Bombay Act II of 1884 "no action"—that is, no action of any sort or description whatever—can be instituted against a Municipality without giving one month's previous notice. The language of this section is clear and wide enough to include ejectment suits. The application of this section to ejectment suits may work hardship in certain cases, but that is not a valid reason for excluding such suits from the operation of this section. Whatever hardship a legislative enactment may entail, if the language of the enactment is clear, it must be given effect to—Maxwell on Statutes, p. 4 ; *Hill* v. *East and West India Dock Company*, 9 Ap. Ca., 448 at p. 464 ; *Rhodes* v. *Smethurst*, 4 M. and W., 42, 63. It has been held in England that under the corresponding section 264 of the Public Health Act notice of action is necessary—*Midland Railway Company* v. *Withington Local Board*, 11 Q. B. D., 788, at p. 794. Having regard, then, to section 86 of the old Act, having regard to the [294] change in the language of section 48 of the Amending Act, and having regard to the English and Indian decisions passed under similar enactments, I contend that section 48 does apply to actions of ejectment.

**Farran, C.J.** :—In the principal case out of which this reference arises, the Municipality of Dakor believing (it may be assumed) that the Gomti Lake was vested in them under the provisions of section 17 of the Bombay District Municipal Act, proceeded under the powers conferred upon them by section 24, clause 15, of that enactment to lay the foundations of a building (a *dharmshala*) in the bed of the lake. In the subordinate case the Municipality took possession

of land forming portion of Survey No. 1584 (by placing mud and refuse upon it), believing (it may be assumed) that it was vested in them as part of the Gomti Lake, and refused to acknowledge the plaintiff's title to it or to restore it to him. In each case the plaintiff claims the land so taken possession of by the Municipality as his own. For the purposes of this reference we must assume that each plaintiff is entitled to the land which he seeks to recover from the Municipality. The question to be determined is whether before bringing such a suit the plaintiff is bound to give to the Municipality the notice required by section 48 of Bombay Act II of 1884, and whether (which is of more importance) the plaintiff loses his right to sue for his land after three months from the date of the Municipality so taking possession of it unless he files a suit for its recovery within that period.

My answer to the question so raised is in the negative upon the broad ground that an action in ejectment, or, in other words, a suit for the possession of land is not "an action * * * for anything done or purporting to have been done in pursuance of the Act." I adopt this broad ground, because I cannot help thinking that what the Municipality have actually done in each of the present cases they have done under the belief that they were acting in pursuance of the Act, and that it would be narrowing the scope and effect of the section too much to say that the act of taking possession of the land in the above manner was not an act purporting to be done by them in pursuance of the Act, although no section of it specifically authorizes them to build foundations in, or to throw earth or rubbish on, the land of another. [295] The object of the present section (48), as it was of the earlier and differently worded sections, appears to me to be to shorten the time within which pecuniary claims for compensation for wrongful acts done by the Municipality or their officers in carrying out the provisions of the Act can be brought, and to give the defendants timely notice of such actions to enable them to consider their position and to tender amends in cases of actions for damages in proper cases. In actions not sounding in damages, such as actions for money had and received, where the tort was waived, Municipalities in common with all defendants always had without express statutory authority the power to avoid an action by payment of the amount actually due. It was only necessary, therefore, to provide expressly for actions for damages. I think, therefore, that a suit against the Municipality to recover damages for either of the acts which the Municipality have done in these cases would be barred after three months from their committal, and that the Municipality would have been entitled to timely notice before they could have been sued in respect of such acts. I am unable, however, to hold that an action in which a plaintiff without suing for damages claims to recover possession of his own land is within either the scope or the spirit or the words of the section. Under the various analogous sections in former Acts it was uniformly held that their provisions did not apply to actions of ejectment. The wording of such sections was different in some respects from that of section 48, but the language, which described the nature of the action which it was sought to cover, is almost the same in all of them as in the latter section. In 38 and 39 Vict., c. 55, section 264, it was :—"A writ or process shall not be sued out * * * for anything done or intended to be done or omitted to be done under the provisions of this Act." In the repealed section, Bombay Act VI of 1873, section 86, it was :—"No action shall be brought * * * for anything done or intended to be done under this Act." In Bombay Act II of 1865, section 240, the wording was : —"No writ or process shall be issued * * * for anything done or intended to be done under the powers of this Act;" and in Bombay Act III of 1872, section 287, the language was the same. Similar language

was also employed in Bengal Act III of 1864, section 87, and in Madras Act V of 1884, section 156. If that [296] language did not in these sections embrace actions in ejectment, (and as I have said it was invariably held that it did not)—*Foat* v. *The Mayor, &c., of Margate*, 11 Q. B. D., 299; *Sorabji Nassarvanji* v *The Justices of the Peace for the City of Bombay*, 12 Bom. H. C. Rep., 250; *Joharmal* v. *The Municipality of Ahmednagar*, I. L. R., 6 Bom.; p. 580; *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi*, I. L. R., 6 Cal., 8; and *President of the Taluk Board, Sivaganga* v. *Narayanan*, I. L. R., 16 Mad., 317,—it would be strange if the Legislature had intended to alter the law in this respect that it should have continued to employ the same language and left the expression of their change of intention to depend upon an inference deducible from an ambiguous provision at the close of the section.

It must in this connection be borne in mind that the language of the former section embraced not only actions sounding in damages, but was applicable to all claims of a pecuniary character arising out of the acts of municipal bodies who might have committed illegalities not justified by their powers—*Ranchhod Varajbhai* v. *The Municipality of Dakor*, I. L. R., 8 Bom., 421: *Midland Railway Co.* v. *Withington Local Board*, 11 Q. B. D., 788. If this be so, the inference arising from the Legislature having apparently considered that actions other than actions sounding in damages came within the scope of the section, lends no colour to the argument that they intended it to cover actions for the possession of land and to alter what had so long been considered to be the law upon this subject. The reasons which induced the Courts to adopt that view of the law are so well set out in the judgment in *Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay*, 12 Bom. H. C. Rep., 250, that it is unnecessary for me to repeat them in my own language. They are, I think, as cogent now as they were then.

Passing, however, from such considerations as these, which are only permissible if the language of the section is ambiguous, and reading the section (48) as a whole, I am of opinion that upon the natural construction of its language it does not include actions in ejectment. I do not think that an action for the possession of land can be said to be an action for anything done or purporting [297] to have been done in pursuance of the Act. An action of ejectment is based on title, and has no reference, except for limitation purposes, to the time when, or the means by which, the defendants obtained possession of the land sued for. The right of the plaintiff to sue is complete when he can show that the defendant is in possession of land belonging to him. He need not go further and allege the means by which the defendant acquired it. Whether these means were lawful or unlawful, is quite immaterial (so long as they do not convey title) in so far as the plaintiff's right to sue is concerned. If this is the correct mode of viewing the nature of an action of ejectment, and I think that it is, I fail to see how such an action can be said to be an action for something done in pursuance of the Act when a Municipality is the defendant, and for that reason I consider that it does not fall within the wording of the section. It is on this point that I reluctantly differ from the judgment of our late Chief Justice in *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19. That learned Judge treated the dispossession of the plaintiff by the Municipality as his cause of action. I have, I think, shown that it is the possession of the defendant without title of the plaintiff's land which gives the plaintiff the right to sue.

I am, therefore, of opinion that the case of *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, was not correctly decided and that our answer to the reference should be that the provisions of section 48 of Bombay Act II

of 1884 do not apply to actions for the possession of land brought against a Municipality.

**Parsons, J.**:—The point referred for our determination is "Whether the provisions of section 48 of Bombay Act II of 1884 apply to all or any actions for the possession of land brought against a Municipality?"

It may, I think, be assumed that the change of language in the new section 48 shows that it was contemplated that there might be actions other than for damages to which the section should be applicable. I see no reason for excluding from those actions suits for the possession of land, but then the restrictive words of the section itself must be also applied to the suits, that is to say, the [298] suits must be "for anything done or purporting to have been done in pursuance of this Act or of the principal Act." The learned Chief Justice in *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, says: "A suit for ejectment being an 'action for an act done,' that act being the dispossession by the defendant with a view to being restored to possession, must be held to fall under the provisions of the first paragraph of the section." This is, in my opinion, too wide a statement, inasmuch as it takes no account of the restrictive words I have mentioned. If to the words "dispossession by the defendant" the words "by an act done or purporting to have been done in pursuance of the Municipal Acts" are added, then, I think, the statement would be a correct exposition of the law. There are, for instance, sections of the Act which give a Municipality power to remove what it considers to be obstructions or encroachments. If a suit were brought against it for possession of the land it may have taken possession of when putting in force the provisions of those sections, it could justly plead in such a suit that its action was done or purported to be done in pursuance of the Act. Where, however, as in the present case, there is no action or assumption of action under any section of the Act, but the Municipality have taken possession of land claiming it as its own property, section 48 cannot, in my opinion, be held applicable.

In a case lately tried by Mr. Justice RANADE and myself—*Kapasi Mulchand* v. *The Viramgaum Municipality*, P. J. for 1896, p. 619,—the action was brought to obtain possession of land which the Municipality had sold to the plaintiff. To such an action section 48 clearly would not apply. In the case of *Nagusha* v. *Municpality of Sholapur*, I. L. R., 18 Bom., 19, the section would not apply, the Municipality having removed the huts not under any power given them by any provision of the Act, but on the general right of an owner of land to take possession of that land and oust trespassers therefrom.

For the same reason in the present case also the section would not apply. Section 24 of the Act, while it gives a Municipality power to make provision out of the municipal property and funds for the cost of certain improvements, neither gives nor purports to give it power to take possession of the land of a private individual.

[299] I answer the question in this way, *viz*., that the provisions of section 48 apply only to actions for the possession of land whereof the plaintiff has been dispossessed by the Municipality acting or purporting to act under some section of the Municipal Act which empowers them to take possession of, or oust any one from, that land.

**Ranade, J.**:—The question referred to us is "whether the provisions of section 48 of Bombay Act II of 1884 apply to all or any actions for the possession of land brought against a Municipality." Section 48 has taken the place of old section 86 of Bombay Act VI of 1873, in respect of which it was held in *Joharmal* v. *The Municipality of Ahmednagar*, I. L. R., 6 Bom., 580, that it did not apply to ejectment suits. There was a similar ruling on the

corresponding section 240 of Bombay Act II of 1865—*Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay*, 12 Bom. H. C. Rep., 250. In *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi*, I. L. R., 6 Cal., 8, a Full Bench of the Calcutta High Court ruled that the corresponding section 87 of Bengal Act III of 1864 did not apply to a suit for the possession of land, which was brought by a plaintiff dispossessed by the Municipality of Santipur. See also *Poorno Chunder* v. *Mr. H. Balfour*, 9 Cal. W. R., 535, where PHEAR, J., differed from BAYLEY, J., in his interpretation of this section. In *The Municipal Committee of Moradabad* v. *Chatri Singh*, I. L. R., 1 All., 269, the Allahabad High Court ruled that section 43 of Act XV of 1873 did not govern a suit for possession of land which was brought by a private person, who claimed a certain highway marked out by the Municipality of Moradabad to be his private property. These rulings were expressly based on the English decisions on the corresponding section 264 of the Public Health Act of 1875, which confined the section about one month's notice and the limitation of three months to claims for compensation and damages for wrongful acts or omissions of municipal and local corporations—*Foat* v. *The Mayor, &c., of Margate*, 11 Q. B. D., 299. Actions based on contracts, and claims in the nature of ejectment, have been accordingly held not to fall within the scope of this section—*Mayandi* v. *McQuhae*, I. L. R., 2 Mad., 124,—or of [300] a provision based on the same lines in section 424 of the Civil Procedure Code—*Shahebzadee Shahunshah Begum* v. *Fergusson*, I. L. R., 7 Cal., 499.

The next question for consideration is whether the new section 48 of Bombay Act II of 1884 has effected any change in the law as settled by these rulings of all the High Courts on the corresponding section of the old enactments. It may be noted that even the old section 86 of Act VI of 1873 was construed in *Ranchhod* v. *The Municipality of Dakor*, I. L. R., 8 Bom., 421, as being wide enough to govern not only claims for damages, but also claims for refund of money illegally levied. Sir CHARLES SARGENT observed in that case that "in our opinion the section is applicable to every claim of a pecuniary character" made against a Municipality in the exercise of its powers. The same learned Judge, when he had occasion to decide a case under the new enactment, arrived at the conclusion that the change in the wording and arrangement of the new section justified the conclusion that section 48 was applicable to a case where the plaintiff sued for the possession of land, as well as for damages in respect of the defendant's wrongful act in having pulled down his huts and built new huts—*Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19. Sir C. SARGENT held in this case that a claim of ejectment fell within the more general words of the first paragraph of the new section, which were not controlled by the more limited scope of the second paragraph. This ruling was noticed in a later decision of this Court—*Kashinath* v. *Gangabai*, P. J. for 1896, p. 402; *ante* p. 283,—and distinguished on the ground that, in the former case, there was an express act of dispossession represented by the pulling down of plaintiff's huts. It was accordingly held that where there was no such dispossession in the exercise of its powers, and the Municipality came into possession under a private right, the ejectment suit had no reference to any act or omission of the Municipality, and section 48, therefore, had no application.

Such being the state of the authorities, it appears to me that the conflict between them is only apparent, and that they may all be reconciled, and the intentions of the Legislature carried out by holding that where the claim for possession of land is founded on a cause of action which has no reference to "anything done or pur- [301] porting to be done in pursuance of the Act" by the Munici-

pality or its officers, the condition about previous notice, and the three months' period of limitation, have no place; but when dispossession has resulted from a direct act or omission committed by or under the orders of the Municipality or its officers, then no suit should lie unless the conditions of section 48 are properly complied with. The Legislature apparently did intend to enlarge considerably the scope of the old section, but it does not follow from this that the words of the section should be so far strained as to embrace all classes of suits for the possession of land. Claims based on contract can never be included under this section for the simple reason that they are not claims "for anything done or purporting to have been done in pursuance of the Act." Claims for the specific performance of a contract to sell or lease land will not, therefore, fall within the section. Where the claim of the Municipality is based on a private right, the plaintiff who may be injured by the exercise of that right, can sue without giving previous notice just as he might sue any other individual. Where any private person is dispossessed by the orders of the Municipality, if he sues for damages in respect of the trespass, section 48 will of course apply. But if he sues to recover possession of the land, the application of the section will depend upon the fact whether the dispossession was the result of any act of the Municipality done by it in the exercise of its statutory powers In that case, section 48 will govern the case as laid down in *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19. If it had no such connection, and the Municipality claimed under a private title, then no notice would be necessary—*Kashinath* v. *Gangabai*, *ante* p. 283. In other words, the true test is not so much the nature of the suit or of the subject-matter, but whether the cause of action was or was not connected with the exercise of the statutory powers conferred on the Municipality.

This was the principle followed in *Ranchhod* v. *The Municipality of Dakor*, I. L. R., 8 Bom., 421, even when the old Act was in force, and it was also the principle of the decision in *Selmes* v *Judge*, L. R., 6 Q. B., 724, where a refund of tolls illegally levied was claimed, and it was held that the section applied not only to cases where compensation was sought for [302] wrongful acts, but also where relief was sought in respect of anything done or purported to be done in the exercise of the powers conferred by the Act.

This is the only way of giving effect to the intentions of the Legislature in enlarging the scope of the old law, without at the same time overstraining the received import of the words used. I am not, therefore, prepared to hold that the case of *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, was wrongly decided. I would rather distinguish it in the way it was distinguished by the learned Judges who decided the case of *Kashinath* v. *Gangabai*, *ante* p. 283. My answer to the question is thus that section 48 does not generally apply to suits for the possession of land except in those cases where the claim arises on account of some act or omission ordered by the Municipality in the exercise of its statutory powers.

**Strachey, J.**:—I agree with the conclusion arrived at by the learned Chief Justice, and with his reasons.

**Hosking, J.**:—In my opinion the provisions of section 48 of Bombay Act II of 1884 do not, as a general rule, apply to actions for the possession of land brought against a Municipality.

Section 48 makes notice compulsory before the institution of any action "for anything done, or purporting to have been done, in pursuance" of Bombay Act II of 1884 or Bombay Act VI of 1873.

Where such notice is required by a statute, the rule as to the actions for which notice is necessary is thus laid down by POLLOCK, C. B., in *Hardwick* v.

*Moss*, 7 H. & N., 136: "If the act is done by a public officer in his capacity of public officer, with reasonable ground for believing that he was authorized by the statute to do it, he is entitled to notice of action."

On examination of Bombay Acts VI of 1873 and II of 1884, I find that under section 28 of Bombay Act VI of 1873 the Municipality is empowered to purchase land; that under certain circumstances by virtue of section 30 land under houses, which have projected on the street, becomes part of the public street, **[303]** and section 25 provides for the acquisition of land by Government for the Municipality under the Land Acquisition Act, 1894; but apart from the provisions of sections 25 and 30, I do not find any section of the Act empowering the Municipality either to take possession or to retain possession of land owned by another person without the owner's consent, and it appears to me that, if the Municipality thus either takes or retains possession, it cannot be said to have reasonable ground for believing that it was authorized by the District Municipal Act to do so. In such a case in deciding the question whether notice is necessary it must be assumed, as Sir MICHAEL WESTROPP said in *Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay*, 12 Bom. H. C. Rep., 250, "that the plaintiff truly alleges the property to be his and to be wrongfully in the possession of the defendant." In the appeals in which this reference has been made it is contended by the Government Pleader that the Municipality was in good faith carrying out works of utility on land which it believed had vested in it -sections 17 and 24 of Bombay Act VI of 1873. This would be a good defence if the plaintiff demanded damages for the occupation of his land or on account of the works carried out; here there is no such claim, and if there were such a claim, it could be separated from the claim to possession of the land As regards the land, the claim is simply for possession on the ground that defendant wrongfully retains possession. No doubt carrying out works of utility on plaintiff's land is at first sight the cause of his bringing his action, but his real cause of action as to possession of the land is the refusal of the Municipality to restore to him possession of his land. A suit for the removal of any work done by the Municipality or for damages might fail to that extent for want of notice; but apart from sections 25 and 30, the Municipality cannot show any authority for retaining possession of land without the owner's consent.

For these reasons I am unable to agree with the learned Judges who decided *Nagusha* v. *Municipality of Sholapur*, I. L. R., 18 Bom., 19, that a suit in ejectment falls under the provisions of the first paragraph of section 48 of Bombay Act II of 1884.

**[304]** *Per* CURAIM:—The answer to the Division Bench will be in accordance with the opinion of the majority of the Full Bench that the provisions of section 48 of Bombay Act II of 1884 do not apply to actions for the possession of land brought against a Municipality.

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**NOTES.**

[ This was followed in (1897) 22 Bom., 605. As regards suits for injunction, notice was held to be unnecessary in (1908) 32 Mad., 371; (1906) 28 All., 600 (*per* KNOX, J.); (1897) 22 Bom., 636. See also (1913) 23 I.C., 317 Punjab, (declaratory suit); (1900) 25 Bom., 142.]

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[ 22 Bom. 304 ]

FULL BENCH.

APPELLATE CIVIL.

*The 20th August, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS AND MR. JUSTICE HOSKING.

Lakhmidas Ramdas............(Original Defendant No. 3) Appellant

*versus*

Jamnadas Shankarlal............(Original Plaintiff) Respondent.*

*Marshalling of securities—Apportionment—Mortgage—Subsequent mortgage to another person of part of the mortgaged property—Notice to puisne incumbrancer—Transfer of Property Act (IV of 1882).*

Defendants Nos. 1 and 2 mortgaged three properties, *viz.*, *A*, *B* and *C*, to the plaintiff and afterwards mortgaged one of them (*A*) only to one Pranjivan. Subsequently the plaintiff obtained a money-decree against defendants Nos. 1 and 2 in respect of another debt, and in execution attached and sold their equity of redemption in *C* and purchased it himself, thus becoming full owner of *C*, which he then sold to another person for Rs. 100.

Pranjivan sued on his mortgage and obtained a decree, and in execution property *A* was sold to defendant No. 3. Subsequently the plaintiff sued to recover his debt by the sale of properties *A* and *B* only. Defendant No. 3 claimed that the securities should be marshalled and that the debt should be apportioned, and that property *C* should bear its proportion of the debt.

*Held*, that the third defendant was entitled to have the debt apportioned, and that property *C* should bear its proportion of the debt. When the plaintiff purchased the equity of redemption in *C* he purchased it subject to its due proportion of the mortgage-debt due to himself. On his purchase the debt to that extent ceased to exist, and the debt due to him on his mortgage was reduced by that amount. The proportion of the debt thus wiped out depended on the proportion of the value of property *C* to the rest of the mortgaged property.

*Held*, also, that the third defendant had a right to have the securities marshalled. That right extends to a purchaser and is not confined to a puisne incumbrancer.

[305] *Rodh Mal* v. *Ram Harakh*, I. L. R., 7 All., 711, followed.

*Held*, also, that the fact that the third defendant had notice of the plaintiff's mortgage did not affect his right to have the securities marshalled. The question of notice was immaterial prior to the passing of the Transfer of Property Act (IV of 1882).

*Chunilal* v. *Fulchand*, I. L. R., 18 Bom., 160, followed.

APPEAL under section 15 of the Amended Letters Patent from the decision of a Division Bench (JARDINE and RANADE, JJ.) in Second Appeal No. 187 of 1895 confirming the decree of F. C. O. Beaman, District Judge of Thana.

Suit by the plaintiff (mortgagee) to recover the mortgage-debt by sale of the mortgaged property.

On 14th January 1870, defendants mortgaged certain land and a house to the plaintiff.

Subsequently they mortgaged the same property with the exception of the house and a plot of land (Survey No. 122) to one Pranjivan.

The plaintiff some time afterwards obtained a money-decree against defendants Nos. 1 and 2 for another debt, and attached and sold the house in

* Appeal No. 16 of 1896 under the Letters Patent.

execution, and at the auction sale he himself became the purchaser, thus adding the equity of redemption to the interest already held by him as mortgagee and becoming absolute owner of the house. He subsequently sold the house to one Francis for Rs. 100.

Pranjivan obtained a decree against defendants Nos. 1 and 2 upon his mortgage, and in execution sold the property which had been mortgaged to him to the third defendant, who thus became owner subject to the previous mortgage to the plaintiff.

In 1892 the plaintiff brought this suit upon his mortgage of 1870 claiming to recover the sum of Rs. 90 by the sale of the mortgaged property exclusive of the house.

The third defendant claimed that the securities should be marshalled and the debt apportioned, contending that the house should bear its proportion of the debt and that the other property should be relieved *pro tanto*.

[306] The Subordinate Judge dismissed the suit on the ground that the plaintiff had realized Rs. 100 by the sale of the house, and that, therefore, nothing was due to him.

The plaintiff appealed.

The Judge found that the first Court was wrong in appropriating the value of the house to the discharge of the amount claimed, and that defendant No. 3 was not entitled to insist upon the properties or funds being marshalled and plaintiff's lien being first satisfied on the house and Survey No. 122, sub No. 6. His decision was as follows:—

I must reverse the decree of the Court below and find for the plaintiff, the decree being that he is entitled to recover ninety rupees from the property mortgaged to him by defendants Nos. 1 and 2 and cost throughout in that proportion from defendant No. 3.

Defendant No. 3 preferred a second appeal, which came on for hearing before a Division Bench composed of JARDINE and RANADE, JJ., who differed as to the application of the doctrine of marshalling in the present case. They delivered the following judgments: —

JARDINE, J.:—On the 14th January 1870, by a deed in the form of sale, but which is found to be a mortgage, the defendants Nos. 1 and 2 mortgaged to the plaintiff certain property. Soon after they mortgaged the same, with the exception of a house and of sub No. 6, to Pranjivan.

Then the plaintiff in execution of a money-decree against the defendants Nos. 1 and 2 got the house put up for sale and bought it himself. The plaintiff then sold the house to Francis, who is not on the record, but who is, as the pleader for the appellant states, the present owner of the equity of redemption of the house.

The pleader says that the equity of redemption of sub No. 6 is presently owned by the defendants Nos. 1 and 2, who are in possession of this sub-number.

The puisne mortgagee, Pranjivan, of the property with the exception of the house and sub No. 6 got a mortgage-decree against the property included in his mortgage, which was bought by the defendant No. 3, now appellant, who thus became and is the owner of the equity of redemption of that property.

[307] As the defendant No. 3 has not sought, in the Courts below, to make Francis a party, I do not think he is entitled to have the claim of the plaintiff apportioned on the house. Equity will not interfere to the injury of a third party, which implies that the third party shall be a party in the suit.

The plaintiff's mortgage was registered, and this was notice to subsequent purchasers and mortgagees—*Dundaya* v. *Chanbasapa*, P. J., 1883, p. 3. The case of *Rodh Mal* v. *Ram Harakh*, I. L. R., 7 All., 711, where marshalling was

directed, is a case where the purchaser was without notice. The case cited by the District Judge, *Rama Raju* v. *Subbarayudu*, I. L. R., 5 Mad., 387, is like the present. In the present state of the authorities I am not prepared to say the decision was wrong.

RANADE, J. :—The only point urged by the appellant's pleader relates to the question whether the equitable doctrine of marshalling was or was not applicable to the circumstances of this case. Though the deed in the respondent's (original plaintiff's) name is in form a deed of sale, it has been all along treated by both parties as a mortgage. This deed was executed on 14th January 1870, by the deceased defendants Nos. 1 and 2, and it charged the debt of Rs. 100 on one house, three varkas and eight kharif lands. The house was subsequently sold in execution of the respondent's decree, and after having bought it himself in 1876, respondent sold the same to one Francis for Rs. 100 in February 1890. This Francis has not been made a party to this suit, but his tenants, who live in the house, were joined as defendants Nos. 4, 5.

As regards the lands, all the properties except survey No. 122, pot No. 6, were sold in execution of a mortgage decree by another creditor of deceased defendants Nos. 1 and 2, and in the sale that took place, defendant No. 3 bought these lands, and obtained possession of the same in November 1883. It is this defendant No. 3 who is appellant before us, and his contention is that the respondent should be required to proceed first against the house and land, survey No. 122, pot No. 6, before he attempted to recover the sum decreed by the sale of the lands in appellant's possession. The District Judge held that the question of marshalling did not [308] arise in the circumstances of this case. He was of opinion that if the mortgagors had mortgaged all the properties first to the respondent, and then a part of the property to the appellant, the equity of marshalling the securities could properly be considered, but that the equity did not arise when the conflict was between a mortgagee and a subsequent purchaser, who buys property subject to prior incumbrances.

I feel satisfied, on a careful consideration of the arguments on both sides, that the District Judge was in error in holding that the doctrine of marshalling did not apply to the circumstances of the present case. Though speaking generally, the occasions for enforcing the equity arise chiefly as between prior and puisne incumbrancer, still the relief is not confined to that class of cases only. Ordinary sureties are, for instance, entitled to the right of marshalling. A vendor of goods may compel the endorsee from vendee to submit to this equity under certain circumstances. (Fisher on Mortgage, Vol. 2, para. 1366, p. 763.) The doctrine has even been applied as between mortgagor and mortgagee when the latter's security is limited to one part of an estate, and the whole is charged with the liability to pay off legacies and debts. (Fisher, Vol. 2, para. 1370). The late Mr. Justice TELANG noticed in his judgment in *Chunilal* v. *Fulchand*, I. L. R., 18 Bom., 160, that the doctrine has been frequently applied with beneficial effect in partition suits in this country.

The District Judge's view is no doubt supported to some extent by the rulings in *Kristodass* v. *Ramkant Roy*, I. L. R., 6 Cal., 142; *Lala Dilawar* v. *Dewan Bolakiram*, I. L. R., 11 Cal., 258; *Khetoosee Cherooria* v. *Banee Madhub*, 12 Cal. W. R., 114, and the decisions of the Madras High Court in *Timmappa* v. *Lakshmamma*, I. L. R., 5 Mad., 385, and *Rama Raju* v. *Subbarayudu*, *ibid.*, 387. These cases were, however, fully considered by JARDINE and TELANG, JJ., in the case above quoted, and as these Judges differed in their views, the point was referred to a third Judge (BAYLEY, J.), who agreed with the view of Mr. Justice TELANG. In this particular case, the question was between two mortgagees. But, as remarked [309] in *Rodh Mal* v. *Ram Harakh*, I. L. R., 7 All., 711, the equities

which apply to a puisne incumbrancer in the marshalling of securities apply also in favour of a *bonâ fide* purchaser for value without notice of a portion of the property, the whole of which was subject to a prior mortgage. Mr. Justice MAHMOOD, who decided the case, referred to some earlier cases—*Tulsee Ram* v. *Munnoo Lal*, 1 Cal. W. R., 353; *Nowa Koer* v. *Abdul Rahim*, Cal. W. R., 1864 (Jan. to July), 374; *Bishonath* v. *Kisto Mohun*, 7 Cal. W. R., 483,—in one of which the Court held that though the purchaser took the estate subject to a prior mortgage, yet the mode in which the mortgagor had dealt with the property entitled the purchaser to require the mortgagee to apply the other property first in satisfaction of his debt. In the words of NORMAN, J., "a subsequent purchaser of one of the estates has just as great an equity as an incumbrancer"—*Bishonath* v. *Kisto Mohun*, 7 Cal. W. R., 483.

These authorities make it perfectly clear that the appellant in this case, in his character as purchaser at an auction sale in execution of another mortgage-decree, has a right to require the respondent to seek satisfaction first out of the property not covered by the purchase, before holding the property in his (appellant's) possession liable to make good the balance of the debt.

Some of the cases have gone much further. In *Ram Dhun Dhur* v. *Mohesh Chunder*, I. L. R., 9 Cal., 406, the mortgagee, who deliberately refrained from proceeding against eleven mortgaged properties in his own possession, and sought satisfaction by the sale of the remaining property which had passed out of his possession into the hands of an auction-purchaser, was required to apportion the entire debt proportionately between all the properties. Similarly, it was ruled in *Nathoo Sahoo* v. *Lalla Ameer Chand*, 24 Cal. W. R., 24, that though a mortgagee can require those persons who have succeeded to the rights of the mortgagor in different estates, that they shall not redeem any part by paying a part of the debt, but must redeem the whole, it does not follow from this that a mortgagee, who has himself purchased the equity of redemption in a particular estate, may throw the whole burden of the mortgage-debt upon the [310] remaining portion of the estate in the hands of other purchasers. Each has bought subject to a proportionate share of the burden, and must discharge it accordingly. It was this last equity which was given effect to in *Moro Raghunath* v. *Balaji*, I. L. R., 13 Bom., 45.

It is, therefore, clear that the equity holds good in favour of the appellant in this case, not only in regard to the Survey No. 122 which has not been sold, but also as regards the house which the respondent has himself purchased, and resold to Francis. As, however, Francis is not a party to this suit, I would make no order in regard to that property, but would only direct that the respondent must first proceed against Survey No. 122, pot No. 6, and if any balance is still left due to the respondent, he should recover the same from the property in appellant's possession.

I would accordingly vary the decree of the lower Court to the extent mentioned above.

*Per* CURIAM:—Under section 575 of the Code of Civil Procedure (Act XIV of 1882) the decree is confirmed with costs.

The Judges having thus differed, the defendant appealed under section 15 of the Amended Letters Patent. The appeal was heard by a Full Bench consisting of FARRAN, C.J., PARSONS and HOSKING, JJ.

*Narayan G. Chandavarkar*, for the Appellant (Defendant No. 3):—There are two questions in this case—one as to the apportionment of the debt and the other as to the marshalling of securities. The plaintiff purchased at the Court sale the equity of redemption in the house, and thus by his own act

destroyed the unity of the security. He cannot, therefore, now object to have the debt apportioned—*Moro Raghunath* v. *Balaji Trimbak*, I. L. R., 13 Bom., 45.

We, as subsequent purchasers of part of the mortgaged property, are entitled to have the securities marshalled. This doctrine is recognized in India —*Chunilal* v. *Fulchand*, I. L. R., 18 Bom., 160. The plaintiff as mortgagee must, therefore, first proceed against the other mortgaged property before proceeding against the property which we have bought.

[311] *Mahadeo B. Chaubal*, for the Respondent (Plaintiff) :—The question of apportionment cannot now be raised. It was not raised in the lower Courts, nor was there any difference of opinion as to it in the Division Bench. The only point now open is as to marshalling. On all other points the Judges of the Division Bench were agreed, and the decree as made was good with respect to them.

Marshalling is allowed only in cases where there is a mortgage of property and a subsequent mortgage of part of that property to others. Purchasers cannot claim it. The doctrine has been, no doubt, extended to purchasers without notice, but should not be extended further. In the present case the defendant is not a purchaser without notice. He purchased the property at a Court sale, and, therefore, bought subject to all the equities that the mortgagor was bound by. A purchaser can get only what the mortgagor could honestly sell—*Rama Raju* v. *Subbarayudu*, I. L. R., 5 Mad., 387. The case of a purchaser at a private sale is on a different footing. It is open for him to show that he is a *bonâ fide* purchaser without notice and, therefore, entitled to have the securities marshalled.

*Narayan G. Chandavarkar*, in reply :—In the District Court the point as to apportionment was taken in the memorandum of appeal. The question of apportionment is not, therefore, raised here for the first time. The whole decree is now in appeal, and, therefore, the question as to the points in which the Judges of the Division Bench were agreed is immaterial.

Marshalling has been allowed in cases of purchasers. The question of notice is covered by the ruling in *Chunilal* v. *Fulchand*, I. L. R., 18 Bom., 160. It is, therefore, not necessary to consider whether the defendant was a purchaser without notice. A purchaser at an auction sale cannot be in a worse position than a purchaser at a private sale with notice.

The **judgment** of the Full Bench was delivered by

**Farran, C. J.** :—The second mortgage which the defendants Nos. 1 and 2 executed in favour of Pranjivan did not include the house described in the plaint, nor the field Survey No. 122, [312] Pot No. 6, which were included in the original mortgage to the plaintiff. As to these the plaintiff himself purchased the equity of redemption of the defendants Nos. 1 and 2 in the house at an auction-sale held by the Court for Rs. 2-2-0. The field Survey No. 122 is still under the dominion of the defendants Nos. 1 and 2, the original mortgagors.

The plaintiff in the present suit sought to enforce his mortgage to its full extent against all the properties included in his mortgage with the exception of the house.

The appellant, who is a purchaser at a Court's sale under a decree obtained by Pranjivan on his mortgage, contended that the plaintiff must enforce his claim against the house and against the field Survey No. 122 (6) before he could proceed against the lands included in the mortgage to Pranjivan. The amount found to be still due upon the plaintiffs' mortgage is Rs. 90.

After purchasing the equity of redemption in the house the plaintiff re-sold it to one Francis for Rs. 100 by Exhibit 38. It is alleged that the latter purchased *benami* for defendants Nos. 4 and 5. Francis has not been made a

party to the suit.* It has been held by the District Judge that Francis under the sale-deed, Exhibit 38, purchased only the equity of redemption in the house, and this view of its effect has been assumed by the Division Court. We have had the document read, and are clearly of opinion, notwithstanding some ambiguous words* at its close which have given rise to a false impression as to its effect, that the whole interest of the plaintiff in the house was conveyed by Exhibit 38 to the purchaser Francis and not the equity of redemption only. Francis or the defendants Nos. 4 and 5, it is immaterial to consider which, therefore, now hold the house free from the mortgage lien.

Pranjivan brought a suit upon his mortgage against the defendants Nos. 1 and 2, and having obtained a decree, caused the properties comprised in his mortgage to be sold, and the third defendant, the appellant in this case, was the purchaser at the auction sale, and thus became the owner of these premises subject to the plaintiff's mortgage thereon. Under this purchase [313] both the interest of the mortgagors and the interest of the mortgagee became vested in him.

This was the position of the parties when the present suit was instituted.

Though the appellant originally claimed to have the mortgage-debt of the plaintiff satisfied in the first instance out of the house and the field Survey No. 122 (6) before the properties which were mortgaged to Pranjivan were resorted to, that claim in respect of the house has now properly been abandoned, and as to it the appellant seeks to have the amount of the mortgage apportioned between the house and the other properties comprised in the plaintiff's mortgage, so that the house may be saddled with its due proportion of the mortgage-debt, and the other properties comprised in the plaintiff's mortgage may be *pro tanto* relieved of its burden.

We have two questions, therefore, to consider, one of marshalling and one of apportionment. As to the latter, it is objected that the claim of the appellant Lakhmidas to have the mortgage-debt apportioned was not made by him in the lower Courts and cannot be now raised in second appeal. The question was, however, directly raised by the plaintiff in the memo. of appeal to the District Judge (the Subordinate Judge had erroneously held that the plaintiff's mortgage had been paid off by the sale of the house for Rs. 100 by the plaintiff to Francis); so the District Judge ought to have considered it. We are, therefore, of opinion that we ought now to do so. It is clear that the plaintiff when he purchased the equity of redemption in the house purchased it subject to its due proportion of the mortgage-debt. That proportion of the mortgage-debt thus ceased to exist, and the plaintiff's right as mortgagee to recover the money secured by his mortgage was reduced to that extent. What proportion of the mortgage-debt was thus wiped out, depends upon the proportion of the value of the house to the value of the rest of the mortgaged properties. We must leave that proportion to be settled by the Court executing the decree.

As to the appellant's claim to have the securities marshalled it is objected that he has not that right as a purchaser of the [314] properties mortgaged to Pranjivan at the Court sale. As such purchaser it is said that he has no right to have the securities marshalled. We think, however, upon the authority of *Rodh Mal* v. *Ram Harakh*, I. L. R., 7 All., 711, that the right to have the securities marshalled extends to a purchaser and is not confined to a puisne incumbrancer. As to the distinction which was attempted to be made between a purchaser like the appellant Lakhmidas at a Court sale held in pursuance of a mortgage decree and an ordinary purchaser or a purchaser at an execution sale in pursuance of a money decree, we are of opinion that no such distinction can be drawn. If a distinction were drawn it would be in favour of

such a purchase as Lakhmidas', which clothes him with the interest both of the mortgagor and mortgagee.

Lastly, as to the appellant not being a purchaser for value without notice, we follow the decision of this Court in *Chunilal* v. *Fulchand*, I. L. R., 18 Bom., 160, which lays down that prior to the passing of the Transfer of Property Act the question of notice was immaterial. To this case as to that the provisions of the Transfer of Property Act are not applicable. The present decision will not be a precedent for cases to be determined under that Act.

The final decree in appeal will be as follows:—

Let the Court in execution ascertain the amount due on the mortgage by deducting from Rs. 90, the proportionate part of the debt for which the house was liable, the amount so ascertained, and the costs hereinafter awarded are to be paid to the plaintiff within six months of ascertainment, in default of such payment the plaintiff to be at liberty to recover it by the sale of the Survey No. 122 (6) and the balance by the sale of the rest of the property mortgaged. We give plaintiff costs in proportion in the Courts of First Instance and Court of appeal. In this Court each party should bear his own costs.

*Final decree made.*

NOTES.

[As regards marshalling and notice, see also (1901) 26 Bom., 83; (1902) 26 Bom., 538; (1904) 6 Bom. L.R., 284; (1900) 24 Mad., 96; (1908) 31 Mad., 419; (1900) 22 All., 284; (1908) 12 C. W. N., 448; (1910) 11 C. L. J., 639.]

## [315] APPELLATE CIVIL.

*The 14th July, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Motibhai..........(Original Plaintiff) Appellant

*versus*

Haridas and others............(Original Defendants) Respondents.*

*Jurisdiction—Partition—Valuation of a suit for partition—Suits Valuation Act (VII of 1887), Sec. 8.*

In a suit for partition of certain property, the value of the whole property sought to be divided was over Rs. 5,000. Plaintiff valued his share at Rs. 250, and paid court fees on this amount.

The suit was filed in the Court of a Subordinate Judge of the First Class.

*Held*, that the value of the subject-matter of the suit could not be held to be more than Rs. 250, so that the suit ought to have been filed in the Court of the Second Class Subordinate Judge.

APPEAL from the decision of Rao Bahadur P. V. Gupte, Acting First Class Subordinate Judge of Ahmedabad.

The plaintiffs sought to recover by partition their share of certain landed property at Nadiad.

The whole of the property sought to be divided was worth more than Rs. 5,000. Plaintiffs valued their share at Rs. 250, and paid court fees on this amount.

* Appeal, No. 95 of 1898.

The plaint was at first presented to the Court of the Second Class Subordinate Judge of Nadiad.

The Subordinate Judge returned the plaint for presentation to the proper Court, holding that he had no jurisdiction to entertain the suit.

The plaint was then filed in the Court of the First Class Subordinate Judge of Ahmedabad. He held that he had jurisdiction to try the suit (1) because the decision of the Nadiad Court was conclusive, and (2) because for purposes of jurisdiction the whole property sought to be divided was the subject-matter of the suit, which was more than Rs. 5,000 in value.

The First Class Subordinate Judge, however, dismissed the suit for non-joinder of parties.

Against this decision the plaintiff appealed to the High Court.

*Manekshah Jehangirshah*, for Appellant.

**[316]** Rao Saheb *Vasudev J. Kirtikar*, for Respondent No. 6.

*Gokuldas K. Parakh, Markand N. Mehta* and *K. M. Jhaveri*, for Respondent No. 26.

**Parsons, J.**:—The first point for our decision is whether this suit was properly brought in the Court of the First Class Subordinate Judge. This depends upon the value of the subject-matter of the suit. It is a partition suit. The value of the whole of the land to be partitioned is admittedly over Rs. 5,000; the value of the share claimed by the plaintiffs is valued by them at Rs. 250.

Under the Court Fees' Act, 1870, the amount of fee payable in the suit would be according to the amount at which the relief sought is valued in the plaint [section 7, cl. iv (*b*) ]. The Suits Valuation Act, 1887, section 8, provides that for such a suit the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same. Thus it seems clear that the value of the subject-matter of the present suit cannot be held to be more than Rs. 250, so that the suit ought to have been filed in the Court of a Second Class Subordinate Judge. We may add that this decision is consonant with the rulings of this Court in *Lakshman Bhatkar* v. *Babaji Bhatkar*, I. L. R., 8 Bom., 31; *Mahadeva Balwant* v. *Laxuman Balwant*, P. J., 1892, p. 13; and *Balvant Ganesh* v. *Nana Chintamon*, I. L. R., 18 Bom., 209, and of the High Court of Allahabad in *Hikmat Ali* v. *Wali-un-nissa*, I. L. R., 12 All., 506. The Calcutta High Court is apparently of the same opinion—*Boidya Nath Adya* v. *Makhan Lal Adya*, I. L. R., 17 Cal., 680.

It is true that the High Court at Madras has come to a contrary decision—*Vydinatha* v. *Subramanya*, I. L. R., 8 Mad., 235, but the later decisions—*Ramayya* v. *Subbarayudu*, I. L. R., 13 Mad., 25, and *Narayanan* v. *Narayanan*, I. L. R., 15 Mad., 69,—seem to embody the more correct principle.

We reverse the decree of the lower Court and send the plaint and other records of the suit to the Court of the Second Class Subordinate Judge at Nadiad for disposal on the merits. All costs to be costs in the cause.

*Decree reversed and case sent back.*

**NOTES.**

[See also (1909) 33 Bom., 658; (1910) 21 M.L.J., 21; (1902) 15 C.P.L.R., 81; 120; (1912) 19 I.C., 870 (Sindh).]

## [317] CRIMINAL REVISION.

*The 22nd July, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

In the matter of the Petition of Ranchhoddas Nagardas.*

*Pleader—Responsibility of, in conduct of case—Suspicious document used in a case—"Guilty knowledge"—Indian Penal Code (Act XLV of 1860), Sec. 471—Sanction for prosecution.*

Sanction was given for the prosecution of a pleader who in the conduct of a case had presented to the Court for his clients a document of suspicious appearance and which his clients were charged with having forged. The sanction was granted by the Sessions Judge on the ground that the document bore on its face such marks of concoction that the pleader's suspicions must have been aroused at the first sight of it, and that had he examined it, as he ought to have done, he would either have rejected it, or have advised his client to produce it in Court at his own risk. On appeal to the High Court,

*Held*, that the sanction should be revoked. A pleader is under no higher obligation than any other agent would be, and to justify his prosecution it should be shown that he had been a party (principal or accessory) to the concoction of the document, or that he had the knowledge that it was concocted.

The mere fact that his suspicions ought to have been aroused by the sight of the document was not, *primâ facie*, evidence that he knew, or had reason to believe, the document to be forged.

THIS was an application to the High Court in the exercise of its Revisional Jurisdiction under section 439 of the Code of Criminal Procedure (Act X of 1882).

The petitioner Ranchhoddas Nagardas was a pleader practising in the Courts of the Ahmedabad District.

Certain parties to a suit filed in the Court of the Second Class Subordinate Judge of Umreth, *viz.*, Maneklal and Bhogilal, engaged the petitioner Ranchhoddas as their pleader to appear and act for them.

A written statement in the suit was in due course put in by them which was countersigned by the petitioner as their pleader. This written statement referred to a certain vahivatnama, a copy of which was annexed to it.

Shortly afterwards some of the parties to the suit alleging that the vahivatnama was forged applied to the Subordinate Judge for a sanction to prosecute Maneklal and Bhogilal for the forgery.

The Subordinate Judge granted the sanction.

[318] Maneklal and Bhogilal then applied to the Sessions Judge to have the sanction revoked.

During the hearing of this application the Sessions Judge of his own motion ordered a notice to issue calling upon the petitioner Ranchhoddas to show cause why he should not be included with Maneklal and Bhogilal in the prosecution for which a sanction was granted. The Sessions Judge after hearing him granted a sanction for his prosecution, on the following grounds:—

* * * * * * *

The questions arise how far is a pleader bound to satisfy himself as to the authenticity and genuineness of documents which may be given to him by his client for production in

* Criminal Application for Revision, No. 121 of 1896.

Court in judicial proceedings, and how far is a pleader criminally liable along with his client for the wrongful acts which have been instituted by the latter ?

"In my opinion, a pleader can only claim immunity so long as he can show that he has exercised due care and caution.

"A pleader no doubt is bound by his instructions, but if a pleader in carrying out those instructions knowingly infringes the criminal law he lays himself open to a criminal prosecution.

"It has been urged on behalf of Mr. Ranchhoddas that he was acting only as a pleader, and cannot, therefore, be held responsible for the actions of his clients. It has been urged that Mr. Ranchhoddas did not produce the document, Exhibit 46, but it was put in by the two appellants along with their written statements. As, however, the written statement is countersigned by Mr. Ranchhoddas, and in the body of the written statement there is a distinct allusion to the document, Exhibit 12, (now Exhibit 46), I do not think that any twisting of facts will persuade any ordinary mind that Mr. Ranchhoddas did not take a part, and a very prominent part, in the production of Exhibit 46 in Civil Miscellaneous Suit 18/95. It is further contended that there is nothing to show that Mr. Ranchhoddas had any guilty knowledge, or even a suspicion, of the falsity of the document placed in Court; and it is argued that there is no duty of a pleader to suspect his clients' documents, nor to sift and discriminate them; carelessness, it is urged, is the worst offence which can be placed to Mr. Ranchhoddas' account.

"The final gist of Mr. Gokaldas' able speech for his client is as follows :—Mr. Ranchhoddas was acting as a pleader, and as such no responsibility can attach to him for the production of documents which his clients put in, even though they may be suspicious documents. This is a very large view indeed to take of the irresponsibility of a pleader, but one which I do not think can for a moment be allowed to prevail. It appears to me that Mr. Gokaldas attempts to invest a pleader with the same mantle of irresponsibility which rightly or wrongly barristers and advocates assume and wear. The duty of a [319] pleader is, as I take it, in the first place to advise his client as to the conduct of his case; to hear what evidence his client proposes to adduce; to sift, examine and discriminate among the evidence both oral and documentary · to avoid bringing before the Court any evidence which may be of no advantage to his client or may be detrimental. It is, I think, the duty of a pleader to examine all documentary evidence, and so far as he can to satisfy himself as to the authenticity and genuineness of the same, and at the same time to form an opinion as to its admissibility or otherwise and advise his client accordingly to the best of his ability.

* * * * *

"If I am right in my opinion as to the duties and responsibility of a pleader, then there can be no doubt that Mr. Ranchhoddas was equally with his clients responsible for the production in Court of Exhibit 46.

"Criminal responsibility may arise as well from omission as commission, and in the present case Mr. Ranchhoddas by his omission to point out to his clients the compromising character of Exhibit 46, equally with his action in joining them in signing the written statement, has made himself *particeps criminis* with the appellants, his clients. * * * "

The Sessions Judge, therefore, directed sanction to issue under section 195 of the Criminal Procedure Code for prosecution of Ranchhoddas on charges under sections 196, 471 and 109 of the Indian Penal Code (Act XLV of 1860).

Ranchhoddas applied to the High Court to revoke this sanction.

*Macpherson* (with him *Gokuldas Kahandas Parakh*) for the Applicant :— This case is without a precedent. A pleader is not bound to examine documents given to him by his client for production in Court. The duty of examining those documents and pronouncing upon their genuineness or otherwise, properly belongs to the Court before which they are produced and not to the agent who produces them. In order to fix a pleader with criminal

responsibility it must be clearly proved that he had guilty knowledge. There is no difference in this respect between the case of a pleader and that of any other agent. No such guilty knowledge has been proved in this case. That the petitioners' suspicions ought to have been raised, is wholly insufficient.

*Lang*, Advocate-General (with him Rao Saheb *Vasudev J. Kirtikar*, Government Pleader,) for the Crown :—The reasons given by the Sessions Judge in support of the order for sanction are sufficient. A pleader stands on a higher footing than an **[320]** ordinary agent. He is bound to exercise his discretion before producing evidence in Court. That this discretion should be properly exercised, is essential to the administration of justice.

**Parsons, J.** :—We have heard the able arguments of Mr. Macpherson for the applicant and of the Advocate-General for the Crown, and we think that the sanction ought to be revoked. The Sessions Judge granted it on the ground that the document in question bears on its face such marks of concoction that the pleader's suspicions must have been aroused at the first sight of it, and that he ought to have strictly examined it, and had he done so, he would either have rejected it or advised his client to produce it in Court on his own risk or responsibility. His offence was thus one rather of omission than of commission. We cannot place a pleader's duty and his responsibility on so high a base as this. We do not think that any Court would be justified in ordering the prosecution of a pleader for presenting on behalf of his client a document merely because the document was suspicious in appearance, nor do we think that pleaders are in duty bound to examine documents given them to produce in Court and to come to a conclusion upon their genuineness, for which conclusion, if wrong, they are liable to be criminally prosecuted. We think that a pleader is under no higher obligation than any other agent would be, and that to justify his prosecution it must be shown that he was a party (principal or accessory) to the concoction of the document, or that he had the knowledge that it was concocted. The words in section 471 of the Penal Code "knows or has reason to believe" are of general application, and the allegation must be proved as strictly in his case as in the case of any one else. It would be difficult, we think, to say that when a pleader acting on the instructions of his client tenders in Court a document he cannot plead and rely upon those instructions as sufficient cause. However, we need not go as far as that. We think in the present case that the mere fact that the suspicions of the pleader ought to have been aroused by the sight of the document is not "*primâ facie*" evidence that he knew or had reason to believe the document to be forged, and, therefore, we revoke the sanction for his prosecution.

*Sanction revoked.*

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## [321] FULL BENCH.

## APPELLATE CIVIL.

*The 23rd July, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Vithu ............(Original Defendant No. 1) Appellant

*versus*

Govinda............(Original Plaintiff) Respondent.*

*Marriage—Remarriage—Widow Remarriage Act (XV of 1856), Secs. 2, 3 and 4—Hindu widow—Inheriting property from son—Widow's remarriage—Castes in which remarriage is allowed—Forfeiture of property inherited from son.*

Under section 2 of the Widow Remarriage Act (XV of 1856), a Hindu widow belonging to a caste in which remarriage has been always allowed, who has inherited property from her son, forfeits by remarriage her interest in such property in favour of the next heir of the son.

APPEAL from an order of remand passed by A. Steward, District Judge of Ahmednagar, against the decree of Rao Saheb B. W. Bhet, Subordinate Judge of Akola.

Suit for redemption. One Chima, a Sudra by caste, died leaving a widow Shivu and an infant son, who died unmarried and childless about the year 1873. On this son's death Shivu succeeded to the land in question, which she mortgaged with possession to defendant No. 1.

Shortly afterwards, *viz.*, in 1874 or 1875, Shivu married again. At that time the nearest heir to Chima's deceased infant son was Chima's sister Gangabai. She died on the 2nd March 1886, leaving a daughter Rakhmi as her heir. On the 9th December 1889, Rakhmi sold the land in suit to the plaintiff. In the same year Shivu sold the land (which as above stated she had already mortgaged to defendant No. 1) to defendants Nos. 1 and 2.

In December 1893, the plaintiff brought this suit against defendants Nos. 1 and 2 to redeem the mortgage and recover the land.

On the 22nd June 1894 Shivu died.

[322] The defendants contended that Rakhmi was never the owner of the land, and that the plaintiff got no title by his purchase from her.

The Subordinate Judge dismissed the plaintiff's suit, holding that Rakhmi was never entitled to the property, but that, if she ever had any title, she had lost it by the adverse possession of Shivu and her mortgagee (defendant No. 1).

On appeal by the plaintiff the Judge reversed the decree and remanded the case under section 562 of the Civil Procedure Code (Act XIV of 1882). He was of opinion that Shivu had forfeited her interest in the property on her second marriage, and that Rakhmi had succeeded as heir. The following is an extract from his judgment:—

"The Subordinate Judge appears to think that a Sudra widow who remarries does not forfeit any interest she may have in the property of her deceased son. But section 2 of Act XV of 1856 is clear on the point. These rights and interests cease as if she had died when

* Appeal, No. 41 of 1895.

she remarried. Mr. Ranade (defendant's pleader) has produced no cases or authorities to induce me to believe that such is not the case.

"With regard to the second point, Rakhma is the daughter of the sister of Chima, the father of his deceased infant son who became his heir. Mr. Ranade contends that she is not a 'bandhu' of his infant son. At page 178 of the old edition of West and Bühler it is written, the Shastras allow besides the so-called nine bandhus the following bhinnagotra sapindas to inherit:—(1) Sister's son, (2) maternal uncle, (3) brother's daughters, (4) sister's daughters. Rakhma was not the daughter of the sister of the deceased infant son of Chima but of his father Chima. I do not, however, think that this ought to prevent her from inheriting in the absence of any other incidental heir; if she does not inherit, the property would revert to Government as intestate. I consider that Rakhma was in her right in conveying the property in suit to plaintiff for Rs. 1,000 in 1889."

Defendant No. 1 appealed against the order of remand.

*Branson* with *Daji A. Khare* appeared for the Appellant (Defendant No. 1):—The question is whether Rakhmi had any right to sell to the plaintiff, and whether Shivu's remarriage had the effect of divesting her estate as mother. Section 2 of Act XV of 1856 is not applicable to the present case. It enables those widows to remarry who could not do so before the Act was passed. But in the present case the parties are Sudras who were allowed to [323] remarry. Act XV of 1856, therefore, did not affect Shivu's rights, and by her remarriage she did not forfeit the property—*Har Saran Das* v. *Nandi*, I. L. R., 11 All., 330; *Rasul Jehan Begum* v. *Ram Surun*, I. L. R., 22 Cal., 589, in which the Allahabad decision is dissented from; *Murugayi* v. *Viramakali*, I. L. R., 1 Mad., 226; *Matungini* v. *Ram Rutton*, I. L. R., 19 Cal., 289; *Akorah* v. *Boreanee*, 11 Cal. W. R., 82. As to Rakhmi's right to inherit, West and Bühler, p. 139, 488. An aunt is not given in the list of bandhus.

Further, it is to be observed that the first Court found that Shivu's possession was adverse from the date of our mortgage, that is, from February 1872.

*Inverarity* with *Gangaram B. Rele* appeared for the Respondent (Plaintiff):—The Judge in appeal sent back the case under section 562 of the Civil Procedure Code for decision on the merits. In the first Court there was no issue on the point of limitation. The real point is whether the plaintiff has a right to sue. The question is who would be the heir after Shivu's death, her remarriage being tantamount to death with respect to the family of her son to whom she had succeeded as heir. Gangabai was alive at the time of Shivu's remarriage. Succession depends upon propinquity and not on religious efficacy—*Parot Bapalal Sevakram* v. *Mehta Harilal*, I. L. R., 19 Bom., 631. Act XV of 1856 is applicable, and even supposing that it is not, we say that under the general Hindu law Shivu forfeited her right to her son's property after her remarriage. The preamble of the Act is useful to determine the real motive and the occasion which led to the passing of the Act—Maxwell on Statutes, pp. 52, 56. Sections 1 and 2 of the Act are express enactments which apply to all Hindu widows—*Rasul Jehan Begum* v. *Ram Surun Singh*, I.L.R., 22 Cal., 589, at p. 596.

A mother inheriting from her son takes nothing more than a widow's estate. See also section 2 of Act XV of 1856.

At the close of the argument the appellant's pleader brought to the notice of the Court a passage in *Parekh Ranchor* v. *Bai Vakhat*, I. L. R. 11 Bom., 119 at p. 130, where it is stated that section 2 of Act XV of 1856 was not applicable to a widow in whose caste remarriage was allowed.

[324] The Court took time to consider, and subsequently referred the question to a Full Bench. The following is the referring judgment:—

FARRAN, C. J.—When we intimated the inclination of our opinion at the close of the argument in this appeal the case of *Parekh Ranchor* v. *Bai Vakhat*,

I. L. R., 11 Bom., 119, had not been brought to our notice. When our attention was called to it we considered it advisable to reserve our judgment. Further consideration has not changed the view which we then expressed; but as it is inconsistent with the ruling in the above cited case we refer the matter to a Full Bench. The question for its consideration will be :—

Whether under Act XV of 1856, section 2, a Hindu widow, belonging to a caste in which remarriage has always been allowed, who has inherited property from her son, by her remarriage forfeits her interest in such property in favour of the next heir of her son?

The question has arisen under the following circumstances. The estate, of which the land in suit forms part, belonged to two brothers Chima and Bhima. On the death of the latter it devolved upon Chima. Chima died many years ago, leaving a minor son whom we may call *S* and a widow Shivu. *S* died unmarried and childless, and upon his death his mother Shivu succeeded to the property. She mortgaged the land in dispute with possession to defendant No. 1. There is no dispute as to the validity of that mortgage. The main question in the suit is as to the plaintiff's title to redeem it.

Bhima and Shivu belonged to a caste of Sudras in which remarriage has always been permitted. There has been no finding by the District Judge whether according to the practice prevailing in that caste a widow forfeits her interest in her husband's estate by her remarriage, or as to what effect (if any) the remarriage of a mother has upon the property which she has inherited from her son, but the Subordinate Judge has found that according to the custom of the caste remarriage does not entail forfeiture in such a case. Shivu remarried eighteen or [326] twenty years previous to the trial before the Subordinate Judge, *i.e.*, in A.D. 1876 or 1874. At that time the nearest heir of *S* was his paternal aunt Gangabai. She died on the 2nd March 1886, leaving a daughter Rakhmi as her heir. Rakhmi sold the equity of redemption in the mortgaged land to the plaintiff on the 9th of December 1889, and he filed the present suit in 1893 to redeem the mortgage. Shivu in 1889 sold the mortgaged premises to defendants Nos. 1 and 2. Shivu died on the 22nd June 1894. The Subordinate Judge rejected the plaintiff's claim, as he considered that Shivu by her remarriage did not forfeit her rights to the property which had been her husband's and which she inherited from her son *S*, and that the plaintiff, therefore, took nothing by his purchase from Rakhmi. The District Judge has held that under the provisions of Act XV of 1856 Shivu by her remarriage forfeited all interest in her son's and husband's property which had devolved upon Rakhmi when she sold the equity of redemption to the plaintiff, and remanded the suit for trial by the Subordinate Judge.

The rulings in the other High Courts are not uniform as to the effect of section 2 of Act XV of 1856 in cases where previous to its enactment the remarriage of a widow in a Hindu caste was permitted, and according to the custom of her caste such remarriage did not entail a forfeiture by the widow of her interest in her husband's estate.

In *Har Saran Das* v. *Nandi*, I. L. R., 11 All., 330, it was held that Act XV of 1856 was not intended to place under disability or liability persons who could marry a second time before the Act was passed. The same view was adopted by this Court in *Parekh Ranchor* v. *Bai Vakhat* (*supra*) to which we have already referred, but there does not appear to have been any argument on that part of the case. The Act was considered in *Akorah* v. *Boreanee*, 11 Cal. W. R., 82, and again by a Full Bench of the Calcutta High Court in *Matungini* v. *Ram Rutton*, I. L. R., 19 Cal., 289, but the point now under consideration did not directly arise in either of these cases. However, in *Rasul*

*Jehan Begum* v. *Ram Surun*, I. L. R., 22 Cal., 589, a Division Bench expressed a strong opinion that section 2 of the Act was applicable to such a state [326] of circumstances as the present. The question does not appear to have arisen in Madras. The view of the Hindu law taken in *Murugayi* v. *Viramakali*, I. L. R., 1 Mad., 224, may possibly have prevented it from being brought before that High Court.

Section 2 of Act XV of 1856, read by itself and without reference to the circumstances under which it was enacted, plainly extends to all Hindu widows irrespective of the castes to which they belong and to the special customs of such castes. It reads as a law of universal applicability. "All rights and interests which any widow may have in her deceased husband's property * * * shall upon her remarriage cease and determine as if she had then died." It would be difficult to use more general words, and in our opinion there is no sufficient indication afforded by the preamble or the other provisions of the Act that the Legislature intended to use them in a restricted sense and as confined to Hindu widows who for the first time were by the Act permitted to marry to lead us to read them in a restricted sense. The preamble shows that the Legislature had in its mind when passing the Act the clear conception that there were at that time two classes of Hindu widows, *viz.*, (1) those who were by the law as administered in the Courts of the East India Company held incapable of contracting a second marriage, and (2) those who were then held capable of marrying a second time, which latter class formed an exception to the more general one. The direct object of the Act was doubtless, as appears from the preamble, to relieve the former class from this disability. The words are: "And whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law . . . shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, &c." The object of the Act is, therefore, plain. That object might have been effected in one of two ways. First, by passing a general law applicable to all Hindus alike, or secondly by passing an enab- [327] ling Act which would be applicable to such widows only as chose to avail themselves of its provisions. The Legislature has, we think, adopted the former method. The first section declares in the very broadest terms that "No marriage contracted between Hindus shall be invalid * * * by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding." It appears difficult to contend that that declaration does not extend to all Hindus alike whatever their caste or the interpretation of the Hindu law authorized by their caste may be. Equally general appears to us to be the positive enactment in the second section which we have read "All rights and interests which any widow may have in her deceased husband's estate * * * shall upon her remarriage cease and determine."

The preamble to the Act does not, therefore, we think, indicate an intention of the Legislature to control its express enactments even if it could legitimately be used for that purpose, which cannot generally be done—Maxwell on Statutes, pp. 52 and 56.

In the judgment of the Court in *Har Saran* v. *Nandi* (*supra*) it is said that the Act was not intended to apply to persons like Musamat Nandi, who could before it have remarried without thereby forfeiting the property inherited

by them from their first husbands. The answer to this appears to be twofold: (1) that it is an assumption without basis to attribute that absence of intention to the Legislature; it is equally probable that they intended to assimilate the Hindu law in this particular in all castes and to make the law as administered accord with the true principles of Hindu law—*Murugayi* v. *Viramakali*, I. L. R., 1 Mad., 224,—and (2) that it is not allowable to cut down the express provisions of a law by a consideration of the supposed intention of the Legislature in passing it. If the Act applies to property in all cases in which a woman inherits from her husband, its express terms extend equally to property inherited by a mother from her husband's sons and her own.

[328] The question was argued before a Full Bench consisting of FARRAN, C. J., and PARSONS and RANADE, JJ.

*Branson* with *Daji A. Khare*, for the Appellant (Defendant):—The preamble to Act XV of 1856 clearly shows that it is an enabling Act. It does away with the disability of those widows who were not allowed to remarry before the Act was passed. If it be held that the Act applies to widows of all classes, then the consequences would be serious in the case of those widows who could remarry before the Act was passed, because they also would forfeit estates already inherited by them. Thus the Act would introduce forfeiture where it did not exist before.

*Viccaji* with *Gangaram B. Rele*, for the Respondent (Plaintiff):—Section 2 of the Act is in plain terms and applies to widows of all castes whether permitted by their respective customs to remarry or not. There being no ambiguity of language, the operation of the section cannot be restricted to that class of widows which does not permit remarriage. The preamble simply recites inconveniences caused to widows of that particular class and supplies a motive or occasion for universal legislation. It cannot, consequently, curtail the plain sense of the operative section of the Act—Maxwell on Statutes, (3rd Ed.), p. 63; *Bank of England* v. *Vagliano Brothers*, (1891) App. C., pp. 144, 145; *Narendra* v. *Kamalbasini*, L. R., 23 I. App., 18: *Doe dem. Bywater* v. *Brandling*, 7 B. and C., 643, 660.

*Branson* in reply.

**Ranade**, J.:—The question referred to the Full Bench is, whether under section 2 of Act XV of 1856, a Hindu widow, belonging to a caste in which remarriage has been always allowed, forfeits upon such remarriage her interest in property which has come to her as heir to her son in favour of the next heirs of her son. The decision of the question depends solely on the interpretation to be placed upon the words "any widow" used in that section,—whether they connote all Hindu widows, independently of the consideration whether remarriage was or was not customary in the caste to which they belong, or only a particular class of widows who laboured under a customary disability which this Act was intended to remove.

[329] This Court and the Allahabad High Court have adopted the latter and the more restricted view of the scope of section 2—*Parekh Ranchor* v. *Bai Vakhat*, I. L. R., 11 Bom., 119; *Har Saran Das* v. *Nandi*, I. L. R., 11 All., 330: while the Madras and the Calcutta High Courts have followed the more general interpretation—*Murugayi* v. *Viramakali*, I. L. R., 1 Mad., 224; *Matungini Gupta* v. *Ram Rutton Roy*, I. L. R., 19 Cal., 289; *Rasul Jehan Begum* v. *Ram Surun Singh*, I. L. R., 22 Cal., 589. It clearly appears that the intention of the Legislature to restrict the scope of the section to those castes only where remarriage was forbidden by custom was assumed by this Court and the Allahabad Court as too obvious a conclusion to need any argument. On the other hand, it may be observed that in the Madras case noted above, no

express reference is made to the provisions of Act XV of 1856, but it is assumed as a self-evident conclusion that where the rule as regards second marriage is relaxed, and such connections are permitted, it cannot be supposed that the law of these castes permits the remarrying widow to retain her first husband's property.

As regards the Bengal cases, it deserves notice that the ruling in *Matungini Gupta* v. *Ram Rutton Roy*, I. L. R., 19 Cal., 289, overruled an earlier ruling in *Gopal Singh* v. *Dhungazee*, 3 Cal. W. R., 206, in which the contrary view had been enunciated. The later decision in *Rasul Jehan Begum* v. *Ram Surun Singh*, I. L. R., 22 Cal., 589, simply followed the earlier ruling in *Matungini Gupta* v. *Ram Rutton Roy*, I. L. R., 19 Cal., 289. The Judges, however, remarked that the question of forfeiture did not properly arise in the case, for the widow-defendant did not claim to have succeeded as heir to her husband, but contended that the estate did not belong to her husband. The expression of the Judges' opinion was thus *obiter dictum*.

In neither of the two last named cases, the earlier decision of a Full Bench of the same Court reported in full in 2 Beng. L. R., p. 199, and briefly in 11 Cal. W. R., p. 82—*Akorah* v. *Boreanee*—was noticed, where it was held that a Hindu widow could succeed as heir to her son when the son died after the widow's remarriage. In the present case, the widow remarried after she [330] succeeded to her son as heir, and this circumstance distinguishes it from the Full Bench ruling in *Akorah* v. *Boreanee*.

In this state of conflict between the several High Courts, it becomes necessary to consider the question as one not concluded by authority. The learned counsel on both sides in the argument before us admitted that the preamble to the Act was at variance with its enacting clauses. The preamble evidently favours the view that the Act was not intended for all classes of Hindu widows. It recognizes the fact that there were certain exceptions to the custom prohibiting the remarriage of widows, and it goes on to state that, with a view to relieve persons who were inclined to disapprove the customary prohibition, the Act was promulgated. The enacting clauses, however, observe no such reserve, and the words used are as general as they can well be, and there is no special section preserving to the castes in which remarriage was permitted full recognition of their customary rights.

It appears to me that this variation between the preamble and the enacting clauses was not the result of any oversight, but that the Legislature deliberately used the more general words in section 2 of the Act, because it found that, while the custom of prohibiting remarriage obtained in certain castes, and did not obtain in others, in the matter of forfeiture by the widow of all interest in her first husband's estate, there was no such divergence. So far as this Presidency is concerned, this is obvious from the information collected by Government, and published in Steele's Law and Customs of Indian castes. At pages 364-65 the names of the castes in the Dekkhan, among whom Pat marriages were allowed or forbidden, are given, and at page 424, mention is made of the castes in which, when a widow performed Pat, her husband's relatives succeeded to her husband's estate. This last list includes some sixty castes, the great Kunbi caste to which the parties here belong, and all castes which are usually engaged in agriculture and manual industry. There is not a single caste mentioned in which any custom to the contrary prevailed. If with this information before it, the Legislature enacted sections 2, 3, 4 in very general terms, thinking thereby to declare what was in fact a general practice, it cannot be said [331] that any new disability was created thereby. The words used in the preamble are no doubt to some extent misleading.

So far from the castes in which remarriage was permitted being fitly described as certain exceptions to the general rule of prohibition, the fact is that the prohibition to remarry is confined to certain sections of the population, namely, the persons belonging to the first three principal castes. These higher castes are numerically less than 20 per cent. of the population. This mistaken impression led to the enactment of section 6 prescribing the ceremonies necessary to validate second marriages. In this part of the country, the customary ceremonies observed at a Pat marriage are different from those observed at a *lagna* or first marriage. In the case of guardianship also, a similar difficulty has been needlessly created by section 3. But as far as section 2 is concerned, the law has only declared what was an universal practice, and this fact must have been present to the mind of the Legislature, and explains the omission of all qualifying words. Under these circumstances, there is no occasion to consider how far the preamble can be permitted to control the more general words of the enacting clauses. In the case of the Dekkhan Agriculturists' Relief Act, XVII of 1879, the preamble is similarly restricted in its scope, being confined to agriculturists, while in the body of the Act there are various sections which extend its scope to non-agriculturist classes of litigants. But as this extension was deliberately made, this Court has held that the preamble did not control the enacting clauses. The forfeiture under section 2 is expressly confined to the limited estate to which a widow succeeds on the death of her husband or his lineal successor. She forfeits only the estate which comes to her during or for her widowhood. The absolute interests she acquires as heir to other relatives are expressly preserved to her by section 5 of the Act, except so far as section 4 limits this right. For these reasons, as the widow Shivu in this case remarried after she succeeded as heir to her son, section 2 operates to deprive her of that estate. The question how far her possession for eighteen or twenty years since she remarried bars the next heir's claim, is a point which will have to be considered by the Division Bench in finally disposing of this case. I am satisfied that the question of law referred to us must be answered in the affirmative.

**[332] Farran, C. J.**:—I concur and have nothing to add to the reasons given in the referring judgment.

**Parsons, J.**:—I also concur for the reasons given in the referring judgment.

*Question answered in the affirmative.*

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**NOTES.**

[While the Bombay view is that all re-marriages are affected by s. 2, whether they took place under the Act or under customary sanction—see also (1902) 15 C. P. L. R., 39; (1903) 16 C. P. L. R., 99—the Allahabad view is that only the former class falls within its purview and the latter class as well as cases of re-marriage after conversion to Christianity and Mahomedanism does not entail forfeiture. (1889) 11 All., 330; (1898) 20 All., 476; (1906) 29 All., 122; (1908) 31 All., 161; (1913) 35 All, 466.

The view entertained in Madras and Calcutta is that her remaining unmarried is a continuing condition of the estate taken by the widow :- (1877) 1 Mad., 226; (1902) 26 Mad., 143; (1912) 12 M. L. T., 158; (1895) 22 Cal., 589; (1891) 19 Cal., 289; (1907) 8 C. L. J., 542; (1909) 14 C. W. N., 346; (1910) 12 C. L. J., 8.

Rights not vested at the time of re-marriage were held to be unaffected by it, so that a mother could inherit to her son by previous marriage, notwithstanding her re-marriage :— (1899) 24 Bom., 89; (1904) 29 Bom., 91; (1911) 15 C. W. N. 579.]

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[ 22 Bom. 332 ]

## APPELLATE CIVIL.

*The 23rd July, 1896.*

PRESENT:

MR. JUSTICE PARSONS, AND MR. JUSTICE RANADE.

H. Plunkett, Income Tax Collector, Poona............(Original Defendant) Appellant

*versus*

Narayan Parashram Tullu............(Original Plaintiff) Respondent.*

*Income Tax Act ( II of 1886), Secs. 21, 22—Agent of a company not resident in India—Liability of.*

The liability for income tax of the agent of a company not resident in British India, but in receipt through such agent of income chargeable under the Income Tax Act (II of 1886) is personal, and section 22 does not make such liability conditional upon his having funds of the company in his hands.

APPEAL from the decision of Arthur H. Unwin, District Judge of Nasik, in Suit No. 3 of 1895.

In April 1893, the Chatre Circus Company was assessed for payment of income tax. The notice under section 17 of the Income Tax Act (II of 1886) was at first issued to one Nago Bhicaji, who was described as the Manager of the Chatre Circus Company. It was dated the 29th April 1893, and it informed Nago Bhicaji that the tax charged was Rs. 51-2, which he was required to pay before the 29th May 1893. The notice reached Nago Bhicaji on 29th June 1893, at Gwalior, where the Circus Company was then giving performances. He wrote to the Income Tax Collector that he got the notice after the last day fixed therein, and that payment within the time fixed was thus not possible. He, however, informed the Income Tax Collector that the plaintiff Narayan was their head manager, and that he had been asked to make all proper arrangements in respect of the demand. Thereupon, the Income Tax Collector for the first time, on 4th August 1893, required the plaintiff, who was not described as manager on this occasion, to pay the tax within eight days.

[333] The plaintiff on 9th September 1893, describing himself as Manager of the Chatre Circus, wrote a letter in which he represented that the Circus Company had not earned any profits, and that throughout the year it was working out of British India, and it was, therefore, not liable to the tax. This letter was accompanied by a printed form of application under section 25, signed by the plaintiff, in which he identified himself with the company, stating that " we " had no property, and earned no profits in British India.

The Income Tax Collector on 13th September 1893, made enquiries about the movements of the circus, and plaintiff sent a reply on 15th September. Later on, the Collector asked to be furnished with information about the company's accounts. Plaintiff asked for time to obtain this information from Gwalior and later on supplied information on these points, and sent extracts of the company's accounts. Finally, the Income Tax Collector confirmed the tax as first assessed on 1st December 1893.

An appeal was then preferred by the plaintiff, in which he again described himself as Manager of the Chatre Circus. This appeal was rejected.

* Appeal, No. 19 of 1896.

The tax not having been paid, on the 6th February 1894, the Collector issued the following warrant for the recovery of the tax :—

"Whereas the Chatre Circus Company represented by their manager, Mr. Narayan Parashram Tullu, have made default in payment of the sum of Rs. 54-9 due by them on the 1st January 1894, on account of income tax for 1893-94, I, Mr. A. H. Plunkett, Collector of Income Tax, Poona City, do hereby direct, under sub-section 1 of section 30 of Act II of 1886, that a sum of Rs. (54-9-0) fifty-four and annas nine be recovered from the said defaulter (the manager)."

In execution of this warrant, six currency notes for Rs. 10 each, the private property of the plaintiff, were attached. He was asked to take back the balance after deducting the tax, which he refused to do.

[334] Plaintiff brought this suit to recover these notes or their value on the ground that as he was not personally liable to pay the income tax for the company, his private property was wrongfully attached.

The District Judge of Nasik awarded the claim with interest, observing *(inter alia)* as follows :—

"Now it is plain that this circus so long as it existed must have had attachable plant and property of its own, and defendant's own *yadi*, Exhibit 15, to plaintiff shows that defendant had been made duly aware that the circus and its properties were actually *at Gwalior* in the autumn of 1893. Defendant in that *yadi* says he has been referred by post-card from the manager of the circus at Gwalior to plaintiff residing at Nasik, who, the post-card is said to have stated, 'will make the needful arrangement' about the levy of income tax. When defendant had thereupon interviewed plaintiff, and after due enquiry into the circus accounts had resolved that the assessment in question must stand, why did not defendant at once seek to ascertain from plaintiff how, when, and where the circus property, or else Chatre himself, was likely to be found tangible for the realization of the tax, and upon information which it must be presumed plaintiff would have furnished, proceed direct against Chatre in person or that property for recovery of the tax ? * * * And supposing that plaintiff had officiated as a *paid* vakil, agent, or employee of Chatre for the circus, or again as a receiver or manager as appointed under section 22 of the Act, it would surely have been an unjustifiable step to seize and distrain his *personal* property, property like these notes, in his private house at Nasik, for his principal's default."

From this decision defendant appealed to the High Court.

Rao Saheb *Vasudev J. Kirtikar* (Government Pleader), for the Appellant (Defendant) :—The plaintiff having held himself out as the manager of the company is now estopped from repudiating his liability to the income tax—Evidence Act (I of 1872) sections 31 and 115. As the agent of a non-resident company in British India plaintiff is liable under sections 21 and 23 of the Act (II of 1886.) The duties of the principal officer of a company are laid down by sections 11, 12 and 28. Plaintiff may call upon the company to recoup him under sections 23 and 49. But his liability to pay the tax primarily cannot be extinguished.

*Daji Abaji Khare*, for the Respondent (Plaintiff) :—Plaintiff is not a paid manager or agent of the company. He has no share or interest in the capital, plant or profits of this circus. He has no doubt signed certain letters and applications as manager, but [335] that fact alone cannot make him personally liable for the income tax payable by the company. I rely upon section 22 of the Act, which prevents the liability from resting upon the plaintiff. Plaintiff when he signed those letters and applications acted more in his capacity as a *vakil* than an agent of the company. He had no funds in his hands belonging to the company. Any such funds, if he had then, would no doubt have been

liable in his hands for the income tax. To the extent of such funds, and such funds alone, he would be liable.

As regards the point of estoppel, the plaintiff's conduct has not in any way prejudiced the defendant. The Collector can call upon the proprietor of the circus whenever he comes into British India to pay the tax, and if he refuses, then to recover the same under the powers vested in him by the Act. But to hold otherwise would be illegal and *ultra vires* of the Income Tax Act (II of 1886).

**Parsons, J.** :—The facts of this case are as follows :—In April 1893, the Chatre Circus Company was assessed for payment of income tax (Sec. 23), and the Income Tax Collector under the instructions of the company, which was then at Gwalior, called on the plaintiff to pay it as the manager of the company in British India (Sec. 15). Certain correspondence followed which need not be set out at length, in which the plaintiff sought to get the assessment remitted on the ground mainly of the company having made no profits in British India. Throughout the whole of it the plaintiff styled himself and was addressed as the manager of the company.

In December 1893, the plaintiff as the manager of the company appealed against the assessment of income tax, but his petition was rejected. The tax not having been paid, on the 6th February 1894, the Collector issued the following warrant for the recovery of the tax :—

"Whereas the Chatre Circus Company represented by their manager, Mr. Narayan Parashram Tullu, have made default in payment of the sum of Rs. 54-9 due by them on the 1st of January 1894, on account of income tax for 1893-94, I, Mr. A. H. Plunkett Collector of Income Tax, Poona City, do hereby direct under sub-section 1 of section 30 of Act II of 1886 that a sum of Rs. (54-9-0) fifty-four and annas nine be recovered from the said defaulter (the manager)."

**[336]** In execution of this warrant, six currency notes for Rs. 10 each, the private property of the plaintiff, were attached. He has now brought this suit to recover these notes or their value on the ground that as he was not personally liable to pay the income tax for the company, his private property was wrongfully attached.

The points for determination, therefore, are :—(1) Whether the plaintiff was personally liable to pay the tax? (2) If not, whether a suit to recover the property attached or its value will lie in a Civil Court?

We decide the first point in the affirmative. Section 21 of the Act (II of 1886) is clear on the point. It provides that a person not resident in British India, but being in receipt through an agent of income chargeable under the Act shall be chargeable in the name of the agent just as he would be chargeable if he were resident in British India. That is precisely the case here. The Chatre Company, which, as the plaintiff says in his appeal petition, "is living at Gwalior and is likely to live there permanently," was assessed in the name of its manager, the plaintiff, for income tax, and demand was made on the plaintiff for payment. He thereupon became liable to pay it. That is the clear meaning of section 21, and section 22 does not, as has been argued, take away that liability. It only provides the agent with the means of obtaining funds or recouping himself for the payment. The plaintiff could have, indeed may have, employed those means, but his omission to do so will not relieve him from liability to pay the tax any more than a plea that he had no funds would.

It is unnecessary to decide the second point. Reversing the decree of the lower Court we order plaintiff's suit to be dismissed with costs throughout.

**Ranade, J.**:—There is no occasion to consider the points of law based on the construction to be placed on the provisions of section 39 and section 30(3) of the Income Tax Act, as we feel satisfied that the District Judge's decree cannot be supported on the merits.

**[337]** The respondent, original plaintiff, brought this suit against the appellant, who is the Income Tax Collector of Poona, to recover back a certain sum which was levied from him as income tax for 1893-94 on the 29th March 1894, for the tax due from the Chatre Circus Company, of which company respondent was stated to be manager. Respondent's main contention was that he was not in any way interested in the financial management of the circus, and only helped it with his advice and services gratis, and that at any rate he was not personally responsible for a tax admittedly due from the Circus Company. The appellant, while maintaining that no suit would lie against him for the refund of the tax in a civil Court under sections 30 and 39 of the Income Tax Act, further pleaded on the merits that respondent had by his conduct held himself out to be, and in fact was, manager of the circus, and that he was, therefore, liable to pay the tax due from the Circus Company as agent for the same. The District Judge held that the respondent was not personally responsible for the payment of the tax due by the Circus Company, and accordingly ordered a refund of the sum levied without right from him.

The correspondence between the parties, however, shows clearly that, in the first instance, the Income Tax Collector did not hold the respondent responsible. The notice under section 17 was at first issued to Nago Bhicaji, who was described as the Manager of the Chatre Circus Company. This notice is Exhibit 23, and bears date the 29th April 1893. It informed Nago Bhicaji that the tax charged was Rs. 51-2, and required him to pay the same before 29th May 1893, or to make any representation about the same that he might deem proper. It appears that the notice reached Nago Bhicaji at Gwalior, where the circus then was, on 29th June 1893, and this Nago Bhicaji wrote to the Income Tax Collector that he got the notice after the last day fixed in it, and that payment within the time fixed was thus not possible. He, however, informed the taxing officer that the respondent-plaintiff Narayan was "our" head manager, and that he had been asked to make all proper arrangements in respect of the demand. Thereupon, the appellant for the first time, on 4th August 1893, required the respondent, who was not **[338]** described as manager on this occasion, to pay the tax within eight days (Exhibit 15). The respondent on 9th September 1893, describing himself as Manager of the Chatre Circus, wrote Exhibit 16, in which letter he represented that the Circus Company had not earned any profits, and that throughout the year it was working out of British India, and it was, therefore, not liable to the charge. This letter was accompanied by a printed form of application under section 25, signed by the respondent, in which he identified himself with the company more completely by the use of the first personal pronoun in stating that "we" had no property, and earned no profits in British India.

The appellant next, on 13th September 1893, made inquiries about the movements of the circus, and respondent sent a reply on 15th September. Later on, appellant asked to be furnished with information about the company's accounts. Respondent asked for time—Exhibits 2[illegible] 29—to obtain this information from Gwalior, and later on supplied information on these points, and sent extracts of the company's accounts. Finally, the Income Tax Collector confirmed the tax as first assessed on 1st December 1893—Exhibit 32. An appeal was then preferred by the respondent in which he again described himself as Manager of the Chatre Circus. This appeal was rejected. Thereafter

a warrant was issued for the levy of the tax from the Chatre Circus Company represented by the manager respondent, and it was in execution of this warrant that the notes of 60 Rs. were recovered from the respondent as manager, as stated in the warrant.

It is quite clear from this correspondence that the respondent-plaintiff all along conducted himself as though he was the *bonâ fide* head manager of the circus. That character was given to him, not by the appellant, but by Nago Bhicaji, and respondent not only never repudiated that character, but actually identified himself with the circus in a way which left no room for doubt that he was the head manager. He did not act in his capacity as vakil forthe Circus Company. He himself states he never had a power of attorney from Mr. Chatre. His own evidence shows that the Nasik Mamlatdar asked him to pay the tax for the Circus Company. The patel and kulkarni also admittedly **[339]** made the demand on him as Manager for the Circus Company, and he was asked to take back the balance after deducting the tax he had paid for the Circus Company. There was, therefore, nothing illegal in all these proceedings. Section 21 of the Act authorizes such a levy from the agent or manager when the principal lives out of British India. The mere fact that respondent was not a paid servant of the company cannot make any difference. It appears that he had advanced moneys to defray the circus expenses. But whether he was pecuniarily interested or not, it is clear that he put himself forward as an agent of the Circus Company, and he is, therefore, estopped now from pleading that he was not liable to be dealt with as such. We at first entertained some doubts which were suggested by plaintiff's evidence as to whether the levy was made from the respondent in his private capacity or as agent. We accordingly sent for the warrant, and its terms leave no doubt that the levy was made from him as manager. He has under the Act his own remedy against the owner of the circus if he has had to pay the money for his principal without having the principal's funds in his hand. Lastly it may be noted that respondent might have applied to the Collector under section 30 (3) (*d*) and made a claim for the money, if he objected to the payment. Section 39 has obviously no application, as respondent did not bring this suit to set aside the assessment. On the whole, we feel satisfied that the District Judge's decision cannot be supported on the merits. We accordingly reverse his decree and dismiss the suit with costs throughout on respondent.

*Decree reversed.*

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## [340] APPELLATE CIVIL.

*The 28th July, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Bapuchand Jethiram Gujar............(Original Applicant) Appellant

*versus*

Mugutrao and others............(Original Opponents) Respondents.*

*Limitation—Limitation Act (XV of 1877), Sch. II, Art. 179, Cl. 4—Instalment decree—Execution—Oral application by judgment-creditor for payment of money paid into Court—Step in aid of execution.*

An application by a judgment-creditor for the payment to him of money which has been paid into Court on his account in execution of his decree is an application to the Court to take a step in aid of execution of the decree within the meaning of article 179 of Schedule II of the Limitation Act (XV of 1877).

SECOND APPEAL from the order of Rao Bahadur Vishvanath B. Marathe, First Class Subordinate Judge of Satara with appellate powers.

On 28th March 1887, Bapuchand (appellant) obtained an instalment decree against the respondents. The decree ordered the payment of the first instalment before 1st April 1887, and of each succeeding instalment before the 1st of April of each year, and directed that in default of any instalment the whole amount due under the decree should be recoverable at once.

The second instalment was not paid until the 3rd April 1888, and was, therefore, late; the third instalment was also late, being made on 2nd April 1889; the fourth was paid on the 1st April 1890.

On 7th August 1891, a sum of Rs. 605-15-0 was paid into Court by the judgment-debtor, and on the oral application of the judgment-creditor it was paid over to him next day.

On 6th August 1894, the judgment-creditor Bapuchand (appellant) applied for further execution of the decree. The judgment-debtor pleaded that he was barred by limitation. The question then rose whether his oral application on the 7th August 1891, for the money which had been paid into Court on his account was an application to take a step in aid of execution of the decree under article 179, sub-clause 4 of the Limitation Act (XV of 1879).

[341] The Subordinate Judge rejected the application as barred by limitation.

On appeal the Judge confirmed the order.

The applicant Bapuchand appealed to the High Court.

*Vasudeo R. Joglekar*, for the Appellant (Applicant) :—An oral application is a step in aid of execution and saves time—*Venkatarayalu* v *Narasimha*, I. L. R., 2 Mad., 174; *Paran Singh* v. *Jawahir Singh*, I. L. R., 6 All., 366; *Kerala Varma* v. *Shangaram*, I. L. R., 16 Mad., 452; *Keshavlal* v. *Pitamberdas*, I. L. R., 19 Bom., 267.

*Narayan G. Chandavarkar*, for the Respondents (Opponents) :—He relied on *Dulsook* v. *Chugon*, I. L. R., 2 Bom., 356; *Hati Devchand* v. *Naroji*, P. J., 1894, p. 407; *Fazal Imam* v. *Metta Singh*, I. L. R., 10 Cal., 549.

* Second Appeal, No. 167 of 1896.

**Farran, C.J.**:—Appellant Bapuchand applied on the 6th August 1894, for further execution of an instalment decree of the 28th March 1887. The two lower Courts have held that the application was time-barred. The decree directed the payment of the first instalment before the 1st August 1887, and the payment of each succeeding instalment before the 1st April each year, and further directed that on default of payment of any instalment the whole amount due under the decree should be recoverable at once.

Payments were made as follows:—the first instalment on the 31st July 1887; the second instalment on the 3rd April 1888; the third on the 2nd April 1889; the fourth on the 1st April 1890; and on the 7th August 1891, the sum of Rs. 635-15 0 was paid. As default was made in paying the second instalment, the whole amount of the decree became payable on the 1st April 1888. It appears from the rojnama that the last of the above payments, that of Rs. 635-15-0, was made by the Court in pursuance of an oral application made to the Court by the judgment-creditor on the 7th or 8th August 1891.

The question then arises, whether an application by a judgment-creditor for the payment to him of money which has been paid into Court on his account in execution of his decree, is an applica-[342]tion to the Court to take a step in aid of execution of the decree. This question has been answered affirmatively by the Madras and Allahabad High Courts—*Venkatarayalu* v. *Narasimha*, I. L R, 2 Mad., 174; *Kerala Varma* v *Shangaram*, I. L. R., 16 Mad, 452; *Koormayya* v. *Krishnamma*, I. L R, 17 Mad., 165; *Paran Singh* v *Jawahir Singh*, I. L. R, 6 All., 366; *Sujan Singh* v. *Hira Singh*, I. L. R., 12 All., 399 at 403. On the other hand the Calcutta High Court holds that such an application is not an application to the Court to take a step in aid of execution—*Hem Chunder* v. *Brojo Soonduri*, I. L. R., 8 Cal., 89; *Fazal Imam* v. *Metta Singh*, I. L. R., 10 Cal, 549; *Gunga Pershad* v. *Debi Sundari*, I. L. R., 11 Cal., 227; *Ananda* v. *Hara Sundari*, I. L. R., 23 Cal., 196. In the last reported judgment of the Calcutta High Court touching this point, Sir COMER PETHERAM, after mentioning the view taken by the Madras and Allahabad High Courts, says (p. 199): "It seems to us that when the sale of the property attached in execution has been completed, and the purchase-money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property, and no application as regards the purchase-money, either to draw it out of Court or to set it off against the decree when the decree-holder is himself the purchaser, can be properly said to be an application to the Court to take some step in aid of the execution of the decree."

The Lower Appellate Court has referred to *Dulsook* v. *Chugon*, I. L. R., 2 Bom., 356, decided by Sir MICHAEL WESTROPP and Mr. Justice MELVILL. The facts of that case were very similar to the facts of the present case, but the Limitation Act then applicable was Act IX of 1871, and the 4th clause of article 167 of the 2nd schedule of that Act corresponding with clause 4 of article 179 of Act XV of 1877 did not specially provide for an application to the Court to take a step in aid of execution: the words in clause 4 of article 167 were, "applying to the Court to enforce, or keep in force the decree or order." The point which we are considering was (probably for that reason) not taken in that case. In *Keshavlal* v. *Pitamberdas*, I. L. R., 19 Bom., 267, Mr. Justice JARDINE expressed an opinion that [343] in the case of a mere money decree, in which the execution by attachment was not intended to be a permanent arrangement, mere receipt of money is not a step in aid of execution, but he held that, where under the terms of the decree the judgment-debtor's property is attached, and the profits sequestrated for a long period, an application to receive the proceeds of such property is a step in aid of execution.

When money is paid into Court in satisfaction of a decree it is, in the ordinary course, placed to the credit of the judgment-creditor, and is then liable to attachment as his money. In a certain sense the decree is then satisfied to the extent of the payment; still it appears to us that the execution of the decree with regard to such payment is not fully completed till the money has been actually paid by the Court to the judgment-creditor or to some one on his account. We, therefore, agree in the view taken by the Madras and Allahabad High Courts.

It was contended by the pleader for the respondent that the decree was time-barred at the date when the last application for the payment out of the Rs. 635-15-0 was made by the judgment-creditor to the Court, inasmuch as the appellant has not shown that any previous application to take a step in aid of execution was made within three years of that date. We think under the circumstances that it was rather for the respondent to show that the decree was then time-barred; but at all events we think that we ought to presume, in the absence of proof to the contrary, that the previous payments out of the instalments to the judgment-creditor were made in pursuance of applications made by him for that purpose to the Court.

It was further contended for respondents that, assuming that an application to take money out of Court is an application to the Court to take a step in aid of execution, yet that as the whole amount of the decree became payable on the 1st April 1888, the subsequent applications made in 1888, 1889 and 1890, being only for payment of instalments, would not keep the decree alive. We do not think this is a sound argument. The step in aid of execution, referred to in clause 4 of article 179, need not, we think, be a step directly towards the complete execution of the decree. The Lower Appellate Court was of opinion [344] that the decree in question had been fully satisfied, but it appears to have overlooked the interest which was due at the date of the decree and for payment of which the decree provides as well as for payment of future interest.

We reverse the decree of the Lower Appellate Court and remand the case that an account may be taken of what is due under the decree and an order may be made for its realization.

*Decree reversed and case remanded.*

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**NOTES.**

[See also (1912) 15 Bom. L. R., 205 where the presumption of an application was applied; (1908) P. R., 103 F. B.]

[22 Bom. 344]

## APPELLATE CIVIL.

*The 29th July, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Raoji............(Original Plaintiff) Appellant

*versus*

Genu............(Original Defendant) Respondent.*

*Vatan—Vatandar—Vatandar family—Hereditary Offices (Bombay Act III of 1874), Sec. 25†—Suit for declaration of right to represent family—Jurisdiction of civil Court.*

The plaintiff sued for a declaration that the branch of the Gavda family which he represented was elder than that represented by one of the defendants. The object which he desired to obtain by a declaration in that form was to influence the Collector in determining whether he should be recognized as the representative vatandar in respect of the four annas share which the Gavda family possessed in a patelki vatan.

*Held* that the civil Court had no jurisdiction to entertain the suit, since the declaration sought, if made, would in effect be a declaration of plaintiff's status as representative vatandar. This, however, equally with the duty of ascertaining the custom of the vatan as to service was a duty which by section 25 of the Bombay Hereditary Offices Act (Bombay Act III of 1874) was imposed on the Collector and not upon the civil Court.

SECOND APPEAL from the decision of A. Steward, District Judge of Poona, reversing the decree of Rao Saheb D. G. Medhekar, Subordinate Judge of Junnar.

The plaintiff sued for a declaration that the branch of the Gavda family represented by him was elder than that repre-[345]sented by the defendant. He stated that the Gavda family had a four annas' share in the patelki vatan at Edgaum; that it was customary for the eldest branch to hold that share; and that fifteen or twenty years previously the defendant's father, taking advantage of the plaintiff's absence from the village, had by false representations got the four annas' share entered in his name as the representative of the eldest branch of the family; that the defendant's father was now dead and that he (the plaintiff) had applied to the Collector to have his name entered as representative of the family and that the Collector referred him to a civil Court to prove his right to represent the family.

The defendant denied the statements of the plaintiff and pleaded that the claim was barred, and was not one which could be entertained by a civil Court.

The Subordinate Judge found that the plaintiff represented the elder branch of the family of the parties; that his cause of action arose when the defendant applied to the Collector for the registration of his name as representative vatandar after the death of his father; that the claim was not time-barred and that it could be entertained by a civil Court. He, therefore, made the declaration sought for.

* Second Appeal, No. 666 of 1895.

† Section 25 of the Bombay Hereditary Offices Act (Bom. Act III of 1874):—

25. It shall be the duty of the Collector to determine, as hereinafter provided, the custom of the vatan as to service, and what persons shall be recognized as representative vatandars for the purpose of this Act, and to register their names.

On appeal by the defendant the Judge reversed the decree and dismissed the suit, holding that it was not cognizable by a civil Court.

The plaintiff preferred a second appeal.

*Narayan M. Samarth*, for Appellant (Plaintiff) :—The main question is whether a civil Court has jurisdiction under the present Vatan Act (Bombay Act III of 1874) to entertain a suit for such a declaration as this. We submit that it has. Under the old Vatan Act (XI of 1843) civil Courts had no jurisdiction to entertain such a suit—*Abaji* v. *Niloji*, 2 Bom. H. C. Rep., A. C. J., 342 ; *Yesaji Apaji* v. *Yesaji Mhaloji*, 8 Bom. H. C. Rep., A. C. J., 35. But the present Vatan Act, which is applicable to the case, has made changes in the old law : see sections 24 to 30 of the Act. Under section 42 of the Specific Relief Act (I of 1877) we are entitled to bring such a suit. The discretion of the [346] Collector arises after the civil Court has determined the right of eldership—*Rangrav Venktesh* v. *Krishnarav Gopal*, P. J., 1877, p. 98 ; *Dadaji* v. *Bhaskarrav*, P. J. 1878, p. 64.

*Ganpat S. Rao*, for the Respondent (Defendant):—Sections 25 and 26 of the Vatan Act empower the Collector to inquire into the custom with respect to a vatan. Therefore, a civil Court has no jurisdiction to entertain a suit with respect to a custom relating to a vatan. On the death of defendant's father, who was the representative vatandar, the Collector was bound to enter defendant's name as the representative vatandar—*Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni*, I. L. R., 2 Bom., 370 ; *Ramchandra* v. *Anant*, I. L. R., 8 Bom., 25 : *Balkrishna* v. *Balaji*, I. L. R., 9 Bom., 25 ; *Govind* v. *Bapuji*, I. L. R., 18 Bom., 516.

Further, we submit that on the face of the plaint the claim is time-barred. Plaintiff's cause of action accrued to him when defendant's father was recognized as the representative vatandar fifteen or twenty years before the institution of the suit, or when Act III of 1874 came into force.

**Farran, C.J.** :—The plaintiff in this suit sued for a declaration that the branch of the Gavda family which he represented was elder than that represented by the first defendant Genu. The plaintiff confined his prayer to that relief. The object which he desired to obtain by a declaration in that form was (as is shown by the statements in the plaint) to influence the Collector in determining whether he should not be recognized as the representative vatandar in respect of the four annas' share which the Gavda family possess in the patelki vatan at Edgaum. There has been no certificate of the Collector put in showing what the custom of the vatan as to service is, nor has either of the lower Courts found upon that question. The plaintiff in his plaint alleges that it is customary for the representative of the eldest branch of the Gavda family to be the representative vatandar of its four annas' share. The first defendant denies that such is the custom. The Subordinate Judge made a declaration in the plaintiff's favour deeming that it was competent for a civil Court to give the plaintiff relief in that form. The District [347] Judge, holding a contrary opinion, reversed the decree of the Subordinate Judge, and dismissed the suit. Hence this appeal.

Now section 25 of the Bombay Hereditary Offices (Act III of 1874) enacts that it shall be the duty of the Collector to determine as thereinafter provided the custom of the vatan as to service and what persons shall be recognized as representative vatandars for the purposes of the Act and to register their names. The sections which follow (26 to 30) lay down elaborate rules to guide the Collector in ascertaining what the custom of the vatan which he is to follow is. When he has ascertained it, section 25 still imposes upon him the duty of

determining what person shall be recognized as representative vatandar and of registering his name.

In the present case, a declaration of eldership would only assist the plaintiff if the custom of the vatan is for the service to be performed by the representative of the elder branch. It is conceded that the civil Courts have not jurisdiction to enter upon an inquiry whether such is the custom of the vatan or not. Assuming that it is, the decree of the civil Court declaring the plaintiff to represent the elder branch would be, in effect, a decree declaring him to be the representative vatandar in the Gavda family. That, however, equally with the duty of ascertaining the custom of the vatan, is a duty, which by section 25 of the Act is imposed on the Collector and not upon the civil Court. We think that the civil Courts are not entitled to assume a jurisdiction which the Legislature has entrusted to other hands. The law upon the subject appears to us to be accurately stated by WEST, J., in *Ramchandra v. Anant*, I. L. R., 8 Bom., at p. 26, in this short sentence—"Bombay Act III of 1874 *in giving the Collector jurisdiction to pronounce who amongst the vatandars shall be representatives* does not give him jurisdiction to determine who in disputed cases shall be vatandars within the definition given in the Act." We, therefore, confirm the decree of the Lower Appellate Court with costs.

*Decree confirmed.*

NOTES.

[This was dissented from in (1909) 11 Bom. L. R., 1339; see also (1909) 2 I. C., 242 (Nagpur).]

## [348] APPELLATE CIVIL.

*The 31st July, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Baliaramgiri Ramchandragiri Inamdar............(Original Plaintiff) Appellant

*versus*

Vasudev Moreshvar Niphadkar and others............(Original Defendants) Respondents.*

*Landlord and tenant—Inamdar—Notice of relinquishment of land by tenant—Valid notice—Land Revenue Code (Bombay Act V of 1879), Sec. 74 †—Tenant must give vacant possession—Remedy of landlord when vacant possession not given—Damages.*

On the 20th March 1893, the defendants who held seven fields as tenants of the plaintiff, the inamdar of the village of Kaneri, gave him notice of relinquishment of six of them.

* Second Appeal, No. 214 of 1896.

† Land Revenue Code (Bombay Act V of 1879), section 74:—

74. An occupant may, by giving written notice to the Mamlatdar or Mahalkari, relinquish his occupancy, either absolutely or in favour of a specified person, provided that such relinquishment apply to the entire occupancy or to whole survey numbers, or recognised shares of survey numbers.

An absolute relinquishment shall be deemed to have effect from the close of the current year, and notice thereof must be given before the 31st March in such year, or before such

The notice stated that these six fields were no longer in their possession, and that they would not be responsible for the assessment. The plaintiff notwithstanding brought this suit to recover the assessment for the year 1893-94. The Subordinate Judge held that the defendants continued to be tenants of the fields in question and were liable to the assessment on the ground that the notice of relinquishment did not purport to give vacant possession to the plaintiff. He thereupon passed a decree for the plaintiff. On appeal the District Judge reversed the decree, holding that the notice was a conditional relinquishment which terminated the tenancy. On appeal to the High Court,

*Held* (confirming the decree of the Lower Appellate Court) that the defendants were not liable to the assessment.

Section 74 of the Bombay Land Revenue Code (Bombay Act V of 1879) only declares the customary common law on the subject of relinquishment of tenancy.

[349] A notice of relinquishment is not invalid because it does not purport to give and does not in fact give vacant possession to the inamdar. The result is the same whether the fact that the possession is not vacant appears on the face of the notice or is shown otherwise.

A tenant giving up demised lands to his landlord is bound to give him vacant possession. The result, however, of his not doing so is not to continue the tenancy, but to create a claim for damages on the part of the landlord. The tenant is liable in damages to the extent of the loss of rent which the landlord sustains during the actual period for which he is kept out of possession and the expenses he is put to in recovering possession of the land.

SECOND APPEAL from the decision of F. C.O. Beaman, District Judge of Thana, reversing the decree of Vadilal T. Parekh, Subordinate Judge of Bhiwndi.

The plaintiff as inamdar of the village of Kaneri sued to recover Rs. 85-8-0 as the assessment for the year 1893-94 due by defendants in respect of seven fields described in the plaint.

The defendants alleged that except one field (called Ambashet) they had relinquished all the fields in question and that these fields were now in the possession of other persons; that on the 22nd March 1893, they had given the plaintiff due notice of their relinquishment of these fields, and they contended that they were, therefore, now not liable for assessment in respect to them.

The notice relied on (after stating that the defendants were not in possession of the fields except Ambashet and had no interest in them) was as follows:—

"Therefore we have previously orally and by written notices informed you that you should enter such lands as are in any one's possession in his name and levy the assessment from him; but as there is ill-feeling between you and us, and as the other sharers are colluding with you, you are trying maliciously to hold us responsible and liable for the assessment due on most of the land in Shivram Chimnaji's *khata*. This is not proper and is illegal. Therefore we now inform you that we have in our possession and ownership only the field Ambashet out of all the lands in Shivram's *khata*, and we are willing to pay the assessment thereon, but you do not accept it, and demand from us the assessment for all the lands. Therefore we are not liable for the costs thereof. The land except Ambashet is not owned by us and is not in our possession. We have also not taken the produce of the land and are not doing so. You are aware of this. You should manage to have the land entered in the name of whoever may be in possession of the same and recover [350] the assessment from him, or

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other date as may be from time to time prescribed in this behalf for each district by the Governor in Council.

A relinquishment in favour of a specified person may be made at any time.

When there are more occupants than one, the notice of relinquishment must be given by the registered occupant; and the person, if any, in whose favour an occupancy is relinquished, or, if such occupancy is relinquished in favour of more persons than one, the principal of such persons must enter into a written agreement to become the registered occupant and his name shall thereupon be substituted in the records for that of the previous registered occupant.

you should get the lands vacated and let them to any one else. You should make whatever arrangement you think proper. We have no objection thereto. We are not responsible for the assessment of the lands or any expenses connected therewith. Be this known to you."

The Subordinate Judge found that the defendants were liable to pay the assessment and awarded the claim.

On appeal by the defendants the Judge reversed the decree. He held that the defendants having relinquished the land by their notice dated 20th March 1893, they were no longer liable to assessment. The following is an extract from his judgment :—

"The plaintiff is inamdar, and the defendants in respect to all the lands which they do hold are sutidars or mirasdars,—that is to say, they hold permanently on condition of paying the assessment. Some years ago the plaintiff enhanced the assessment, and there was litigation between him and the present defendants, as a result of which it was held that he had a right to enhance, and that the defendants were bound to pay him that year's assessment. Since then a new point has arisen. The defendants now deny that (with the exception of one field about which here is no appeal) they are in possession of any of the land in suit. And they say further that as in March 1893, they served the plaintiff with a notice, amounting to an absolute and unqualified relinquishment, he cannot sue them for the assessment for 1893-94. I think that contention must prevail. It is true that section 74 of Act V of 1879 does not apply to villages which have not been surveyed. But there is equally no question but that if it did apply, and the notice in question (receipt of which is not denied) had been served on a Mamlatdar or Mahalkari, it would have been sufficient to discharge the defendants from all further revenue demands on the holding. The contention is that since the inamdar has not been empowered under section 88 of the Land Revenue Code to receive relinquishments under section 74, the defendants gained nothing by their notice, and were bound to hold over until the landlord chose to release them. This appears to be an untenable position."

The plaintiff preferred a second appeal.

*Narayan G. Chandavarkar*, for the Appellant (Plaintiff) :—The Judge erred in holding that the notice (Exhibit No. 22) given to us by the defendants was a valid relinquishment of their rights and liabilities. Section 74 of the Land Revenue Code is not applicable to the present case; but in any case the defendants cannot claim protection under it, because a tenant cannot relinquish his tenancy in favour of another person and force another tenant on the landlord.

**[351]** *Mahadev B. Chaubal*, for the Respondents (Defendants) :— The real point in the case is as to the effect of the notice of relinquishment (Exhibit No. 22) which we gave. We gave three notices informing the plaintiff that we were not willing to cultivate the lands. A landlord cannot recover rent from his tenant after the tenant has given notice of relinquishment.

*Narayan G. Chandavarkar*, in reply:—The defendants' notice of relinquishment does not absolve them from liability. They ought to have given possession to us. Further, the notice is not legal, because it relates only to six out of the seven fields of which the defendants are in possession— *Subrav* v. *Ratnushet*, P. J., 1882, p. 167; *Nana* v. *Annapa*, P. J., 1889, p. 14.

**Farran, C. J.** :—The question for determination in this appeal is whether the defendants are liable for the assessment on the seven fields described in the plaint for the year 1893-94 notwithstanding their having given the plaintiff the notice, dated the 20th March 1893, which has been put in as Exhibit No. 22.

In the year 1886, the plaintiff, who, as priest of the temple of Shri Vajreshwari, is inamdar of the village of Kaneri, sued the defendants and other persons for enhanced assessment on the above fields and other land. The defendants in answer alleged that they were *mirasi* tenants in possession of

the fields, and were not liable to have the assessment upon them raised. The ultimate result of the suit in appeal was that the defendants were decreed to pay Rs. 85-8-0, the enhanced assessment on the fields for 1885-86 (Exhibits Nos. 24 and 25). There was no decision come to in that case as to the tenure upon which the defendants held the fields. The District Judge in the present case has treated them as having held the fields on *mirasi* tenure.

After the decree in 1885-86 the plaintiff recovered the enhanced assessment on the fields from the defendants down to and including the year 1892-93. The defendants during the last three or four of these years unsuccessfully resisted the plaintiff's demand for assessment on the ground that they were in possess-[352]ion of one only of the seven fields, but the plaintiff, with the assistance of the Revenue authorities, recovered the assessment on them all. Eventually the defendants on the 20th March 1893, gave the plaintiff the notice of that date, the effect of which we have now to consider. The present suit is brought by the plaintiff to recover from the defendants the enhanced assessment on the seven fields for the year 1893-94.

We agree with the District Judge that, although Bombay Act V of 1879, section 74, does not apply to the fields in question, they being situate in an unsurveyed village, it was competent to the defendants by a proper notice to the inamdar given at the proper season to relinquish their holding and cease thenceforth to be liable for the assessment. There being no covenant entered into by the defendants to continue to hold these fields for a fixed period, and not being *adscripti glebæ* bound to remain indefinitely the tenants of the inamdar, they were entitled by a legal notice to terminate the relationship of tenants and landlord between them. Section 74 of Act V of 1879 only gives definiteness to the customary common law upon this subject. The contrary was not indeed contended before us, although it appears to have been argued on behalf of the inamdar-plaintiff in the Lower Appellate Court.

The only question (apart from the retention of one field by the defendants which gives rise to different considerations) which we have to determine is whether the notice is a sufficient notice of relinquishment. It is not disputed that it was given at the proper season of the year, or that it was a timely notice for the year 1893-94. In terms it is an absolute and unqualified notice. After stating that the defendants were not in possession of the fields (except one Ambashet), and had not taken their produce and had no interest in them, it continues [His Lordship read the notice and continued.]

The Subordinate Judge treated the defendants as the continuing tenants of the plaintiff on the ground that the notice does not purport to give vacant possession of the six fields to the plaintiff. The District Judge considered it to be an unconditional notice of relinquishment which terminated the tenancy of the defendants. [353] He has not considered the question of vacant possession not being given. The defendants in their written statement say that three of the fields, Shingale, Wawe and Bag, belong to Keshav Narayan, and that three of them, Hira, Maind and Chari, belong to Pandurang Dinkar, and at the hearing they called Keshav to state that he was in possession of the three fields said to be in his possession. He is a relation of the defendants. Though there is no finding of the District Judge upon the point, it must, we think, be taken as a fact that the defendants did not give vacant possession to the plaintiff when they gave the notice just referred to.

It appears to us that the notice is in terms an absolute relinquishment by the defendants of all interest in the six fields, and that it is not the less so because it states that the defendants had not been in possession of the fields. It leaves the fields at the unqualified disposal of the inamdar in so far as the

defendants are concerned, and is thus a notice as defined in the cases of *Venkatesh* v. *Krishnaji*, I. L. R., 8 Bom., 160, and *Balaji* v. *Bhikaji*, I. L. R., 8 Bom., 164.

The question thus arises whether a notice of relinquishment is invalid if it does not purport to give and does not in fact give vacant possession to the inamdar. It does not seem to us to affect the legal aspect of the case whether the fact that the possession is not vacant appears on the face of the notice or is shown otherwise. The legal result must, we think, be the same in either case. There can, we think, be no doubt that a tenant giving up demised lands to his landlord is bound to give him vacant possession. That is the law in England even in the case of a demise by parol. Where there is no express stipulation to that effect made at the time of the letting of the land, it will be implied as one of the terms of such letting—*Henderson* v. *Squire*, L. R., 4 Q. B., 170. The same must, we think, be the law in India.

The question, however, still remains. What is the result of not giving vacant possession? Does it continue the tenancy indefinitely, or does it give rise to a claim for damages on the part of the landlord? The latter appears to us to be its legal result. In the case of *Henderson* v. *Squire* above referred to [354] the tenant had underlet a part of the premises, and the under-tenant refused to vacate at the termination of the principal tenancy. The landlord recovered possession by ejectment. The tenant was there held liable in damages to the extent of the loss of rent which the landlord sustained during the actual period for which he was kept out of possession and the expenses he was put to in ejecting the sub-tenant. The same rule should, we think, be applied in a case like the present. It would be unreasonable to hold cultivators, like the defendants, liable for rent perpetually because the inamdar does not choose to demand or recover possession from Keshav and Pandurang, if he does not desire to treat them as his tenants. If they refuse to vacate at the request of the defendants, it is difficult to see how the defendants after the notice could force them to do so. There is no finding by the District Judge how these men got into possession, whether with the consent or against the wish of the defendants, or whether they are or are not willing to vacate the fields. The Subordinate Judge appears to think that they may be holding on behalf of the defendants, but he has not found to that effect, and that aspect of the case does not appear to have been presented to the District Judge. It would have been more desirable if the latter had dealt with this question of non-vacant possession, but as his judgment does not allude to it we must presume that it cannot have been pressed upon him.

As this is not a suit for damages for not giving up vacant possession, but to recover assessment from the defendants as if they had given no notice of relinquishment, we do not think it necessary, in the view which we take of the law, to remand the appeal for further inquiry upon that point. The conclusion which we have come to does not appear to us to be at variance with *Subrav* v. *Ratnushet*, P. J., 1882, p. 167, followed in *Nana* v. *Annapa*, P. J., 1889, p. 14.

The question whether the notice is bad on the ground that it relates to six only out of the seven fields is one upon which the plaintiff did not apparently rely in either of the lower Courts. The holding is only joint in the sense that these seven fields with other fields once stood in the *khata* of Shivram Chimnaji. No [355] other connection is shown between the fields. The objection was not mentioned by the learned pleader for the appellant in his opening speech. He only incidentally referred to it in his reply to meet the argument of the learned pleader for the respondents. We do not think that under all the

circumstances of the case we ought to consider the objection in second appeal when raised there for the first time, or to remand the appeal for the lower Court to consider it. We accordingly confirm the decree with costs.

*Decree confirmed.*

NOTES.

[See also (1910) 12 Bom. L. R., 474 as regards the tenant's duty to give vacant possession.]

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[ 22 Bom. 365 ]

## ORIGINAL CIVIL.

*The 12th November, 1897.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE A. STRACHEY.

Fardunji Merwanji Banaji and others............Appellants

*versus*

Mithibai and others............Respondents.*

***Agreement—Construction—Gift to the heirs of A from generation to generation.***

The members of a Parsi family, the heirs of one Framji Cowasji Banaji deceased, entered into an agreement dated the 24th May 1851, by which they agreed that the remaining income (after paying the deceased's debts) of a certain estate which had belonged to the deceased, called the Powai estate, situated in the island of Salsette, should be appropriated in certain shares among themselves as heirs of the deceased and "*after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever.*" In a previous suit (I. L. R., 6 Bom., 151) it was decided that under this agreement the signatories thereto took only a life interest in their respective shares. In the present suit it was contended and was held by the Division Court that the subsequent gift to the "heirs and children (of the signatories) from generation to generation for ever" was void as infringing the rule against perpetuities. On appeal,

*Held*, that the settlement in favour of the heirs and children of each signatory was in law a valid settlement and not void as creating a perpetuity. In the absence of words in the context showing that they were intended to take less, the respective heirs and children of the signatories took an absolute estate.

[366] A gift to the heirs of *A* from generation to generation confers on them when ascertained the same estate as if the gift were to *X* and *Y* the heirs of *A nominatim*.

THIS suit was filed by the plaintiff Mithibai and others for the administration of the estate of her father-in-law Framji Cowasji Bomanji, who died in February 1851.

He had left a will and codicil, dated respectively the 5th July 1828, and 15th December 1831. Subsequently, however, to their execution he had become possessed of a large property called the Powai estate situate in the island of Salsette, and neither the will nor the codicil contained any residuary devise, so that he left the Powai estate undisposed of and also some immoveable property in Bombay and a considerable amount of moveable property. The Powai estate had been granted to him, his heirs, executors, administrators and assigns

* Suit No. 877 of 1870. Appeal No. 954.

for ever by the East India Company under an indenture dated 15th February 1837. The deed contained a covenant by him for himself and his heirs, executors and administrators that he and they would, out of the income of this estate, provide a supply of water for the use of the poor of Kamathipura in Bombay, and accordingly it appeared that at the date of the family arrangement hereinafter mentioned (24th May 1851) the said estate was vested in trustees for the purpose of keeping up this charity and also a fire temple.

The said Framji Cowasji Bomanji left him surviving his widow Bachubai; three sons, *viz.*, Jehangir (husband of the plaintiff Mithibai), Pestonji and Nanabhai; three daughters, *viz.*, Ratanbai, Navazbai and Perozbai; and several grand-children by three other daughters, Gulbai, Meherbai and Manekbai, all of whom had predeceased him.

Disputes arose in the family as to the distribution of his property, and to put an end to them a family arrangement was entered into on the 24th May 1851.

The following clauses of the said agreement are the only portions material to this report :—

"7. As to all the debts due by the late Sett Framji Cowasji, deceased, (the proceeds of) the sale of his landed estate in Bombay and the amount of insurance of the ship *Buckinghamshire* destroyed by fire having been collected, and furniture and other goods and effects having been sold, and such outstanding debts as [387] may be due by different persons having been collected, his creditors should be paid; but on selling and collecting all the above (property) should all the creditors be not paid in full, then there are six villages, inclusive of Poway in Salsette, belonging to the deceased, which have been obtained from Government rent-free for ever. Out of the income of these villages in the first place water should be supplied for the use of the poor community of Kamathipura in Bombay, which the late Framji Cowasji Sett, deceased, has been supplying from the year 1824 A.D out of the well in his Girgaon oart, called Mugbhat; and, in order that this charity may continue for ever, a trust-deed in English, dated the 30th September 1837, has been made for drawing Rs. 2,400, namely, twentyfour hundred, annually out of the income of the villages inclusive of Poway; and the English Government has been appointed trustees therein, with a view that should the heirs of the deceased be unable to supply the water properly, then Government, the trustees, having drawn out of the income of the village of Poway the abovementioned sum of Rs. 2,400 every year, are to conduct and preserve that charity work for ever. Therefore, after the amounts of these charges of the karkuns and sepoys and other charges of the villages inclusive of Poway have been deducted from the amount of the income, the surplus, whatever it may be, should be paid in the best possible way to the creditors in part payment of the interest; and in case there be any surplus, the same should be paid to them in equal proportions in part payment of their principal, until all the debts of the late Framji Cowasji, deceased, are discharged. Payments are to be truly made out of this income.

"8. Besides the above six villages inclusive of Poway (free from payment of any tax) there are in Salsette two other villages, Vikroli and Kanzoor, adjoining Poway which were farmed from Government for ever on the —day of—18—on agreeing to pay annually Rs. 1,000 for rent. After paying which sum of Rs. 1,000, as well as the amount of other expenses of the said villages out of the annual income of the said villages, a sum of Rs. (2,500), namely, twenty-five hundred per annum out of the remaining income has been bestowed by the late Sett Framji Cowasji, deceased, for defraying the current expenses of the late Bawa Cowasji Byramji's Atush Byram or fire temple in Bombay: it has been directed to be paid to the managers of the said fire temple, for the purpose of defraying its current expenses, for which a separate trust-deed was executed in English on the 12th day of July 1849, by the late Sett Framji Cowasji, deceased; and according to what is therein written, a sum as far as Rs. 2,500 is to be paid from the revenue of these villages; should the income of the said two villages be insufficient to make up the above mentioned sum of Rs. 2,500 the deficiency,

whatever it may amount to, is to be made up by the income of Poway and its adjoining villages as therein directed; and should there be any surplus it should be added to the income of the villages of Poway and should be appropriated as stated in the above mentioned para. 7 towards the payment of the deceased's creditors, which we, all the undersigned, are truly to agree to and to abide by.

**[358]** " 9. We, all the undersigned, heirs of the late Sett Framji Cowasji, deceased, have by our unanimous consent acknowledged and determined by this writing the under-mentioned persons to be the heirs of the said Framji Cowasji, deceased; the particulars of their names and the manner in which it is agreed their shares are to be paid are as follows, *viz.* :—

" (25) Twenty-five cents to Bai Buchubai. the widow of our late patron Framji Cowasji, 25.

" (50) Fifty cents to be divided equally among the sons who are living; the particulars whereof are as follows, *viz.*, Jehangir Framji, Pestonji Framji and Nanabhoy Framji, 50.

" (25) Twenty-five cents to be divided in equal shares among the living daughters and the heirs of the deceased daughters—Bai Ratanbai, the widow of the late Nusserwanji Rustomji Bali Homaji, deceased; Bai Navazbai, the wife of Dhunjibhoy Byramji Rana; Bai Perozbai, the wife of Ardasir Cursetji Sett. The late Gulbai, deceased, wife of the late Dhunjibhoy Nusserwanji, deceased, is dead, and her daughter Hirabai is at present her heir, and she is the wife of Sorabji Pestonji. The late Meherbai, deceased, the wife of Pestonji Nowroji, is dead, and her heirs are her two sons, Ardasir Pestonji and Nowroji Pestonji; and these sons are at present young and are living with their father Pestonji Nowroji; and having appointed along with their father and guardian two other persons as trustees, and the amount of the share of these young heirs until such time as they come of age having been duly guaranteed, that is to say, having been invested in Government papers, the accumulating interest is to be added thereto and their shares should be paid to them as they respectively come of age. The late Manekbai, deceased, the wife of Dadabhoy Rustomji, is dead, and her heirs are her daughter Sirinbai and her son Kaikhusru; but those children are at present young and are living with their father Dadabhoy Rustomji, and having appointed along with their father and guardian two other persons as trustees the amount of their shares of these young heirs, until such time as they come of age having been duly guaranteed, that is to say, having been invested in Government papers, the accumulating interest is to be added thereto and their shares should be paid to them as they respectively come of age.

" According to these particulars 100, namely one hundred, cents are to be apportioned among Buchubai, the three sons, the three living daughters and the children and heirs of the three deceased daughters, agreeably to the shares of the heirs settled above.

" 11. After paying in full, agreeably to what is written above, all the creditors of the late Sett Framji Cowasji, deceased, out of the income of the Powai estate of the late Sett Framji Cowasji, deceased, as written above, out of the remaining income whatever it may come to, after paying for the two charitable works, namely, supplying water and the management of the fire temple for which trust-deeds have been made, agreeably to and as mentioned in paragraphs 7 and 8, and after deducting the amount of the expenses of those villages, *the remainder is to be* **[359]** *apportioned to the abovementioned heirs agreeably to the shares mentioned above; but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever; no other person shall make any claim or demand whatsoever thereon, and should any male or female heirs give away his, her or their share to a stranger or to any improper person, the same should not take effect; and we, all the heirs, do agree by this writing, that should anything of this kind be done, it is to be all null and void, and is truly to become void; and should any of the undermentioned heirs or their heirs and children die hereafter without issue, then his or her share is truly to go to the surviving male and female heirs, and my (Buchubai's) share too after my death is truly to go to the male and female heirs settled above; and in the event of their death, to their children and heirs in the manner written above.* This we, all the undersigned heirs, concurring with one another are truly to abide by. Should we or our children and heirs now or hereafter make any alterations or deviations therein, or make any claim or demand thereon, it is to be truly null and void; moreover

the authority for the management of the estate of the late Sett Framji Cowasji, deceased, whatever it may be, and the income of the villages in Salsette inclusive of Powai and the management and the taking care thereof, and for the management of the supply of water for charity from the Girgaon cart to the poor of the Kamathipura in Bombay belongs to us, Pestonji Framji and Nanabhoy Framji, the executors and heirs appointed in the said will of the late Sett Framji Cowasji, deceased; and in the event of the death of either of them, one of his sons and heirs is to be appointed by the other, and so, from generation to generation, who is to do all the business agreeably to what is written above. Should any one die without appointing any one out of his sons as his heirs, then his eldest son, whoever he may be, is truly to join in conducting all the management on behalf of his father, agreeably to what is written above, and is truly to give and receive what is due to any from the other heirs appointed by this writing. Agreeably to what is written above no other heirs have any authority in this matter, and should any one whatsoever raise any claim or demand whatsoever thereon at any time it is truly to be null and void.

"14. As the late Sett Framji Cowasji, deceased, had himself no right either to sell or mortgage the villages and the estate in Salsette belonging to our patron the late Framji Cowasji, deceased, consequently none can ever exercise such a right over the same in any respect, but we, the undersigned heirs and our successive heirs, do agree that we are in no way able either now or at any time hereafter to sell or mortgage the said estate in Salsette. But in addition thereto, agreeably to what is written in the above paragraph in this writing, it is agreed that the claim of inheritance of us, the undersigned heirs of our patron the late Framji Cowasji, deceased, is to be received out of the income of this estate. *As to that claim we, the undersigned, all the heirs of the late Sett Framji Cowasji, deceased, and our successive heirs, do agree that the claim of each of us separately over the abovementioned income is not in any way to be sold or to be given in writing to any one now or hereafter by any one of us or any of our successive* [360] *heirs*, and should any one do any such thing it shall truly be null and void. By this writing our respective shares after they shall have come into our hands may be used and enjoyed by us in any way we like; but agreeably to this writing we are not to sell or give away in writing our prospective income to anybody which we all are truly to agree to and abide by agreeably to this writing."

The present suit was based upon this family agreement, and the plaintiff prayed (*inter alia*) that the rights and interests of the plaintiffs and defendants under it might be ascertained and declared; that accounts might be taken and the estate distributed, &c., &c.

On the 24th February 1872, the suit came on for hearing, and by consent it was declared that the parties were entitled to have the estate ascertained and distributed under the said family agreement and that the said agreement was binding upon them; and the matter was referred to the Commissioner to take the accounts and to ascertain and report as to the shares to which the parties were respectively entitled.

In 1873, Nanabhoy (a son of Framji Cawasji), one of the signatories to the said agreement, sold his share and interest in the estate to one Harivalabdas Kaliandas, and the question shortly afterwards arose as to the nature and extent of the interest taken by Nanabhoy and the other signatories under the agreement. In 1881 the question came before BAYLEY, J., who held that under the terms of the agreement the signatories took only a life interest in their respective shares (see *Mithibai* v. *Limji Nowroji Banaji*, I. L. R., 5 Bom., 506). On appeal that decision was confirmed (see I. L. R., 6 Bom., 151).

The taking of accounts was subsequently proceeded with, and on the 14th July 1884, the Commissioner made his report. As already mentioned, Nanabhoy, one of the signatories to the agreement, had sold his interest to Harivalabdas Kaliandas, who had since died, and the right to Nanabhoy's share had devolved on Narandas Kaliandas, the brother of Harivalabdas. Narandas filed

exceptions to the report, raising the question as to the devolution of the shares specified in the agreement subsequently to the life interests of the signatories thereto. The matter came again before BAYLEY, J., who on the 1st March 1887, [361] held that the limitations in the agreement subsequent to the life interests given thereby to the signatories were void as infringing the rule against perpetuities, and that consequently there was a resulting trust of the respective shares to the heirs of Framji Cowasji.

The following are extracts from his judgment :—

"On the argument of the exceptions before me it was contended by the learned Advocate-General on behalf of Narandas Kaliandas that, assuming Nanabhoy Framji only took a life estate, everything beyond that is bad as tending to create a perpetuity; in other words, that the true intent of the parties to the agreement of the 24th May 1851, was not to dispose of the estate itself, but to enable them and their descendants to enjoy the profits of the Poway estate in Salsette for ever; whilst Mr. Lang and Mr. Starling on behalf of their respective clients urged that the parties intended to divide the estate itself among themselves and their descendants, and consequently that those who come immediately after the respective life tenants took absolute estates equivalent to estates in fee simple. The point for decision appears to present no serious difficulty, the manifest intention to be collected from the provisions of the family agreement of 24th May 1851, being, in my opinion, quite clear.

"The learned Advocate-General, on behalf of the defendant Narandas Kaliandas, relied strongly on the decision in March 1885, of the Privy Council in the case of *Sookhmoy Chunder Dass* v. *Srimati Monohurri*, L. R. 12 Ind. Ap., 103: s. c. I. L. R., 11 Cal., 684, where, it appearing that a Hindu testator's intention was that his estate itself should not be disposed of, but to make a gift simply with reference to the enjoyment of profits, the object being to create a perpetuity as regards the estate and to limit for an indefinite period the enjoyment of the profits, it was held that by Hindu law the whole will was invalid. Their Lordships say at pages 109 and 110: 'It is true, if the bequest had been of rents and profits, and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it; but what their Lordships have to do is to find the intention, looking at the whole of the provisions of the will; and they gather from those words that it was not his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate, has added a clause against alienation, in which case the clause against alienation would be void, but the provision here against alienation is confirmatory of the other part of the will.' In the agreement here there is also a clause against alienation—clause 14, which has the following terms. [His Lordship read clause 14, *supra*, p. 359, and continued.]

"All that the signatories and their heirs are to receive is the remaining income of the Poway estate after the yearly burthens imposed by the trusts, whic hare [362] to continue for ever, have been discharged. The agreement does not pass or give away the estate to any one. That had, in the opinion of the signatories, been already vested by the trust deeds in the trustees. Assuming, therefore, as after the decision in the Court of Appeal this Court is bound to assume, that the parties to the agreement of the 24th May 1851 took life interests in the property mentioned, the question arises whether all the limitations, subsequent to such life interests, are not void as infringing the rule against perpetuities which, it is contended, is applicable to the Parsi signatories to that document. As the Judges of the Court of Appeal said (I. L. R., 6 Bom., at p. 164) in the present case 'the lands are outside the jurisdiction of the High Court and the question is as to the construction to be placed

on an agreement entered into by persons assumed to be the heirs of the testator ;' at page 162 they said : 'As the contract relates to immoveable property outside the territorial jurisdiction of this Court, the rights of the parties must, according to the well established rule, be determined by the *lex loci rei sita*. This rule would be applicable both as forming part of the English law which, as stated by the Chief Justice in *Nowroji* v. *Rogers*, 4 Bom. H. C. Rep., 1, has always been the law applicable to Parsis in this Court, subject to certain statutory and other exceptions or as the well established rule of jurisprudence adopted by all writers on the subject. Much learned argument was addressed to us as to what is the *lex loci* of the mofussil. We do not, however, think it necessary to come to any distinct conclusion on this question which has occupied the attention of so many learned Judges with such varied results. In the view we take of this case, it becomes unnecessary to determine whether there be any *lex loci* properly so called in the mofussil, or if there be, whether it is the English law in some modified form or the regulations ; as we cannot doubt that even assuming English law to be the *lex loci* in the mofussil, or that at any rate it must be applied in this Court in the absence of any *lex loci*, the English law so to be applied cannot include the rule in *Shelley's case*'." * * * *

"Now in the recent argument before this Court neither Mr. Lang nor Mr. Starling suggested the existence of any Act of Parliament or regulation or any special law or usage applicable to lands held by Parsis in the island of Salsette. The main question debated was, did the parties to the agreement of the 24th May 1851, intend and purport by it to dispose of and divide the Powai estate itself, or did they intend and purport by it to divide the profit and increment of it among themselves and their descendants ? It appears to me, therefore, that I have to ascertain whether according to English law, or rather according to so much of it as is administered to Parsis in this Court, effect can be given to the evident intention of the parties to be collected from the various portions of the agreement itself. After giving the matter the best consideration in my power, I entertain no doubt that all the limitations of the remaining income of the villages in Salsette inclusive of Powai after the life interests [363] therein given to the signatories of the agreement of the 24th May 1851, are illegal and void as infringing the rule against perpetuities, a rule which in my opinion is applicable to the agreement in question and to that portion of the income of the estate in Salsette with which it professes to deal. * * *

"For the above reasons and applying the principles of the authorities I have cited, as far as they are applicable to the circumstances of the case before me, and adopting, as I am bound to do, the decision of the Court of Appeal in February 1882, that those who signed the agreement of the 24th May 1851, took under it life interests, I hold that all the subsequent limitations are void as infringing the rule against perpetuities. The consequence is that after such life interests there was a resulting trust in favour of the signatories to that document, or, to speak more accurately, in favour of the heirs of Framji Cowasji (who, as presently to be noticed, died intestate as to the Salsette estate) as declared by the agreement of the 24th May 1851, and by the consent decretal order of the 24th February 1872, by which decretal order it is declared that the agreement dated the 24th May 1851, in the plaint in this suit mentioned was and is now a binding and valid agreement between the parties thereto and doth order and decree the same accordingly. As pointed out in my former judgment (I. L. R., 5 Bom., 509), neither the will nor the codicil of Framji Cowasji contained any general devise of his residuary estate, and there were

no words in either of those documents sufficiently large to include the Poway estate! As to that estate he consequently died intestate.

* * * * * *

"The defendant Narandas Kaliandas, as the present assignee of the share of Nanabhoy Framji, will, of course, take all that Nanabhoy Framji would have taken or may hereafter be found entitled to take as one of the heirs of Framji Cowasji. The third objection taken by Narandas Kaliandas to the report of the Acting Commissioner must accordingly be allowed."

His Lordship directed certain further accounts to be taken and referred the matter back to the Commissioner.

On the 29th April 1895, the Commissioner made his final report, which was confirmed by the Court on the 16th June 1896.

The case came before the Court (TYABJI, J.,) on further directions and costs on the 12th November 1896, and the final decree was made.

The appellants appealed on the following grounds:—

1. That the said decree is erroneous, inasmuch as it was based on the order of the Honourable Mr. Justice BAYLEY made herein on the 1st day of March 1887, against which order the appellants herein desire to complain.

[364] 2. That the said order is wrong in that it declares that the limitations in the family agreement of the 24th May 1851, subsequent to the life interests of the signatories, are null and void, and that there was a resulting trust in favour of the heirs of Framji Cowasji, deceased, as declared by the said agreement in respect of the estate, created under such void limitations.

3. That the said subsequent limitations ought not to have been held to be void *in toto*.

4. That it ought to have been held that the signatories to the said agreement were not entitled to any further interest or estate in the subject-matter of the said agreement over and above their life estate secured to them by the said agreement.

5. That it ought to have been declared that on the death of each of the signatories of the said agreement, his or her heirs became absolutely entitled to the corpus of the property in which the deceased signatory had a life estate.

6. That it ought to have been declared that no signatory had any right to affect the corpus of his or her original share under the said agreement by a will or testamentary writing.

Some of the plaintiffs filed cross-objections to the decree.

*Starling* and *Jardine*, for the Appellants:—This appeal is really against the order made by BAYLEY, J., on 1st March 1887, although in form against the final decree of the 12th November 1896. We contend that there was no resulting trust after the life estates given to the signatories as held by BAYLEY, J., but that after the life estates the heirs of the signatories took the respective shares in fee under the terms of the family arrangement of 1851. They cited *Thakur Harihar Buksh* v. *Uman Pershad*, L. R., 14 Ind. Ap., 7 at p. 16; *In re Ridley*; *Buckton* v. *Hay*, 11 Ch. D., 645.

*Lang* (Advocate-General) and *Lowndes*, for some of the Respondents contended that an appeal from the order of BAYLEY, J., in 1887 was too late. They cited *Rahimbhoy* v. *C. A. Turner*, I. L. R., 15 Bom., 155. On the main question they cited *Carne* v. *Long*, 2 DeG. F. and J., 75; *Thomson* v. *Shakespear*, 1 DeG. F. and J., 399.

*Mankar* and *J. E. Modi*, for other Respondents cited *Sookhmoy Chunder* v. *Srimati Monohurri*, L. R., 12 Ind. Ap., 103; *Ganendro Mohun Tagore* v. *Juttendro Mohun Tagore*, 12 Beng. L. R. (O. C.), 1 at p. 11.

[365] *Robertson* and *Davar*, for other Respondents cited Theobald on Wills, page 482.

*Jardine* in reply as to the right to appeal referred to *Mahant Ishvargar* v. *Chudasama Amarsang*, I. L. R., 8 Bom., 548; *Aben* v. *Cassirao*, I. L. R., 6 Bom., 260.

**Farran, C. J.**:—The principal question which has been argued before us upon this appeal is whether the declaration in the order of Mr. Justice BAYLEY of the 1st March 1887, "that the limitations in the family agreement of the 24th May 1851, contained subsequent to the life interest of the signatories to the said agreement in the Powai estate, were and are void, and that there is a resulting trust in favour of the heirs of Framji Cowasji, deceased, as declared by the said agreement in respect of the estate created under such void limitations," is a correct declaration of the rights of the persons described in the family-agreement as the "heirs and children" of the signatories to it.

The order in which the above declaration is contained was made upon objections to a report of the Commissioner on matters referred to him by the decretal order of the 24th February 1872. It directed additional inquiries and accounts. These inquiries and accounts were accordingly taken, and their result was embodied in a report dated the 29th April 1895. A decree upon further directions was passed upon that report. The learned Judge who passed the decree adopted the declaration to which we have referred and passed the decree in accordance with it, deeming that it was binding upon him as the decision of a Judge of co-ordinate jurisdiction. The present appeal is from that decree in form, but in substance it seeks to review the declaration made by the order of the 1st March 1887.

A preliminary objection arises and has been taken that the appeal does not lie, inasmuch as it ought to have been made from the order of the 1st March 1887 (which would be now too late) and not from the decree which adopts the order and its consequences. We think that the appeal lies in its present form. The original decretal order referring the suit to the Commissioner was doubtless a decree within the terms of section 2 of the Civil Procedure Code (Act XIV of 1882), but the last separate **[366]** order made subsequent thereto, giving directions to the Commissioner as to the mode in which he shall carry out the original decretal order even though it may direct further and additional inquiries, is, in our opinion, an order to which the provisions of section 591 of the present Civil Procedure Code (Act XIV of 1882) are applicable. The case of *Hirji Jina* v. *Narran Mulji*, 12 Bom. H. C. Rep., 129, was decided under the Code of 1859. The term decree is now precisely defined, and does not appear to us to embrace the order with which we are dealing.

The clause in the agreement of the 24th May 1851, upon which our decision rests is as follows (His Lordship read clause 11, see *ante*, pp. 358-359, and continued:—) It appears from this and other clauses of the agreement that at its date the Powai estate was vested in trustees for the purpose of keeping up a supply of water for the use of the poor of Kamathipura and was also subject to a charge in favour of a fire temple. The signatories to the agreement, therefore, appear to have considered that they could only deal with the surplus income of the estate, and this is all as to which they purport to agree; but as the agreement is of an executory character which it was intended to have carried out by a formal instrument, we cannot doubt that it is operative to affect whatever interest in the Powai estate the signatories at its date possessed subject to the trusts declared by the charitable deeds.

The scheme of the agreement was to divide this income into shares and to allot his or her proper share in such income to the several heirs of Framji Cowasji, the signatories to the deed. This, which is we think sufficiently apparent from the terms of the 11th clause, is made still clearer by those of

the 14th clause, which speaks of the manner in which the respective shares of the signatories are to be used and employed. It has already been definitely decided by the appellate Court that each of the signatories to the agreement took only an estate for life in his share. The question which remains for us to determine is whether the signatories have sufficiently indicated their intention as to who are to take their respective shares upon the death of each, and, if so, whether legal effect can be given to their intention.

**[367]** The clause provides that after their death their shares are to be enjoyed and received by "their heirs and children from generation to generation for ever." Having regard to the context which we have referred to, this must necessarily mean that the share of each signatory is to be enjoyed by "his heirs and children from generation to generation for ever." The clause must, therefore, we think, be read as though the word "respective" preceded the expression "heirs and children."

Each share is thus settled upon each signatory for life and after his death upon his "heirs and children," the latter words being, as already decided, words of purchase and not of limitation. The question arises what estate do the "heirs and children" take. We cannot doubt that, unless the subsequent context plainly shows that they were intended to take less, they must be held to take an absolute estate. This is the usual—we might, we think, say the invariable—way in which an estate of inheritance is given in Indian documents. The case of *Thakur Harihar Buksh* v. *Uman Pershad*, L. R., 14 Ind. Ap., 7, relied upon by Mr. Starling is an authoritative ruling to that effect, as is also the case of *Ram Lal Mookerjee* v. *Secretary of State*, L. R., 8 Ind. Ap., 46. Mr. Lowndes contends that the expression "from generation to generation" usually employed to describe the *quantum* of estate given to the donee has a different meaning when the gift is expressed to be in favour of "heirs" from that which it bears when it is in favour of a named person, but he has not cited any authority in support of that contention, and we know of none. We think that a gift to the heirs of *A* from generation to generation confers upon them when ascertained exactly the same estate as if the gift were to *X* and *Y*, the heirs of *A nominatim*.

We have now to see whether the subsequent context shows that the limitation in favour of the "heirs and children" of each signatory is not intended to be given here its usual effect, but to limit to them some lesser or different estate. It is immediately followed by a direction that they are not to give it away to an improper person, and in a subsequent clause the same provision is repeated in the form of a covenant: "we, the undersigned, all the heirs of Sett Framji Cowasji, deceased, and our successive heirs **[368]** do agree that the claim of each of us separately over the abovementioned income is not in any way to be sold or to be given in writing to any one now or hereafter by any of us or any of our successive heirs." This provision, it may be admitted, shows an intention on the part of the signatories that their several heirs shall not dispose of the shares which shall devolve upon them respectively, but that such shares shall be inalienable in their hands and thus to create a perpetuity. Following, however, as the provision does, words of absolute gift its effect is *nil*. It is repugnant to the gift and may be altogether disregarded. This provision does not appear to us to give support to the contention that the earlier words are not used in their ordinary signification.

The limitation which follows this provision is, however, much relied upon as showing that the intention of the settlors was that their heirs should not take absolute estates, but only successive life estates. The limitation is that should any one of the heirs die without issue, his share is to pass to the other

heirs. This appears to be an attempt to create an estate tail in the heirs. The limitation over, however, fails *in toto*, as it offends against the law of perpetuities, and the result is that the heirs take the estate free from the limitations—*Carver* v. *Bowles*, 2 Russ. and M., 301 at p. 306; *Ring* v. *Hardwick*, 2 B., p. 352; Theobald, 4th Ed., p. 487. Such a limitation would be valid in England, where estates can be limited in tail, but that is only because estates tail are there always barrable: see Theobald, 4th Ed., p. 478, and cases there cited.

Analyse the clause and it will be found to amount to this: (1) a settlement on the heirs of each signatory from generation to generation for ever,—in other words, a settlement of an absolute estate upon them; (2) a provision against alienation which is absolutely void; (3) a limitation over upon the failure of heirs in any line, which is also void.

The settlement in favour of the heirs and children of each signatory is, therefore, in law, we think, a valid settlement, and is not, as held by the Division Court, void as creating a perpetuity. Its signatories may have had that object in view, but they have failed to use apt words to effect it. Our conclusion upon this [369] part of the case is, we think, in accordance with the rules of construction laid down by the Privy Council in *Lalit Mohun* v. *Chukkun Lal*, I. L. R., 24 Cal., 834, the report of which case has been published since our judgment was written. A careful perusal of the judgment of their Lordships delivered by Lord DAVEY strengthens our view as to the correctness of the construction of the agreement of 1851 which we have adopted.

It is, however, objected for the respondents that the limitation to "the heirs and children" of each signatory is too ambiguous to be given effect to, and that the settlement in their favour for that reason fails. Later on in the same clause "children and heirs" is used as the exact equivalent of the phrase "heirs and children", and in clause 14 the word "heirs" is used singly in the same sense. It appears to us that they have all the same meaning, *viz*., children and other heirs. The signatories describe themselves as the "heirs" of Framji Cowasji. They were his children and other heirs. The children of living children do not sign, but those of deceased children do, and so does his widow. The context affords a glossary explanatory of this expression. There can, we think, be no doubt as to who are the settlors meant by this phrase "heirs and children," or how they were intended to take.

We are for these reasons of opinion that the decision of the lower Court upon this question cannot be supported, and that the children and other heirs of the respective settlors are entitled to the respective shares settled upon them. Who are to take the respective shares of the settlors who are still living, cannot be determined until after their respective deaths.

As to the cross-objections made on behalf of the plaintiff, (His Lordship then gave directions in accordance with the above decision as to the payment of the shares of certain of the signatories who had died, as to which questions had been raised by the cross-objections, and continued :—)

The appeal must for these reasons be allowed, as also the cross-objections 3 and 4 above referred to. In this respect the decree will be confirmed.

[370] The sale of the estate cannot under the above circumstances at once take place.

The debts mentioned in Schedule No. 5 should be paid at once.

The parties can draw up a decree, and if they cannot agree, the minutes can be spoken to. Costs out of estate to all parties.

*Appeal allowed.*

Attorneys for the Appellants :—Messrs. *Boughton and Byrne*.

Attorneys for the Respondents:—Messrs. *Crawford and Co.*; Messrs. *Ardesir, Hormasji and Dinsha*; Messrs. *Wadia and Ghandi*; and Messrs. *Jehangir and Seervai.*

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[ 22 Bom. 370 ]

## ORIGINAL CIVIL.

*The 4th December, 1897.*

PRESENT:

MR. JUSTICE FULTON.

Pherozsha Pestonji Randeria............Plaintiff

*versus*

The Sun Mills, Limited............Defendants.*

*Decree—Rectifying decree—Practice—Procedure.*

By a written agreement the defendants agreed to purchase from the plaintiff certain land comprising 5,280 square yards or thereabouts at the rate of Re. 1-1-6 per square yard. The sum of Rs. 1,000 was paid on the date of the agreement in part payment of the price. The plaintiff sued for specific performance of the agreement. The plaint set forth the facts and the part payment, and prayed that the defendant might be ordered specifically to perform the agreement and to pay to the plaintiff the balance of the purchase-money, *viz.*, the sum of Rs. 4,475. On the 9th September 1897, judgment was given for the plaintiff ordering "specific performance as prayed and costs." The decree was accordingly drawn up in terms of the prayer of the plaint. It was afterwards discovered that the sum mentioned in the prayer (*viz.* Rs. 4,475), and inserted in the decree, was incorrect and ought to have been Rs. 4,775, the latter being the real balance due at the rate mentioned in the agreement after deducting the Rs. 1,000 paid as earnest. On 6th November 1897, the plaintiff gave notice of motion to rectify the decree by altering the figure Rs. 4,475 to Rs. 4,775. On motion to rectify the decree,

*Held* that the decree should be rectified.

APPLICATION to rectify the decree passed on the 9th September 1897.

[371] The suit was for the specific performance of an agreement dated the 17th July 1896, whereby the defendants agreed to purchase from the plaintiff a certain piece of land situate at Byculla in Bombay.

The material part of the agreement was as follows:—

"I, Pherozsha Pestonji Randeria, agree to sell and we, The Sun Mills, Limited, agree to purchase, the hereditaments described in the schedule hereto and the inheritance thereof in fee simple in possession at the rate of one rupee one anna and six pies per square yard.

"2. The purchasers have this day paid rupees one thousand to the vendors as earnest and in part payment of the purchase-money."

The schedule referred to was as follows:—

"All that piece or parcel of Government land or ground situate, lying and being on the Ferguson Road without the Fort of Bombay in the occupation of the vendor's tenants containing by admeasurement (5,280) five thousand two hundred and eighty square yards or

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* Suit No. 235 of 1897.

thereabouts, registered in the books of the Collector of Land Revenue under Collector's old Nos. 654, 690 and Collector's new No. 12634 and bounded as follows, &c., &c."

The plaint set forth the facts and prayed as follows:—

"(a) That the defendant company may be decreed specifically to perform the said contract of the 17th July 1896, and to pay to the plaintiff the balance of the said purchase-money, *viz.*, the sum of Rs. 4,475."

The suit was duly heard, and on the 9th September 1897, judgment was given for the plaintiff ordering " specific performance as prayed, and costs." The decree was accordingly drawn up in the terms of the prayer of the plaint.

It was subsequently discovered that the sum mentioned in the prayer of the plaint (*viz.* Rs. 4,475) and inserted in the decree was incorrect, and ought to have been Rs. 4,775, the latter being the real balance of purchase-money due to the plaintiff under the contract for 5,280 square yards at the rate of Re. 1-1-6 per square yard after deducting Rs. 1,000 paid as earnest.

On the 4th October 1897, the plaintiff's solicitors wrote to the solicitors of the defendants:—

"On examining the decree herein, we observe that the decree directs the defendant to specifically perform the contract and to pay to the plaintiff Rs. 4,475 as the balance of the purchase-money.

[372] "We have, however, discovered that the amount of balance of purchase-money mentioned in the decree is not correct. The correct figure is Rs. 4,775 as follows:—5,280 square yards at Re. 1-1-6 per square yard, amounts to Rs. 5,775, and deducting Rs. 1,000 paid as earnest-money the balance is Rs. 4,775 and not Rs. 4,475. We find that the figure 4,475 was copied in prayer A of the plaint by a clerical error and from the plaint it has found its way into the decree.

"We, therefore, propose to apply to Mr. Justice FULTON in chambers to correct the mistake and request you will let us know if you will consent to such correction being made.

"An early reply is requested."

"Yours truly,

"LITTLE & CO."

The defendants' solicitors replied by a letter of 4th November 1897:—

"We are in receipt of your letter about the decree.

"Your client asked for a decree for a specified sum and has got it. If he had asked for more we would have considered the matter. Our instructions are to oppose any application you may make in the matter.

"Yours truly,

"HIRALAL, MULLA AND MULLA."

On the 6th November 1897, the plaintiff's solicitors gave notice that they would move to rectify the decree by altering the figures Rs. 4,475 to Rs. 4,775.

*Anderson*, for the Plaintiff:—We seek to rectify merely a clerical error. It is not disputed that the land we sold was 5,280 square yards in extent, or that the rate at which it was sold was Re. 1-1-6. That was the contract between the parties. The decree ordered specific performance of that contract, and we are entitled to the sum we now ask for, although by mistake we inserted a smaller sum in the plaint. We are willing to have the land measured. Counsel referred to the Annual Practice for 1895, p. 596; *Barker* v. *Purvis*, 56 L. T. Rep., 131; *In re Taylor's Estate*, 22 Ch. D., 495 at p. 503.

*Starling*, for the Defendant:—The decree is in accordance with the plaint. The plaint cannot be amended after decree. What is really sought is a review of judgment, but that is barred by limitation, and it is doubtful if a judgment can be reviewed which involves an amendment of the plaint. I am not instructed to [373] admit that 5,280 square yards were sold. What was really sold was land bounded as described in the schedule, believed to be about 5,280 yards. The plaintiff's own figures must be accepted, and he cannot now alter them.

**Fulton, J.**:—This suit was brought by the plaintiff for specific performance of a contract by the defendants for the purchase of a piece of land.

The plaint referred to the agreement of the 17th July 1896, of which a copy was annexed. It recited that the plaintiff had received Rs. 1,000 by way of earnest-money and in part payment of the purchase-money and after stating that the defendants had neglected and refused to carry out the contract, prayed that they might be decreed specifically to perform the said contract of the 17th July 1896, and to pay to the plaintiff the balance of the said purchase-money, *viz.*, the sum of Rs. 4,475.

The contract contained an agreement by the defendants to purchase at a rate of Re. 1-1-6 per square yard land within certain specified boundaries containing by admeasurement 5,280 square yards or thereabouts.

At the hearing objections were taken to the plaintiff's title, but no question was raised as to the area of the land or the amount of the balance due.

On the 9th September, judgment was given for the plaintiff. The judgment delivered was oral, and the note in my note-book was as follows:—

"Decree for specific performance as prayed, and costs."

On this the decree was drawn up in the terms of the prayer of the plaint.

The plaintiff has now moved to amend the decree by substituting Rs. 4,775 for Rs. 4,475. The reasons for this amendment are contained in his solicitors' letter to the solicitors of the defendants dated the 4th October. It is obvious that assuming the area of the land to be 5,280 square yards the balance due to the plaintiff is Rs. 4,775, and the item of Rs. 4,475 was entered in the plaint through a clerical error.

[374] In argument it was not alleged that the land was less than 5,280 square yards, though no admission was made as to its real area. The objections to the proposed amendment are of a technical nature. It was said that there was no error in the decree, which was according to the judgment and awarded the plaintiff all he asked for in the plaint. If the judgment was wrong, a review, it was urged, ought to have been applied for; but it was clear that the error, if any, was in the plaint itself.

The argument, I think, is not quite sound. The essential part of the judgment was that the defendant was specifically to perform his contract; and it is clear that, if the decree contains mention of a sum of rupees the payment of which will not amount to performance of the contract, it does not correctly represent the intention of the judgment. It seems to me to be of little consequence that the error arose from the plaintiff's own mistake in his plaint. A perusal of the contract which is referred to in the plaint shows that the prayer for the specific performance and the prayer for payment of Rs. 4,475 are inconsistent. Similarly, the decree is inconsistent, and the portion of it directing payment of Rs. 4,475 is at variance with the judgment directing specific performance of the contract.

The case seems to me to be somewhat analogous to that of *Karim Mahomed* v. *Rajooma*, I. L. R., 12 Bom., 174, and in the circumstances, I think, the plaintiff has taken the proper course in moving for a correction of the decree. After all, procedure is merely subservient to justice, and to the present case, I think, I may appropriately apply the words of LINDLEY, L.J., quoted by Sir C. SARGENT: "If an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, *In re Swire*; *Mellor* v. *Swire*, 30 Ch. D., 239, at p. 246."

In the present case there can be no question that my intention was to direct specific performance and that is the intention which must be given effect to by the decree. The prayer in the plaint for payment of Rs. 4,475 was really superfluous, and so was the direction in the decree to pay that precise sum.

[376] The contract binds the defendants to pay for the land at the rate of Re. 1-1-6 per square yard and the decree must be amended by striking out the words "the sum of Rs. 4,475 being" in the last line of the first page of the decree. If the defendant really dispute the amount of the balance due and the plaintiff has to come to the Court for execution of the decree, the area will have to be measured, doubtless at the risk as to costs of the party who is found to be mistaken on the point.

Looking to the grounds on which the defendants have resisted any amendment of the decree, and their conduct in reference thereto as shown by the correspondence, I think that they must pay the costs of this motion.

Attorneys for the Plaintiff :—Messrs. *Little & Co.*

Attorneys for the Defendants :—Messrs. *Hiralal, Mulla and Mulla.*

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**NOTES.**

[This was followed in (1909) 5 N. L. R., 159.]

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[ 22 Bom. 375 ]

## APPELLATE CIVIL.

*The 31st July, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Sari and others............(Original Plaintiffs) Appellants

*versus*

Motiram Mahadu and others.. .........(Original Defendants) Respondents.*

*Mortgage—Rights of mortgagor and mortgagee—Stipulation postponing the mortgagor's right to redeem beyond the time when the mortgagee can require payment of the mortgage-debt—Redemption.*

A stipulation postponing the mortgagor's right to redeem beyond the time when the mortgagee can call in his money is inoperative.

*Sayad Abdul Hak* v. *Gulam Zilani*, I. L. R., 20 Bom., 677, followed.

SECOND APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Thana with appellate powers, reversing the decree of Rao Saheb G. A. Bhat, Subordinate Judge of Mahad.

Suit for redemption. The plaintiffs alleged that they had mortgaged the land in question by deed, dated 5th December 1882, for five years to the defendants' father (deceased) for Rs. 300; that in December 1893, they offered to redeem the lands, but the defend-[376]ants replied that the term fixed was fifty years and not five. The plaintiffs alleged that the mortgagee in collusion with the writer of the deed had fraudulently inserted the words fifty years in the deed.

* Second Appeal, No. 301 of 1896.

The deed contained the following clause binding the mortgagors to pay off the mortgage-debt whenever the mortgagee should demand it :—

"Should you (mortgagee) for any reason not wish to carry on the management of the mortgaged property, then either before the time or thereafter (that is, to say whenever you may demand your money) I will pay off the whole amount according to the above agreement. Should I not pay the same, you are to recover the same in full from the mortgaged property."

The defendants pleaded that the mortgage term was fifty years and that the suit was premature.

The Subordinate Judge found that the term fixed in the deed was five years and not fifty. He, therefore, directed the plaintiffs to redeem the lands on payment of Rs. 450 to the defendants.

On appeal by the defendants, the Judge reversed the decree, holding that the plaintiffs were not entitled to redeem, the term for redemption fixed in the mortgage being fifty years.

The plaintiffs preferred a second appeal.

*Kalabhai Lallubhai*, for the Appellants (Plaintiffs) :—The conditions of the mortgage are oppressive and inequitable. The term of fifty years makes the transaction virtually a sale. Further, the rights of foreclosure and redemption are not co-extensive. The mortgagors are left entirely at the mercy of the creditor. He is empowered to call in his money at any time either before or after the stipulated term, and the mortgagors are not to redeem till he makes a demand for the money. Such a transaction cannot stand —*Sayad Abdul Hak* v. *Gulam Zilani*, I L. R., 20 Bom., 677.

*Trimbak R. Kotval*, for the Respondents (Defendants).

**Farran, C.J.** :—The mortgage before us contains the following clause :—" Should you for any reason not wish to carry on the management of the mortgaged property, then either before the time or thereafter (that is to say, whenever you may demand your [377] money) I will pay off the whole amount according to the above agreement. Should I not pay the same, you are to recover the same in full from the mortgaged property " The effect of such a stipulation has been considered in *Sayad Abdul Hak* v. *Gulam Zilani*, I. L. R., 20 Bom., 677, and it has been there held that the stipulation postponing the mortgagor's right to redeem beyond the time when the mortgagee can call in his money is inoperative. The present case shows the desirability of such a rule. What advantage can it possibly be to the ladies here that they should be able to redeem after fifty years and remain all that time liable to pay the mortgage-money whenever it may please the mortgagee to demand it.

As the appeal before the Subordinate Judge, First Class, A. P., was heard *ex parte*, his attention was not called to the above ruling. No reasons have been assigned before us why we should not follow it. We consider, therefore, that we are bound to do so.

We must reverse the decree of the Subordinate Judge and remand the appeal that he may take the accounts and allow plaintiffs to redeem on the usual terms. Costs, costs in the cause.

*Decree reversed and case remanded.*

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**NOTES.**

[ See also (1904) 26 All., 479.]

[22 Bom. 377]

## APPELLATE CIVIL.

*The 6th August, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Balvant Ganesh Oze............(Original Plaintiff) Appellant

*versus*

The Secretary of State for India in Council............(Original Defendant) Respondent.*

*Irrigation Act (Bom. Act VII of 1879), Sec. 48†—Revenue Jurisdiction Act (X of 1876), Sec. 4 (b)‡—Water-rate—Incidence—Land revenue—Canal water—Percolation of the water—Opinion of the canal officer—Civil Courts—Jurisdiction.*

Where water-rate is levied under section 48 of the Irrigation Act (Bom. Act VII of 1879), the question as to the jurisdiction of civil Courts in a suit for the [378] determination of the legality or otherwise of such levy, depends upon whether the incidence of the rate is authorized by the provisions of the section. Under it, the condition precedent to levying the rate is not the fact ascertained by evidence whether the water in dispute has percolated from the canal, but the opinion of the canal officer that it has so percolated, he and not the civil Court being made the judge of such percolation for the purposes of the Act.

Such water-rate falls within the denomination of land revenue.

APPEAL from decision of W. H. Crowe, District Judge of Poona.

Suit to recover Rs. 115-3-0 paid by the plaintiff under protest as water-rate levied on him for two years (1889-90, 1890-91) and for an injunction restraining Government from levying such rate for the future.

The plaintiff was the owner of certain land in the Poona District, near which was a *nala*. Across this *nala* the plaintiff had built a dam in order to collect the water flowing from the hills which he conducted to his land by a channel constructed by himself and used for the purpose of irrigating his crops. The water flowed from the *nala* to the land by gravitation.

* Appeal, No. 22 of 1895.

† Section 48 of the Irrigation Act (Bom. Act VII of 1879):—

48. If it shall appear to a canal officer duly empowered to enforce the provisions of this section, that any cultivated land within two hundred yards of any canal receives, by percolation or leakage from such canal, an advantage equivalent to that which would be given by a direct supply of canal water for irrigation,

or that any cultivated land, wherever situate, derives by a surface flow, or by means of a well sunk within two hundreds yards of any canal after the admission of water into such canal a supply of water which has percolated or leaked from such canal,

he may charge on such land a water-rate not exceeding that which would ordinarily have been charged for a similar direct supply to land similarly cultivated.

For the purposes of this Act, land charged under this section shall be deemed to be land irrigated from a canal.

‡ Section 4 (b) of the Revenue Jurisdiction Act (Act X of 1876):—

4. Subject to the exceptions hereinafter appearing, no civil Court shall exercise jurisdiction as to any of the following matters:—

(b) objections—

to the amount or incidence of any assessment of land revenue authorized by Government, or

to the mode of assessment, or to the principle on which such assessment is fixed, or

* * * *

The plaintiff's land was at some distance from the main branch of the Government irrigation canal (the Mutha Right Bank [379] Canal), but was about 200 yards distant from its nearest distributing channel.

The plaintiff complained that he had been charged water-rate under section 48 of the Irrigation Act (Bom. Act VII of 1879), on the ground that the *nala* and his land were supplied with water which percolated from the said canal. He denied that this was the case, and he alleged that the water-rate was, therefore, improperly levied upon him. He prayed that the defendant should be ordered to repay the sum (Rs. 115-3 0) for two years which he (the plaintiff) had paid under protest, and that an injunction should be granted restraining the defendant from levying it. The suit was filed on 12th September 1893.

The defendant pleaded that as the plaintiff had paid the money on the 25th July 1891, the suit was barred by limitation under article 16* of Schedule II of the Limitation Act (XV of 1877); that the Court had no jurisdiction to entertain the suit under section 4 (3) of the Revenue Jurisdiction Act (X of 1876); that the water taken by the plaintiff from the *nala* was water which came from the irrigation canal, which was only 200 yards from the plaintiff's land, and that section 48 of the Irrigation Act applied.

The District Judge of Poona dismissed the suit. He held that he had no jurisdiction to entertain it, but on the merits he held that the *nala* was supplied by water which percolated from the canal, and that section 48 of the Irrigation Act applied. As to the claim of Rs. 115-3-0, he held that it was barred by limitation.

The plaintiff appealed.

*Inverarity* (with *Shivram V. Bhandarkar*), for the Appellant (Plaintiff) :—The Judge held that he had no jurisdiction to entertain the suit and he decided it against us also on the merits. We contend that the *nala* does not get water by percolation from the canal, and supposing that it does, still we would not be liable to pay assessment under the Irrigation Act for taking water from the *nala*. When water is collected by a dam in a *nala*, and when it is thence carried by some artificial means, it ceases to be "surface flow."

Rao Saheb *Vasudev J. Kirtikar* (Government Pleader) for the Respondent (Defendant): —Civil Courts have no jurisdiction to [380] entertain a suit like the present under section 4 of the Revenue Jurisdiction Act (Act X of 1876). In the present case the rate was authorized by Government.

[FARRAN, C. J. :—The question is whether the rate was authorized.]

We submit that it was—*Waman* v. *Collector of Poona*, P. J., 1892, p. 21.

At this stage of the hearing the Court framed the following issue, and sent it back to the Judge for his finding :—

"Did the water flow directly by gravitation from the dammed up *nala* through a channel on to the plaintiff's land, or was it raised from the *nala* by artificial means and so caused to flow by a channel on to the land of the plaintiff ?"

The finding of the Judge was that the water flowed directly by gravitation from the dammed up *nala* through a channel on to the plaintiff's land.

* [Art. 16 :—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| Against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears. | One year. | When the payment is made.] |

*Branson* (with *Shivram V. Bhandarkar*) for the Appellant (Plaintiff):—It was urged that there is percolation going on, but it is impossible to say whether the percolation is from the canal or the field channel. The defendant must show that the water in the *nala* is the percolated water from the canal and the field channel and from no other source. If the *nala* contains water from any other source, then the levy of assessment from us would be illegal. The water is first collected in the *nala* by a dam and then we take it to our field by cutting a channel. Under these circumstances it is impossible to uphold the levy of water-rate under section 48 of the Irrigation Act. That section relates to a direct surface flow of water which has leaked or percolated.

We have produced affidavits to show that the water does not percolate.

Rao Saheb *Vasudev J. Kirtikar* (Government Pleader), for the Respondent (Defendant).

**Farran, C. J.**:—This is an appeal from the decree of the District Judge of Poona. The circumstances under which it is brought are these. The plaintiff is the owner or occupant of Survey No. 24 in the village of Loni Kalbhar. A *nala* from the [381] hills lying to the south of Loni passes close to the field. The plaintiff has constructed a dam across this *nala* behind which water collects. Thence it is led by means of a channel constructed by the plaintiff to the field in question where it is used by him for the purpose of irrigating his sugarcane crops. The water flows by gravitation only without being raised for the purpose from the dammed *nala* to the field. In respect of the water thus reaching the plaintiff's field the canal officer empowered to enforce the provisions of section 48 of "The Bombay Irrigation Act, 1879" has charged the plaintiff under that section with a "water-rate not exceeding that which would ordinarily have been charged for a similar direct supply" (from a canal) "to land similarly cultivated." The land of the plaintiff though at a considerable distance from the main branch of the Mutha Right Bank Canal is within 200 yards of its nearest distributing channel. The distributing channel is, however, included by the force of section 3 of the Act within the term "canal." The plaintiff's land is thus brought within 200 yards of the canal.

The plaintiff filed the present suit on the 12th September 1893, to recover the sum of Rs. 115-3-0 paid by him, under protest, to Government on the 25th July 1891, as water-rate levied for the years 1889-90 and 1890-91 in respect of his above survey number and for a declaration that Government is not entitled to demand from him Rs. 57-9-6 per annum on that account and for an injunction to restrain Government from levying it in future.

The main defences raised on behalf of the defendant were (1) that the suit was barred by limitation; (2) that the Court had no jurisdiction to entertain the suit under section 4 of Act X of 1876; and (3) that the *nala* dammed by the plaintiff derived the water used by the plaintiff from the field water-courses supplied by the canal, the plaintiff's land being within 200 yards from the canal; and that the case fell within the provisions of section 48 of the Act.

The lower Court has found that the plaintiff's claim to recover the money paid under protest is barred under article 16 of Schedule II of the Limitation Act, but that the claim for a [382] declaration and injunction is not time-barred. There has been no appeal upon that part of the case, which we do not, therefore, further consider.

The question whether the Court has jurisdiction to entertain the claim depends upon the construction and effect of section 4 of Act X of 1876, which enacts that "subject to the exceptions hereinafter appearing no civil Court shall exercise jurisdiction as to * * * (b) objections to the

amount or incidence of any assessment of land revenue authorized by Government or to the mode of assessment or to the principle upon which such assessment is fixed, &c." It is not contended before us that the water-rate in question is not land revenue, and in *Waman* v. *Collector of Poona*, P. J., 1892, p. 21, it has been ruled that it falls within that denomination, and so it appears to us that it does. The contention of the plaintiff on this point is that, even assuming the water in the *nala* behind the dam to be derived by leakage or percolation from the Government canal, the canal officer was not authorized to levy a water-rate upon his land, as the case is not one which falls under the provisions of Bombay Act VII of 1879, section 48, which is the only law under which such a rate can be levied from him. It is not suggested that independently of the Act, Government has authorized or could authorize the levy of this water-rate from the plaintiff, nor has Government directed that the water-rate should have this particular incidence unless it falls within the scope of the section 48.

Assuming, then, that the rate being authorized by section 48 of the Act is a rate authorized by Government (as its amount certainly is), the question of jurisdiction appears to us to depend upon whether the incidence of the rate upon the plaintiff's land is authorized by Government, or, in other words, by the provisions of section 48. If it can fall within those provisions, or within the authorization by Government, the jurisdiction of the civil Courts is, it appears to us, ousted. If it does not fall within that authorization, or within those provisions, the levy of the rate is illegal, and the jurisdiction of the civil Courts is preserved. We proceed, therefore, to consider whether the levy [383] of this rate from the plaintiff is authorized by the provisions of section 48 of the Bombay Irrigation Act of 1879.

The plaintiff contends that the water in the *nala* behind the dam is not derived by percolation or leakage from the Government "canal," but comes from another source. The District Judge has raised an issue upon that contention, which he has found against the plaintiff and in favour of Government. Counsel for the appellant before us was anxious to be allowed to refute that finding and asked leave to put in affidavits or to adduce evidence before this Court to the effect that the result of the sinking of certain trial pits showed clearly, if not conclusively, that the opinion formed by the canal authorities as to the source of the water in the *nala* was erroneous and that it was really filled from sources independent of the canal water. We have not ourselves formed an opinion upon this question, nor have we allowed the affidavits to be put in, because it appears to us that the authority to levy the rate does not depend upon whether the plaintiff's land is, in the judgment of the civil Court founded upon the evidence before it, irrigated with canal water, but depends upon the opinion formed on that question by the canal officer. The words of the section are :—"If it shall appear to a canal officer * * * that any cultivated land within 200 yards of any canal receives by percolation or leakage from such canal an advantage, &c., or that any cultivated land wherever situate receives by a surface flow a supply of water which has percolated or leaked from such canal * * * he may charge on such land a water-rate not exceeding that which would ordinarily have been charged for a similar direct supply to land similarly cultivated." The condition precedent to leving the rate is not the fact ascertained by evidence whether the water in dispute has percolated from the canal, but the opinion of the canal officer that it has so percolated. He and not the civil Court is made the judge of such percolation for the purposes of the Act.

Now in this case it has, we consider, appeared to the canal officer that the *nala* in question is supplied with water in the dry season which has wholly or almost wholly leaked or percolated from the canal, and the question only remains whether that [384] brings the case within the provisions of section 48 of the Act. We think that it does. The first part of the section hardly, we think, applies to the case. The plaintiff's land cannot well be said to receive by percolation or leakage from the canal an advantage equivalent to that which would be given by a direct supply of canal water for irrigation, but the second part of the section, in our opinion, applies. The *nala ex concessis* in the opinion of the canal officer has been filled with a supply of water which has percolated or leaked from the canal. The plaintiff's cultivated land derives by a surface flow a supply of the water which has so percolated or leaked, and the conditions of the section are thus, we think, fulfilled. It does not seem to us to be material whether the reservoir which collects the percolation from the canal is a natural reservoir or one artificially formed so long as the water flows from it by a surface flow on to the plaintiff's land. If the plaintiff can show that the opinion formed by the canal officer is erroneous, and that the *nala* is kept supplied by sources independent of the canal water, his remedy is to convince the canal authorities of that fact and not by suit in the civil Court. We must confirm the decree appealed from with costs.

*Decree confirmed.*

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**[22 Bom. 384]**

APPELLATE CIVIL.

*The 6th August, 1896.*

PRESENT:

MR. JUSTICE RANADE AND MR. JUSTICE HOSKING.

Vasudevacharya and others............(Original Plaintiffs) Appellants

*versus*

The Municipality of Sholapur............(Original Defendants) Respondents.*

*Municipality—District Municipal Act (Bom. Act XXVI of 1850)—The District Municipal Act (Bom. Act VI of 1873), Sec. 14†, rules framed under—Rule 16‡—Rule not mandatory but only permissive—Contract Act (IX of 1872), Sec. 265—Suit for damages and injunction restraining municipality from stopping water-supply—Right to sue in civil Courts.*

The plaintiffs having sued the Municipality of Sholapur for damages and for an injunction restraining the municipality from stopping the supply of water to their house, the

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* Second Appeal, No. 246 of 1896.

† Section 14 of the District Municipal Act (Bom. Act VI of 1873):—

14. *Clause 1.*—It shall be the duty of every municipality, as soon after their constitution as conveniently may be, to prepare rules, and afterwards from time to time repeal, alter or amend the same as occasion may require, regulating the nature and action of the municipal executive administration:

Provided that no rule shall have effect until the same shall have been approved by the Governor in Council.

All rules when so approved shall, until altered or rescinded under the same authorities, have the same force as if they had been inserted in this Act.

‡ Rule 16:—

16. Parties dissatisfied with a decision of the managing committee or of any sub-committee appointed under section 1 of these rules.........may prefer an appeal to the municipality whose decision shall be final.

first Court allowed the claim, but the Judge in appeal dis-[886]missed the suit, holding that it was premature, and that the plaintiffs had no right to sue the municipality for damages under Rule 16 of the Rules framed by the municipality under section 14 of the District Municipal Act (Bom. Act VI of 1873), that rule providing that "parties dissatisfied with a decision of the managing committee or of any sub-committee may prefer an appeal to the municipality whose decision shall be final."

*Held*, reversing the decree, that the rule must be construed as permissive and not mandatory. It referred to departmental procedure only and did not debar the institution of the civil suit.

SECOND APPEAL from the decision of G. Jacob, District Judge of Sholapur-Bijapur, reversing the decree of Rao Saheb Ramchandra Vyankatesh Patki, Joint Subordinate Judge of Sholapur.

The plaintiffs sued the defendants for an injunction restraining them from stopping the supply of water to the plaintiff's house and for damages, alleging that the defendants had illegally and of malice stopped the supply of water through the pipe in their house.

The defendants pleaded that they had a right under the District Municipal Act (Bom. Act VI of 1873) to stop the supply of water, and that the damages claimed were excessive.

The Subordinate Judge found that the defendants were not entitled to stop the water-supply under the District Municipal Act or under the rules framed under the Act. He, therefore, allowed the claim with further damages from the date of suit to be determined in execution proceedings.

On appeal by the defendants the Judge reversed the decree and dismissed the suit. The following is an extract from his judgment:—

Rule XVI of the Rules framed under the Act and sanctioned by Government in Resolution No. 3630 of the 28th December 1874, provides that "parties [886] dissatisfied with a decision of the managing committee or of any sub-committee appointed under section 1 of these rules may prefer an appeal to the municipality whose decision shall be final."

The plaintiffs did not avail themselves of this remedy. Following the decision in *Sakharam* v. *Chairman of the Municipality of Kalyan*, 7 Bom. H. C. Rep. (A.C.J.), 33, I must, therefore, hold that the plaintiffs' suit was premature, or in other words that they had no right to sue the municipality for damages

The plaintiffs preferred a second appeal.

*Gangaram B. Rele.* for the Appellants (Plaintiffs):—The decision relied on by the Judge is not applicable. That decision was passed under the old District Municipal Act (Bom. Act XXVI of 1850), while the Act now in force is Bombay Act VI of 1873. Further, clause (1) of Rule VI of the Rules framed under the Act of 1850 made it compulsory upon an aggrieved party to complain to the municipality because it laid down that all complaints against the municipality *shall* be addressed in the first instance to the Municipal Commissioner. According to Rule 16 of the Rules framed by the municipality under the Act it was not obligatory on us to lodge a complaint to the municipality, the word used in it being *may* and not *shall*. If we had gone to the municipality we would have been debarred from seeking a remedy in the civil Court, as the rule makes the decision of the municipality final.

Rao Saheb *Vasudev J. Kirtikar* (Government Pleader), for the Respondent (Defendant):—The word *may* in Rule 16 should be construed to mean *must*, because the latter part of the rule lays down that the decision of the municipality shall be final. If it be left open to parties to seek redress either by resorting to a civil Court or to the municipality, then the parties would naturally seek their remedy by a suit, and then the clause as to the finality of the

decision of the municipality would be a dead letter. It has been held that the word *may* occurring in section 265 of the Contract Act means *must*—*Prosad Doss Mullick* v. *Russick Lall Mullik*, I. L. R., 7 Cal., 157 ; *Delhi and London Bank, Limited* v. *Orchard*, I. L. R., 3 Cal., 47.

**[387] Ranade, J.** :—The District Judge has in this case reversed the decree of the Court of First Instance, and dismissed appellants' suit against the respondent, the Municipality of Sholapur, on the ground that the suit was not maintainable, as the appellants had not complied with the provision of Rule 16, which directs that "parties dissatisfied with the decision of the managing committee or any other sub-committee *may* appeal to the municipality whose decision shall be final." He relied upon the authority of *Sakharam* v. *Chairman of the Municipality of Kalyan*, 7 Bom. H. C. Rep., 33.

It was, however, contended before us that that decision had reference to the rules made under Act XXVI of 1850, while the rule in dispute is one of a set of rules framed under section 14 of Act VI of 1873. It was further pointed out that while clause 1 of the former set of rules directed that "all complaints against the municipality *shall* in the first instance be addressed to the Municipal Commissioners," Rule 16 framed under the latter Act was not mandatory, but only permissive, as it used the word "may" in place of the old word "shall." The respondent's pleader urged, on the other hand, that the word "may" in the new set of rules should be construed as though it meant "shall," and referred to the decisions passed upon section 265 of the Contract Act, where a similar construction had been placed upon the word "may" as being intended to be mandatory, and not permissive only.

There can be no doubt that, under certain circumstances, such constructions have been placed on the word "may." Maxwell on the Interpretation of Statutes discusses this subject at some length, and his remarks show that Courts in England have no doubt held that where a Statute confers an authority to do an act which the public interests demand, the directory, permissive, or enabling words used in it must be construed as imperative, unless there be special grounds for a contrary construction. Special consideration, however, may show that the permissive words used were intended to confer a discretionary power only. The question thus resolves itself into one of giving effect to the intentions of the Legislature.

**[388]** In the present case, it may be noted that the dispute relates to the interpretation of a rule made by the municipality itself, and liable to be altered by it, and not to an Act of the Legislature. Further, reading Rules 15, 16, 17 together, it will be seen that while in Rule 15, which relates to complaints against servants, the words used are that such complaints shall in the first instance be addressed to the managing committee, and in Rule 17 it is provided that appeals in respect of orders under section 33 shall lie to the President, whose decision shall be final it is only in Rule 16 that the permissive "may" is used, though it is provided that the decision of the municipality shall be final. The respondent's pleader laid some stress upon the use of these last words. It appears to us, however, that by themselves they are not sufficient to take away the permissive character of the rule when it is read side by side with the preceding and succeeding rules. Under the old rules, an appeal was permitted from the decision of the municipality to the Collector, and in cases of doubt the matter could be taken to the Police Commissioner, whose decision was declared to be final. This appeal to the Collector and Police Commissioner was taken away in the new set of rules, as the new Act contained an express provision permitting parties who had complaints against the municipality or its officers to bring civil suits after giving due notice. This notice afforded

opportunity to the municipality to remove all cause for complaint if it were inclined to do so. The intention of the Legislature being thus plainly manifested, it is clear that the rules must be construed in consonance with the same, and Rule 16 must be construed as permissive, and not mandatory. It refers to departmental procedure only, and does not debar the institution of the civil suit.

For these reasons, the decree of the lower Court must be reversed, and the case remanded for trial on the other issues, and final disposal on the merits. Costs of this appeal on the respondent, and other costs to abide by the final result.

*Decree reversed and case remanded.*

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## [389] FULL BENCH.

## APPELLATE CIVIL.

*The 13th August, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS, AND MR. JUSTICE HOSKING.

Narayan Sheshgiri Pai............(Original Defendant No. 2) Appellant

*versus*

Parshotam Sheshgiri and others............(Original Plaintiff and Defendants Nos. 1 and 3) Respondents.*

*Landlord and tenant— Mulgeni lease—Forfeiture not followed by sale—Land Revenue Code (Bom. Act V of 1879), Secs 57 and 153—Construction.*

A declaration of forfeiture, under section 153 of the Land Revenue Code (Bom. Act V of 1879), of the interests of a lessee holding under a permanent lease, not followed by a sale, but by an order transferring possession of the holding to the lessor under section 57, has not the effect of defeating prior incumbrances created by the lessee in favour of third persons.

APPEAL under section 15 of the Amended Letters Patent, 1865, from the decision of a Division Bench consisting of JARDINE and RANADE, JJ., in Second Appeal No. 890 of 1893.

The facts of this case are as follows:—

On the 28th October 1880, the father of Narayan (defendant No. 2) granted a mulgeni lease of certain land to Nagappa (defendant No. 1), the rent reserved being Rs. 29 per annum. On the 4th of September 1888, Nagappa (defendant No. 1) mortgaged his interest in the land to the plaintiff. Subsequently the rent payable by defendant Nagappa under the lease having fallen into arrear, Narayan (defendant No. 2) applied to the Collector under section 86 of the Bombay Land Revenue Code (Bom. Act.V of 1879) for assistance to recover the arrears. The Assistant Collector after holding the inquiry directed by section 87, passed an order giving the required assistance to Narayan (defendant No. 2) as the superior holder, and declared the mulgeni right of Nagappa (defendant No. 1) in the land to be forfeited, putting the second defendant Narayan at the same time in possession of the land.

* Appeal No. 36 of 1895 under the Letters Patent.

The third defendant Dalla took proceedings before the Revenue authorities to have the order restoring the property to Narayan [390] set aside. These proceedings resulted in the original order of the Assistant Collector being upheld.

The plaintiff as mortgagee filed the present suit to recover the amount due under his mortgage of the 4th September 1888, against Nagappa (defendant No. 1) personally and by the sale of his interest in the mortgaged land.

The lessor Narayan was joined as defendant No. 2, because he denied Nagappa's (defendant No. 1's) right to the land mortgaged. Defendant No. 3 was joined, because he had purchased the right of Nagappa (defendant No. 1) from the Revenue authorities.

Narayan (defendant No. 2) pleaded (*inter alia*) that the suit would not lie as far as the land was concerned, as the mortgaged holding had been forfeited and possession thereof given to him under a decree of the Revenue Court.

The First Class Subordinate Judge at Karwar held that Nagappa (defendant No. 1) had forfeited his interest in the land under the mulgeni lease and he awarded the plaintiff's claim to recover his mortgage-debt from Nagappa (defendant No. 1) personally and by sale of his interest in the land, if he had any, apart from his forfeited mulgeni right.

In appeal the District Judge of Kanara amended this decree by declaring that the sale of such interest as Nagappa (defendant No. 1) may have in the land, should confer on the purchaser the right to hold the land as a mulgeni tenant of Narayan (defendant No. 2) under the lease of 28th October 1880.

Narayan (defendant No. 2) preferred a second appeal to the High Court.

*Ganpat Sadashiv Rao*, for the Appellant (Defendant No. 2).

1895, *July* 17. **Ranade, J.** :—The question at issue in this case is whether a declaration of forfeiture, under section 153 of Bom. Act V of 1879, of the interests of a lessee holding under a mulgeni (permanent) lease, not followed by a sale, but by an order transferring possession of the holding to the lessor under section 57, has the effect of defeating prior incumbrances created by the lessee in favour of third parties, such as that claimed by the mortgagee-appellant before us. In disposing of this question, the analogies [391] furnished by the English law of landlord and tenant can prove of little help; for, as was observed in *Nagardas* v. *Hari Damji*, P. J. for 1891, p. 133, the relations between an Indian zamindar and rayat are not generally the same as those between the English landlord and tenant. This caution was inculcated in regard to the English law about forfeiture In *Sattyappa* v. *Mahadevamma*, P. J. for 1892, p. 353, the same observation is made in regard to the doctrine of waiver, and in *Ramji* v. *Vinayak*, P. J. for 1893, p. 491, in respect of the right of re-entry on alienation.

The old native law of the country was peculiarly favourable to permanent tenants such as mirasdars, with whom mulgenidar lessees may well be and have been classed. Even in respect of State dues, a mirasdar never permanently forfeited his interest by reason of default in the payment of assessment. His land might be attached and transferred to the temporary occupation of another, but he could claim it back on payment of all arrears at any time on his return to the village. The incident of forfeiture might of course be attached as a condition in a private lease, but there is nothing in the evidence before us to show that the mulgeni lease in the present case contained such a condition. The lessor applied under section 86 for help to the Collector to recover his rent, which in this case exceeded the assessment of the land, and the Revenue authorities thereupon made a declaration of forfeiture under section 153, and soon after transferred possession of the land to the lessor under section 57. We

have thus to see how far these orders of the Revenue authorities affected the prior mortgage incumbrance created by the lessee. The appellant's pleader relied chiefly on the analogy of a declaration of forfeiture for Government dues. The Land Revenue Code, however, makes a clear distinction between State dues and private dues, and though under section 86 the Revenue authorities are empowered to give help on the application of superior holders to recover the arrears of rent or revenue due to them, by the use of the precautionary and other measures laid down in Chapter XI for the recovery of State dues, there is an express reservation in section 86 excluding the operation of section 137, which secures to State dues a priority [392] over all other claims. This distinction between State dues and private claims has been recognized judicially in *Ratanji* v. *Sakharam*, P. J. for 1884, p. 68; *Narayan* v. *Vithal*, P. J. for 1893, p. 191, and *Sato* v. *Sarvotamrao, ibid*, 251. We must, therefore, carefully consider sections 56, 57, 80, 81, 86, 137, 153 of the Land Revenue Code to see how far the orders passed by the Revenue authorities in this case under sections 153 and 57 had the effect of destroying all prior incumbrances created by the permanent lessee.

Apart from positive law, it is obvious that a person can only forfeit such interest as he has in his land at the time of his default in payment, and it would not be equitable to antedate the effect of the forfeiture so as to defeat prior incumbrances, especially under a system of land-law which declares that a permanent tenant's interest is both heritable and transferable.

Turning next to positive law, it appears that, under section 86, the superior holders are entitled to assistance in the shape of the use of precautionary and other measures for the recovery of rent or revenue, under the same rules, and in the same manner as is prescribed by Chapter XI for the realization of Government land revenue. Section 153 lays down the precautionary and other measures referred to in this Chapter XI, and it empowers the Collector to declare the occupancy or alienated holding, in respect of which an arrear of land revenue is due, to be forfeited to Government, and to sell or otherwise dispose of the same under sections 56 and 57 of the Land Revenue Code. Under section 56, the non-payment of land revenue dues makes an occupancy or alienated holding liable to forfeiture. Two courses are open to the Collector after such a liability has accrued. He may levy the arrears due by a sale of the occupancy or holding, or he may otherwise dispose of such occupancy, &c., under rules or orders made under section 214. When a sale takes place, section 56 lays down that the property sold will be freed from all tenures, incumbrances and rights created by the occupant or holder. Under section 57, the Collector may, on such forfeiture, take immediate possession, and dispose of the same by placing it in the possession of the purchaser (apparently when a sale takes [393] place), or any other person entitled to hold it (being co-occupant, tenant or mortgagee, or other persons interested under sections 80, 81), under the provisions of the Code. Admittedly, in this case, no sale has taken place after the declaration of forfeiture. Only a transfer of possession has taken place under section 57. If it was deemed necessary to insert a special provision like section 137 to reserve a precedence for Government claims to land revenue over all other private demands, &c., and if, in extending by section 86 the procedure under Chapter XI to enable private landlords to realize their dues, mention of this special precedence was expressly excluded, it is obvious that a mere declaration of forfeiture, even when followed by an order transferring possession, does not, in the case of private landlords, destroy all prior incumbrances created by the occupant.

In *Dasharatha* v. *Nyahalchand*, I. L. R., 16 Bom., 134, the effect of a mere transfer of possession under the orders of the Mamlatdar was considered by this

Court. The registered occupant in that case had mortgaged his land, and the mortgagee obtained a decree for the sale of the land in respect of his mortgage-debt. In the meanwhile, the occupant committed default in payment of land revenue, and the mortgagee-creditor, having paid the arrears of revenue due, was placed in possession. Subsequently, the occupant sued for redemption, and the mortgagee pleaded adverse title as having been placed in possession by the Revenue authorities. This contention was disallowed, and it was held that the mortgage relationship still subsisted. The case of *Gahinaji* v. *Bhikchand*, P. J. for 1893, p. 547, is an express decision on this same point. In that case, there was a forfeiture followed by a subsequent restoration of the holding to the old occupant under the orders of the Collector. The prior incumbrance created by the occupant before the forfeiture was held to be not extinguished by the mere declaration of forfeiture as it would have been if a sale had taken place.

It is not necessary here to discuss the effects of the provisions of the Transfer of Property Act, Chapter V, for the present suit was instituted before January 1893, when the notification of **[394]** Government was issued, and under section 424 the provisions of Chapter V do not apply to agricultural leases.

For the reasons stated above I would reject the appeal, and confirm the decree of the District Court.

**Jardine, J.**:—After the original decree was passed, and before the first appeal was heard, the Collector of Kanara passed a decision annulling the later and restoring the earlier decision of the Assistant Collector. Being of opinion that the District Judge ought to have admitted the Collector's decision as evidence, we have recorded it here, and have next to ascertain what the earlier decision of the Assistant Collector settled. It recites section 153 of the Land Revenue Code, Bombay Act V of 1879 It declares that in consequence of the Mulgenidar Nagappa's default of payment to the superior holder Narayan, Nagappa's rights were forfeited, and the land was directed to be given into possession of Narayan. Mr. Ganpatrao, relying on section 56 and rule 58, made under section 214 of the Code (printed in General Rules in force in the Revenue Department, Edition of 1893, p. 30), has contended that the declaration of forfeiture so made as above extinguishes by mere operation of the Code every incumbrance or interest created before this forfeiture by the mulgeni lessee, such as *e.g.*, the mortgage by Nagappa to the plaintiff Parshotam. But he was unable to cite any judicial decision in support, or to show that this was the Statute law before the Revenue Code of 1879 was enacted.

He contended that the land revenue being a paramount charge on the land, the superior holder, though a subject, had a right by Statute to the same priorities as the Government; and that as a Collector could, after a forfeiture declared, and by virtue of section 56, sell the estate free from all tenures, incumbrances and rights created by the occupant, therefore the placing of Narayan, the superior holder, in possession was an extinguishment of all such rights, including Nagappa's mortgage to plaintiff, as charges on the land.

We think that the giving of possession to Narayan was an act done under section 57, a recognition by the Assistant Collector that he was entitled to hold it under the Code or some other **[395]** law. There is nothing in this section, however, which quenches earlier incumbrances; I think Mr. Ganpatrao goes too far in placing the rights of Narayan, a superior holder and mere subject, on a par with those of the State. The State has paramount rights under section 137, which is as follows:—

"The claim of Government to any moneys recoverable under the provisions of this chapter shall have precedence over any other debt, demand or claim

whatsoever, whether in respect of mortgage, judgment-decree, execution, or attachment or otherwise howsoever, against any land or the holder thereof."

But section 86, which extends to superior holders certain procedures used by the State to recover its own paramount dues, makes an express exception of section 137, a clear indication that the above rule of priority was not enacted in favour of the subject superior holder.

We have first to determine the true intent of these two sections, 137 and 86. I am of opinion that they are not to be construed as enactments altering the principles of the law as it stood in 1879.

Section 137 is merely declaratory of the law as interpreted by this Court in *Abdul Gani* v. *Krishnaji*, 10 Bom. H. C. Rep., 416; *Gundo* v. *Mardan*, 10 Bom. H. C. Rep., 419, and *Ghelabhai* v. *Pranjivan*, 11 Bom. H. C. Rep., 218, that the land revenue due to the Crown is the paramount charge on the land. The rights of the Crown are founded on reasons which are foreign to any subject, as seen in *Secretary of State for India* v. *Bombay Landing and Shipping Company*, 5 *ibid.*, 23, especially pp. 48 and 49 (O.C.J.). *Cessat ratio cessat lex.* The exception in section 86 declaring that a superior holder is not to get the assistance of the doctrine of section 137 merely leaves the law as it was. Some perplexity may have disturbed the mind of the draftsman after he had inserted the high prerogative doctrine among little rules of procedure, fiscal rules apt alike to Crown and subject for recovering revenue or rent. That is why he excludes in section 86 the superior holder from what he calls a rule, as if any subject could have the right which even before [396] *Magna Charta*, C. 18, the common law gave the King—*Quia thesaurus regis est pacis vinculum et bellorum nervi.*

Except as declaratory, I think section 86 deals only with procedure, and cannot be construed as altering the principles which the High Courts of India have applied as law and equity to the failure of a lessee to pay rent when that payment is a condition of his tenure. (As to mulgeni leases see *Subbaraya* v. *Krishna*, I. L. R., 6 Mad., 159; *Narayana* v. *Narayana*, I. L. R., 6 Mad., 327) We must now see what principles the Courts have applied. The High Courts have applied the English doctrine of forfeiture. The latest views of the Indian Legislature as shown in section 115 of the Transfer of Property Act IV of 1882 (which does not apply to this case) are similar to the statement of the law of England about the effect of surrender and forfeiture upon an under-lessee's interest expressed by Lord Justice MELLISH in *Great Western Railway Company* v. *Smith*, 2 Ch. D., 235 at p. 253. "It is a rule of law, that if there is a lessee, and he has created an under-lease, or any other legal interest, if the lease is forfeited, then the under-lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself." Rent, like service, is a condition in law annexed *tacite*; (compare this feudal law with section 83); and if the rent be not paid "then may the feoffor or his heirs enter into such lands or tenements and them in his former estate to have and hold, and the feoffee quite to ouste thereof." Coke on Littleton, 201. Coke explains the former estate to be "that estate which he had at the time of the estate made upon condition." In Bacon's Abridgement, Conditions O 4, the rule is found which is stated in rather fuller terms by Woodfall on Landlord and Tenant, Edition 14th, p. 327, that "on an entry on ejectment or recovery for a condition broken, the lessor gets the estate he had at the time of the estate made on condition and may avoid all mesne charges and encumbrances." His authorities are Coke on Littleton, Bacon, and Cole on Ejectment, 68. Cole applying to entry the doctrine of remitter says:—"Immediately upon entry the party is by law *remitted* to his previous estate; (that is to say) he becomes seized or

possessed of the land for such an estate [397] therein (if any) as was legally vested in him before and at the time of the entry."

In regard to his entry and present possession the defendant Narayan has apparently used the legal procedure. As mentioned above, the revenue official has declared under section 157 that Nagappa's rights are forfeited, which distinguishes the case from *Dasharatha* v. *Nyahalchand*, I.L R., 16 Bom., 134. The same order also puts Narayan in possession, which distinguishes the case from *Malhari* v. *Tukaram*, 6 Bom. H. C. Rep., 86, A. C. J.; the entry is not the act of Narayan himself as in *Indrabutty* v. *Bolloway*, 9 Cal. W. R., 168, Civ. R.

On considering section 153 and sections 56 and 57 together, I do not think that upon making a declaration of forfeiture the Collector must necessarily sell the forfeited estate. Reading sections 56 and 57 distributively, I am of opinion that he had power himself to take possession and to dispose of the holding by putting in the person whom he thought entitled at law, who on the English principles is the lessor Narayan, not the plaintiff Parshotam, the mortgagee from the lessee. As it does not appear that the plaintiff-mortgagee paid to Narayan the rent due from Nagappa, section 80 does not come into play. The final order of the Collector was passed after considering the question under section 81. His decision annuls that which held that there had been collusion between Nagappa and Narayan, resulting in a forfeiture on failure to pay the rent, with a view to defeat incumbrances created by the lessee. In the present suit the pleadings and issues do not show that Parshotam alleged this fraud; so fraud ceases to be a fact in this appeal.

I do not know of any principle by which the mulgeni lessee Nagappa can be treated as *legitimus dominus pro tempore* so as to create an estate in a mortgagee which shall not be subject to forfeiture. This is not a case analogous to that exceptional one of the *Earl of Arundel*, Dyer, 344a, in Bacon's Abridgement, where the feoffee of a manor upon condition was held to have created enduring grants by copy, because he was *legitimus dominus pro tempore*. Where the only question is between the lessee and his grantee, [398] the grants may in certain circumstances be upheld in equity as they are at law on a surrender; and *Gahinaji* v. *Bhikchand*, P. J., 1893, p. 547, is such a case. But as I can find no case, so I believe that not one of the High Courts of India has hitherto treated an inferior holder or lessee as competent to grant an estate more perdurable than his own. So grievous an interference with a landlord's property cannot be tolerated in law or equity. There is no analogy at all between the lord of a manor making grant by copy and the lessee who holds on condition. The former holds a Court, and his powers as owner of a franchise are settled by custom; therefore he was held to be *legitimus dominus pro tempore*. Having had the advantage of perusing Mr. Justice RANADE'S judgment, I may say that we are not dealing with a mirasdar whose rights do not depend on a lease; and I will not in a mere incidental manner say anything on the question whether a mirasdar is *legitimus dominus* for this purpose by custom; *obiter dicta* here may have unforeseen results. I may, however, remark that the mirasdar has been treated in some cases not as perpetual lessee; but like the muldar in this case as the highest superior holder—*Narayan* v. *Lakshuman*, 10 Bom. H. C. Rep., 324; *Alagaiya* v. *Saminada*, 1 Mad. H.C. Rep., 264.

On this great and important question of the lessee's powers I have the misfortune to differ with my brother RANADE; and, moreover, Mr. Ganpatrao did not argue the law of forfeiture as between landlord and tenant. To make my views clear I will now sum them up. 1. The feudal notion that payment of the rent or service was a condition in law had been treated as the law of India before the passing of section 83 of the Land Revenue Code which declares

the condition. 2. All the High Courts have held *forfeiture* to attach as a breach of that condition. 3. No High Court has held that a mere lessee can grant an estate more perdurable than his own, and which shall not be subject to forfeiture in favour of the lessor in the event of the lessee's estate being forfeited. 4. The rules of law as to the different effects of surrender and forfeiture are not to be ignored. **[399]** 5. The Legislature of Bombay in framing rules of procedure did not intend to alter the law about transfer of property. 6. An ordinary subject lessee on a perpetual lease on condition is not a *dominus*. 7. The mulgenidar Nagappa could not by his own mere act create a mortgage in favour of Parshotam, which would survive the forfeiture of Nagappa's own estate to the landlord.

It follows that, in my opinion, the decree of the District Court ought to be amended. But as my brother RANADE upholds it, this Court will confirm it under section 575 of the Code of Civil Procedure.

The Judges having differed, the decree of the District Judge was confirmed under section 575 of the Code of Civil Procedure (Act XIV of 1882).

Narayan (defendant No. 2) preferred an appeal, under section 15 of the Amended Letters Patent from the decision of the Division Bench.

The appeal came on for argument before a Full Bench consisting of FARRAN, C. J., and PARSONS and HOSKING, JJ.

*Ganpat Sadashiv Rao* for the Appellant (Defendant No. 2) :—The question is what is the effect of a forfeiture for non-payment of rent under section 153 of the Land Revenue Code. We contend that it has the effect of extinguishing not only the lessee's interest in the holding, but also that of the under-lessee, or any other person who derives his title from the lessee. The land reverts to the lessor free from all charges and incumbrances created by the lessee. See section 56 of the Land Revenue Code and the rules made under section 214. In accordance with these rules the Collector has disposed of the holding in dispute and put the original lessor in possession. Payment of rent is a condition of the tenancy, and forfeiture attaches as a breach of the condition.

There was no appearance for the Respondent.

**Farran, C. J.** :—This is an appeal under the Letters Patent from the decree of a Division Bench passed in second appeal. The learned Judges who heard the appeal having differed in opinion, the decree of the Lower Appellate Court was confirmed. The question of law which we have to consider is one of some import-**[400]**ance. It is to be regretted that the respondent was not represented before us and that we have to deal with the appeal on an *ex parte* argument. The facts which gave rise to the question are these.

On the 28th October 1880, the father of Narayan (defendant No. 2) granted a mulgeni lease of the land in suit to Nagappa (defendant No. 1), the rent reserved being Rs. 29 per annum. On the 4th of September 1888, the defendant Nagappa mortgaged his interest in the land to the plaintiff. Subsequently the rent payable by defendant Nagappa under the lease having fallen into arrear, the defendant Narayan applied to the Collector under section 86 of "The Bombay Land Revenue Code, 1879" for assistance in the recovery of the arrears. The Assistant Collector after holding the inquiry directed by section 87 passed an order for rendering assistance to Narayan as the superior holder and declared the mulgeni right of the defendant Nagappa in the land to be forfeited; and purporting, I assume, to act under section 57 of the Code, put the defendant Narayan in possession of the land.

The third defendant Dalla took proceedings before the Revenue authorities to have the order restoring the property to the superior holder set aside. It is

unnecessary further to refer to these proceedings. They resulted finally in the original order of the Assistant Collector being upheld. The present suit was filed by the plaintiff, the mortgagee under the mortgage of the 4th September 1888, to recover the amount due under his mortgage against the defendant Nagappa personally and by the sale of his interest in the mortgaged land. The defendant Narayan contended by his written statement that the suit would not lie as far as the land was concerned, as the mortgaged holding had been forfeited and possession thereof given to him under a decree of the Revenue Court.

The Assistant Collector in taking the above steps in favour of the superior holder appears to have acted in pursuance of a Resolution of Government of the 30th May 1881, (General Rules of the Revenue Department, 1893, p 30), which concludes as follows :—" Accordingly when section 153 provides that the Col- [401] lector may declare the occupancy in respect of which an arrear of land revenue is due to be forfeited to the Government, so he may declare a holding with which he is dealing under section 86 to have reverted to the superior holder."

The first question for decision is whether Nagappa's lease was liable to be declared forfeited under section 153 of the Land Revenue Code. It does not for this purpose seem necessary to consider whether the earlier provision of section 56, which makes the arrears of land revenue due on account of land by any landholder a paramount charge on the holding, applies to the arrears of rent under a mulgeni lease, though if such a lease can be sold free from incumbrances under the provisions of sections 153 and 56 the inference would rather be that it does, but there are difficulties in the way of so holding, so I pass from that question. Section 86 of the Code enables a superior holder by written application to the Collector to obtain assistance by the use of precautionary *and other* measures for the recovery of rent or land revenue payable to them by inferior holders * * * under the same rules (except that contained in section 137) and in the same manner as prescribed in Chapter XI of the Act for the realization of land revenue by Government. Nagappa clearly, I think, came within the definition of "inferior holder" contained in section 3, clause 14, of the Code, so it follows that his superior holder was entitled to have measures taken in his favour under Chapter XI for the recovery of his rent under the same rules and in the same manner (subject to the limitation contained in the proviso to section 86) as Government could resort to. As forfeiture under section 153 is one of the measures which can be resorted to under Chapter XI it follows that Nagappa's lease or holding was liable to be declared forfeited under section 153.

Assuming, then, that it was liable to such a declaration of forfeiture, it has next to be considered what is the effect of the declaration. The Code itself does not enact that any particular legal consequences shall flow from the forfeiture of a holding by the Collector beyond making such a forfeiture a [402] condition precedent to his selling or otherwise disposing of the same. In the case of the breach of a covenant in a lease at common law which contains a condition for re-entry, the right of the landlord is to re-enter and hold the leasehold premises as of his former estate freed from the lease and all incumbrances created by the lessee—Woodfall, p. 327. Upon such re-entry the interest of the lessee under the lease determines and he has no further claim upon it. When we turn to the Land Revenue Code we find that the Collector upon declaring the forfeiture must sell or otherwise dispose of the holding under the provisions of sections 56 and 57 *and credit the proceeds (if any) to the defaulter's accounts*. This distinguishes a forfeiture under the Code from a forfeiture and re-entry at common law where no such further steps are incumbent on the landlord. It appears to me that a declaration of forfeiture by the

Collector under section 153 is the formal preliminary step which leads to the consequences indicated in the Code, but is not in itself until these steps are taken productive of any direct legal result. Upon a declaration of forfeiture it does not, I think, follow that the holding thereupon becomes the property of the superior holder or that he becomes *ipso facto* seized of his original estate in the forfeited holding, else as I have said the proceeds of the holding when dealt with would not be credited to the tenant. The steps which the Collector is to take upon a declaration of forfeiture are indicated in section 153. He is to sell or otherwise dispose of the same under the provisions of sections 56 and 57. The case of a sale gives rise to no difficulty whether it is the case of the sale of a holding held directly from Government or of a holding under a superior holder. Its consequences are plainly indicated in section 56. The sale is to be of the holding freed from all sub-tenures and incumbrances subject in the case of a holding from a superior holder to the paramount claims of Government under section 137. The Collector, however, can otherwise dispose of the holding under the provisions of sections 56 and 57. It he does so it appears to me that he can dispose of the holding only under rules and orders made in this behalf under section 214. He cannot dispose of it otherwise. Now when the rules [403] and orders made in this behalf under section 214 are examined, it will be found that they are applicable only to holdings from Government and are wholly inapplicable to a holding under a superior holder. What the Collector is to do under these rules and orders is to cause the land comprised in the forfeited holding to be entered in the records as unoccupied alienated land, with which he may then or subsequently deal as such. The rules and orders contain further provisions and directions which are inconsistent with the Collector's power absolutely to restore a forfeited holding to the superior holder as of his original estate. It appears to me, therefore, that the Collector has no authority under section 56 to restore the forfeited holding to the superior holder. If such a power were conferred upon him by rules made under section 214 I should be inclined to think that the same consequences would follow upon such restoration as follow now when the Collector otherwise than by sale disposes of holdings held under Government. I cannot see how different consequences would flow from the same action of the Collector in cases where a superior holder is concerned from those which flow from that action where Government is concerned, and in the case of Government I cannot doubt that it re-enters of its old estate. The rules and orders made under section 214 (which have the force of law) show that, I think, conclusively.

It remains to consider the provisions of section 57, which enables the Collector to take immediate possession of the land embraced within a holding forfeited under section 56 or any other law for the time being in force and to dispose of the same by placing it in possession of the purchaser or other person entitled to hold it according to the provisions of the Land Revenue Code or any other law for the time being in force. These provisions appear to me to deal with possession only. They do not, I think, enable the Collector to determine any question of right. It shall be lawful for the Collector to dispose of the *land* by placing it in the possession of the purchaser is, I think, but a circuitous mode of saying that it shall be lawful for him to place the land in the possession of the purchaser. When the person entitled to the land has been ascertained under the provi-[404]sions of the preceding section or any other Act, the Collector is empowered without civil process to put him in possession. Read in that sense section 57 is merely ancillary to section 56 with a superadded provision enabling the Collector to deal generally with the possession of land comprised within forfeited holdings. It cannot, I think, have been intended by the use of the general words employed in the section to constitute

the Collector a civil Court to deal with all questions relating to the forfeitures of land. It must be borne in mind that the section deals primarily with land forfeited to Government, and that it is only indirectly under the provisions of section 86 that land held under superior holders is brought within its purview.

If this be the true meaning of the section, the making over of the land in question to the defendant Narayan did not amount to a disposing of the land by the Collector under the provisions of the Code, and had, therefore, no legal operation upon the rights of the several parties interested in the defendant Nagappa's holding.

The result of the above reading of the sections 153, 56, and 57 of the Land Revenue Code might doubtless lead to the conclusion that even the interest of Nagapa in the holding in suit has not been terminated by the proceedings already taken under the Code though it is liable to be terminated under them. It is not, however, necessary for me so to hold in this case. It will be sufficient for the determination of this appeal to say that the plaintiff's interest in the holding has not been extinguished. It is also unnecessary to consider whether the making over of the land by the Collector to the defendant Narayan was legal.

For these reasons I agree with the result which the Lower Appellate Court and Mr. Justice RANADE have arrived at in this case, and am of opinion that the decree appealed from is correct and ought to be confirmed.

**Parsons, J.**:—The decision of this case depends upon the construction to be placed upon certain sections of the Bombay Land Revenue Code, 1879. Section 86 provides that superior holders shall be entitled to assistance for the recovery of rent or land revenue under the same rules, except that contained in section 137, and in the same manner as prescribed in Chapter XI for the [406] realization of land revenue to Government. Section 150, which is in Chapter XI, contains the processes by which an arrear of land revenue may be recovered, among them is "(*b*) by forfeiture of the occupancy or alienated holding in respect of which the arrear is due under section 153."

Section 153 provides that "the Collector may declare the occupancy or alienated holding in respect of which an arrear of land revenue is due, to be forfeited to Government, and sell or otherwise dispose of the same under the provisions of sections 56 and 57, and credit the proceeds, if any, to the defaulter's accounts."

Section 56 gives the Collector power to "levy all sums in arrear by sale of the occupancy ,or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors-in-title, or in any wise subsisting as against such occupant or holder, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214."

Section 57 gives the Collector power "in the event of the forfeiture of a holding through any default in payment or other failure occasioning such forfeiture under the last section or any law for the time being in force, to take immediate possession of the land embraced within such holding, and to dispose of the same by placing it in the possession of the purchaser or other person entitled to hold it according to the provisions of this Act or any other law for the time being in force."

Section 137 declares that "the claim of Government to any moneys recoverable under the provisions of this chapter shall have precedence over any other debt, demand, or claim whatsoever whether in respect of mortgage, judgment-decree, execution, or attachment, or otherwise howsoever, against any land or the holder thereof."

We have to apply the sections to the facts of the present case in which the rent payable by the mulgeni tenant having fallen into arrear, the Collector on the application of the superior holder declared the mulgeni holding forfeited, and disposed of the hold-[406] ing by placing it in the possession of the superior holder, and determine whether the claim of the latter to hold the land free from a mortgage incumbrance created by the mulgeni tenant is good or not. In my opinion he is not entitled to so hold the land. It is true that the mulgeni lease has been declared forfeited by the Collector, but the Code does not provide for the forfeiture of an inferior holding to the superior holder. Section 153 speaks only of forfeiture to Government. Section 86 when applying Part XI does not place the superior holder in the position of Government. I do not agree with the Legal Remembrancer, upon whose opinion Government passed the Government Resolution No. 3089 of 30th May 1881, that section 153 must be construed as if the occupant took the position of Government. There is a great difference between the position of Government and that of a superior holder, and the latter has not for his rent the paramount claim that Government has for its land revenue. The declaration, therefore, of forfeiture in the present case made no change in the legal relationship of the landlord and tenant. It was merely a step that had to be taken before other acts could be done. Having declared the lease forfeited, the Collector could then proceed to sell or otherwise dispose of the same under the provisions of sections 56 and 57 and credit the proceeds, if any, to the defaulter's accounts. Section 56 allows of a disposal only under rules and orders made in this behalf under section 214. I have carefully studied these rules, but I can find among them no rule or order which allows the Collector to dispose of the holding by handing it over to the superior holder. It is of course always difficult to apply rules framed for one set of circumstances to another and different set. A rule like 59, which provides for the land being entered as Government waste or unoccupied land, cannot apply to land like this. Rules 59A and 59B might apply, but they have no application to the circumstances of the present case. The only rule which does apply is 60, the general one, and this renders it obligatory on the Collector to put the forfeited holding up for sale, except in two cases neither of which exists here. Thus the only legal method of disposal of an inferior holding is by sale.

[407] It remains only to consider the mode of disposal under section 57. That allows of a disposal of the holding by " placing it in the possession of the purchaser or other person entitled to hold it according to the provisions of this Act or any other law for the time being in force." The superior holder in this case is not the purchaser, and as we have seen, is not a person entitled to hold it. There has been no valid proceeding under which he has become entitled to put an end to the tenancy and re-enter on the land. Not having been legally disposed of, the mulgeni lease though forfeited still subsists and is liable to the claim of the mortgagee. I concur, therefore, in confirming the decree with costs.

**Hosking, J** :—In this case, appellant Narayan, a superior holder of certain alienated land, having applied to the Revenue authorities under section 86 of the Bombay Land Revenue Code for assistance in recovering arrears of rent from Nagappa, his mulgeni tenant, the Revenue authorities, under section 153 of the said Code, declared the mulgeni tenancy forfeited, and under section 57 put the superior holder in possession of the land. The question for decision is, whether the said land is now free from a mortgage charge created by the inferior holder in favour of respondent Parshotam, before the forfeiture.

A forfeiture followed by a sale under section 56 frees the land sold from prior incumbrances. In the present case there was no sale. Under the latter

part of section 56 a forfeited holding may be disposed of under rules or orders made by Government under section 214. No restriction is placed upon the power of Government, and by such rules it may free the forfeited holding from prior incumbrances, but these rules or orders can only be made as to the disposal of a forfeited superior holding, for that is the only kind of holding contemplated by section 56. By virtue of section 86 the rules and orders might, if practicable, be applied to a forfeited inferior holding. The following rule has been made by Government as to the disposal of a forfeited superior holding:—"The Collector shall cause the land comprised in any forfeited alienated holding to be entered in the records as unoccupied unalienated land, and may dispose of it forthwith, or at any subsequent time, in accordance with the rules and orders [408] in force relating to land of that description" (Rule 59 under section 214, Bombay Revenue Code—Government Rules, Revenue Department). According to the rules for the disposal of unoccupied unalienated land the Callector may grant the occupancy upon payment of a price fixed by him, or without charge, or he may have the occupancy sold by auction and grant it to the highest bidder (Rule 16 under section 214). It appears to be impracticable to apply these rules to the case of a forfeited inferior holding. Consequently, in my opinion, section 56 is inapplicable to the forfeiture under consideration.

The question then remains as to the effect of a forfeiture under section 153 followed by disposal under section 57, apart from section 56, assuming such procedure to be legal. Section 137 gives the claims of Government precedence over all other debts, including mortgages. Section 86 specially denies this privilege to superior holders. It is, therefore, I think clear that the forfeiture of an inferior holding under section 153, apart from section 56, does not free the land from prior incumbrances. Under section 80 the mortgagee of an occupancy may prevent a forfeiture by paying arrears of land revenue, but I do not find any provision in the Code giving a similar right to a mortgagee of a superior or inferior alienated holding. There is, therefore, the more reason for holding that the forfeiture of an alienated holding does not free the holding from a prior mortgage. The forfeiture in the present case has been declared under the provisions of the Bombay Land Revenue Code, and the only question is as to the effect of the forfeiture under the Code.

Had the superior holder wished to enforce a right of forfeiture under a condition in the lease, or under the general law of landlord and tenant, he should have had recourse to a suit in the civil Court. The mortgagee would have been entitled to be made a party to such a suit, and, assuming there were a right of forfeiture, the Court would have given the mortgagee an opportunity of preventing the forfeiture by paying the arrears of rent.

For these reasons I am of opinion that the decree of the Division Bench should be confirmed.

*Decree confirmed with costs.*

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**NOTES.**

[See also (1899) 24 Bom., 34. An ejectment under the Madras Rent Recovery Act determines all mesne incumbrances and subordinate interests:—(1903) 27 Mad., 401.]

## [409] APPELLATE CIVIL.

*The 18th August, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Lallu............(Original Defendant) Appellant

*versus*

Jagmohan............(Original Plaintiff) Respondent.*

*Will—Construction—Bequest by a Hindu to his wife—Life estate—Reversioner—Vested remainder—Contingent bequest.*

One Jamnadas Natha died in 1876, leaving a will which after stating his property in detail provided as follows : —" When I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death, my daughter Mahalaxmi is owner of the said property after that (death)."

*Held*, that Suraj took only a life estate under the will, with remainder over to Mahalaxmi after her death.

*Held* also, that the bequest to Mahalaxmi was not contingent on her surviving Suraj, but that she took a vested remainder which upon her death passed to her heirs.

APPEAL from the decision of Rao Bahadur Lalshankar Umiashankar, First class Subordinate Judge of Ahmedabad.

One Jamnadas Natha, a separated Hindu, died on 19th July 1876, leaving a widow Bai Suraj and a daughter Mahalaxmi by a predeceased wife.

He left a will dated 19th January 1874, of which the following is the material part :—

"My property consists of dwelling-houses and moveables such as cash, jewels and furniture, the silk, &c., appertaining to my business, and outstanding debts, whatever the same may be. As to this, when I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's *kaja raja* (death), my daughter Mahalaxmi is owner of the said property after that (death). I have, therefore, made this my will in respect thereof."

In accordance with this will the testator's widow Suraj took possession of all his property, both moveable and immoveable, after his death in 1876.

[410] His daughter Mahalaxmi died in July 1883.

Suraj died on 11th March 1893, leaving a will dated 27th December 1883, whereby she bequeathed the whole of the property in her possession to her brother's son Lallu (the defendant). On her death Lallu took possession.

The plaintiff was the grandson of Mulchand, the separated brother of Jamnadas Nathu. In 1894 he brought this suit claiming as reversionary heir of Jamnadas Natha to be entitled to his property on the death of his widow Suraj. He contended that under the will of Jamnadas Nathu his widow Suraj took only a life interest in the property and that she had no power to bequeath it to Lallu.

The defendant pleaded (*inter alia*) that Suraj took an absolute interest under the will of Jamnadas Natha and that she had, therefore, full power to bequeath the property to him (the defendant) as she had done.

* Appeal, No. 170 of 1894.

The First Class Subordinate Judge of Ahmedabad held, on the construction of Jamnadas' will, that Suraj took only a life interest in the testator's property, that she was not competent to dispose of it by will, and that her will, therefore, did not confer any title on the defendant to any part of the property in dispute.

He accordingly decreed the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

*Ganpat Sadashiv Rao*, for Appellant (Defendant):—The defendant holds the property under the will of Suraj. The question is whether Suraj under the will of her husband Jamnadas took an absolute estate which she could bequeath to the defendant. We say she did. The will gives her as full an estate in the property as the testator had. The Court must give effect to these words in the will. They show that he did not mean to give her only a life estate.

The gift over to his daughter Mahalaxmi is to take effect only in the event of the wife's death during the lifetime of the testator. It is a substitutionary bequest, contingent on the lapse or failure of the prior absolute devise—*Gee* v. *Mayor, &c., of Manches*-**[411]***ter*, 17 Q. B., 737; *Woodburne* v. *Woodburne*, 23 L. J. Ch., 336; *Clayton* v. *Lowe*, 5 B. & Ald., 636. The rule is well established that where a bequest is simply to *A* and "in case of his death," or "if he die," to *B*, *A* surviving the testator takes absolutely—Williams on Executors, 1082, 3 (4th Ed.). In the present case the wife did survive the testator: she, therefore, took the property absolutely; and was competent to dispose of it by will as much as by gift *inter vivos*. Her will is, therefore, valid.

But assuming that she took only a life estate, it is clear that Mahalaxmi took a vested remainder. That being so, then although she predeceased Suraj, her interest passed on her death to her heirs. The principle laid down in section 106 of Act X of 1865 applies by analogy to the present case, so that even if Suraj took only a life estate, the plaintiff cannot succeed, as he is not the heir of Mahalaxmi.

*Goverdhan M. Tripathi*, for Respondent (Plaintiff):—The will does not confer an absolute interest on Suraj. The gift over to Mahalaxmi clearly shows that the testator intended to give his wife nothing more than a life estate. The rules laid down by English Courts for the construction of English wills do not apply in the case of Hindu wills. Hindu wills are to be construed according to the laws and usages of Hindus. The principle is now well settled that unless a will contains words of inheritance or words giving an express power of alienation to a widow, a bequest by a husband to a wife does not confer on her an absolute estate—*Hirabai* v. *Lakshmibai*, I. L. R., 11 Bom., 573; *Harilal* v. *Bai Rewa*, I. L. R., 21 Bom., 376. There are no such words in the will in question. Suraj, therefore, took a life estate only.

As to the gift over to Mahalaxmi, it is a contingent bequest, contingent on her surviving the widow. And as she did not survive the widow, her legacy fails. The property is, therefore, undisposed of, after the death of Suraj, and the plaintiff is entitled to inherit as the next of kin of the testator Jamnadas Natha. Even assuming that Mahalaxmi took a vested interest in the legacy, which passed on her death to her heirs, we do not admit that the plaintiff **[412]** is not her heir. The question as to who are Mahalaxmi's heirs has not been raised in the lower Court, and there are no materials before this Court to enable it to decide that point.

**Farran, C.J.**:—This is an appeal from the decree of the Subordinate Judge, First Class, at Ahmedabad allowing the plaintiff's claim. The plaintiff as the nearest reversionary heir of Jamnadas Natha after the death of Bai Suraj, the

widow of Jamnadas, sued to recover from the defendant, who claims under a will of Bai Suraj, the property left at her death. The defendant contends that Bai Suraj had, in consequence of Jamnadas having made a will in her favour, power to deal with his property by her will; and also, if she had not such power, that the heir of Mahalaxmi, the daughter of Jamnadas, and not the plaintiff, is the person now entitled to the property. The rights of the parties in the main, therefore, depend upon the construction and effect of the will of Jamnadas. The argument before us on appeal was confined to this part of the case.

The facts which it is necessary to remember as bearing upon the construction of the will and the devolution of the property are these. The testator Jamnadas, who was a trader and had a shop, was a separated Hindu. When he made his will in March 1874, he had a wife Bai Suraj and a daughter Mahalaxmi by another wife (then deceased) who was young. His separated brother Mulchand was alive and had a son. The plaintiff is Mulchand's grandson. Jamnadas died in July 1876, leaving his widow Bai Suraj and his daughter Mahalaxmi surviving him. The latter married, but died in July 1883, without leaving issue. The parties are not agreed as to who her heir is. The lower Court has not considered that question. Bai Suraj made a will in December 1883, leaving the property to the defendant No. 1. She died in 1893. The present suit was filed in 1894.

The will is short. After referring to the state of his family and his separation and enumerating his property the testator proceeds: "As to that when I am not alive my wife named Suraj is the owner of the property and has the same right of doing things independently as I myself during my lifetime have, and after her death my daughter Mahalaxmi is the owner of the [413] said property. I have, therefore, made this my will in respect thereof." This is the translation which has been furnished to us. Though it conveys the general meaning it is not literally accurate. The Subordinate Judge renders it thus: "And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death after that my daughter Mahalaxmi is the owner of that property." The words "*tene kaja raja hoe to*" which the translator renders "after her death" and the Subordinate Judge renders "in case of her death" are still more literally rendered "should death to her be." They do not in our view import a contingency but are a euphemism to denote the time of the wife's future death which native feeling does not permit of being expressed in speech as a certainty. The words "after that" which follow the word "death" show, we think, that this is certainly so in the present case.

Mr. Rao, who argued the appeal with much ability for the appellant, contends that the true intention of the testator to be gathered from the words of the will was to give an absolute and unqualified estate in perpetuity with the fullest powers of alienation and disposition to the widow, and that the gift to Mahalaxmi was substitutionary to provide for the event of Bai Suraj dying in the lifetime of the testator. He relied upon the rule deducible from the cases of *Gee* v. *Mayor, &c., of Manchester*, 17 Q. B., 737, and *Woodburne* v. *Woodburne*, 23 L J. Ch., 336. He argues that unless this construction is adopted, and if Bai Suraj takes only a life estate, the words giving her such ample powers over the property must be rejected as meaningless. It appears to us, however, that, as we have already said, the gift over to Mahalaxmi is not expressed as a contingency by the testator, but as a certainty, and that, therefore, there is no room or basis for the argument. The words which gave the widow such ample power over the property are, we think, only

*intended to enlarge the Hindu widow's ordinary power and to provide that she is to be perfectly untrammelled in its enjoyment and management so long as she lives, but that the estate is still to pass to Mahalaxmi on her death.* We are of opinion that Bai Suraj took only a life estate in the property with remainder to Mahalaxmi after her death.

[414] Mr. Govardhanram, on the other hand, contended that the gift to Mahalaxmi was contingent on her surviving Bai Suraj, but we think that his contention also ought not to prevail, and that Mahalaxmi took a vested estate in the property subject to the life interest given to Bai Suraj. In the first place, there are no words to be found in the will expressive of contingency, and the will certainly in express terms disposes of the entire estate of the testator in the property. This is the rule laid down in section 106 of the Indian Succession Act, which, though inapplicable to the will which we are construing, has been made applicable by the Hindu Wills Act to Hindu wills executed in the Presidency Town. It is argued that this construction would defeat the probable intentions of the testator, but we think not. It is clear that if Mahalaxmi had survived Bai Suraj she would have taken an absolute estate under the will and that it would then have passed to her heirs if she died infestate. The same result follows if she dies before Bai Suraj. It passes on her death to her heirs. If she had survived Bai Suraj (in the absence of a will) she would also have taken an absolute estate in the property which would in that case also have passed to her heirs. The case of the property passing to Mahalaxmi absolutely and after her death to her heirs may well, therefore, have been the intention of the testator in any event; but it is, we think, idle to speculate on intention where none is expressed. What the testator has done is to give his whole property to his wife and daughter and to leave the result to the general rules of law. We must, therefore, hold that Bai Mahalaxmi took a vested estate in the property after the death of the widow Bai Suraj which upon her death passed to her heirs. This will defeat the plaintiff's claim in this suit unless he is the heir of Mahalaxmi. It is not conceded that he is not. We must send down an issue to have it determined whether the plaintiff is the heir of Mahalaxmi. Finding to be certified within two months. Further evidence on the issue may be received.

*Issue sent down.*

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**NOTES.**

[As regards the construction of a gift to a woman, see also (1912) 17 C.L.J., 680; (1899) 24 Bom., 420; (1903) 6 Bom. L. R., 625; (1904) 29 Bom., 306; (1902) 30 Cal., 20; (1906) 1 S.L.R., 211.]

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## [415] APPELLATE CIVIL.

*The 18th August, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Ramchandra Krishnapa ...........Plaintiff

*versus*

Belya and another............Defendants.

Subrao Vithoba Gurgure,............ Auction-purchaser.*

*Execution—Sale—Civil Procedure Code (Act XIV of 1882), Sec. 307--Payment by purchaser into the Post Office within time—Money not received by the Court until after expiration of time allowed by the section.*

A purchaser at an execution sale was bound under section 307 of the Civil Procedure Code (Act XIV of 1882) to pay the balance of the purchase-money into Court on the 19th June 1896. On the 17th June he paid in the amount to the Post Office at Yellapur and obtained a money order which he sent to the Nazir of the Court. The Nazir did not receive the money until the 22nd June.

*Held*, that the payment was not in time. The Post Office is not the agent of the Court and the purchaser was bound to see that the money reached the Court in time to satisfy the requirements of section 307.

REFERENCE by Rao Bahadur Raghavendra Ramchandra Gangoli, Acting First Class Subordinate Judge of Karwar, under section 617 of the Civil Procedure Code (Act XIV of 1882).

On the 4th June 1896, certain immoveable property was sold in execution of the decree of the Court of the First Class Subordinate Judge of Karwar. The purchaser paid the deposit of twenty-five per cent. on the amount of the purchase-money on the same day. Under section 307 of the Civil Procedure Code (Act XIV of 1882) he was bound to pay the balance of the purchase-money before the evening of the 19th June. On the 17th June he paid the money into the Post Office at Yellapur and caused a money order to be sent to the Nazir of the Court. The Nazir received the money on the 22nd June.

On these facts the Subordinate Judge submitted the following question :—

" Whether a payment into the Post Office is equivalent to a payment into Court for the purposes of section 307 of the Code of Civil Procedure ? "

[416] The opinion of the Subordinate Judge was in the affirmative. He referred to *Srinivas* v. *Malayacha*, I. L. R., 7 Mad., 211 ; *Gujadhar Pauree* v. *Naik Pauree*, I. L. R., 8 Cal., 528.

*Shamrav Vitthal* (*amicus curiæ*), for Plaintiff and Defendants.

*Narayan G. Chandavarkar* (*amicus curiæ*), for Auction-Purchaser.

**Farran, C. J.** :—We answer the question in the negative. The Post Office is not a part of the Court or the agent of the Court. The purchaser, if he chooses to send the purchase-money by it, must, as in any other mode of sending the money, send it so that it shall reach the Court in time to satisfy the requirements of section 307 of the Code of Civil Procedure. He cannot treat the time of payment into the Post Office as the time of payment to the Court. In both the cases cited by the Subordinate Judge the money was

* Civil Reference, No. 5 of 1896.

actually brought to the Court within the time allowed, so that they have no application to the present case.

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[ 22 Bom. 418 ]

## APPELLATE CIVIL.

*The 24th August, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Amava and others............(Original Defendants) Appellants

*versus*

Mahadgauda............(Original Plaintiff) Respondent.*

*Hindu law—Jains—Adoption—Death of only son leaving widows in lifetime of father—Subsequent death of father—Vesting of father's estate in son's widows—Adoption by son's senior widow without consent of junior widow—Divesting of estate.*

By custom the Jains are governed in matters of adoption by the ordinary rules of Hindu law.

Where an only son has died in his father's lifetime leaving a widow, an adoption by her after the father's death, and after she has inherited the estate, is valid.

Where the son has left two widows, an adoption by the senior widow after the father's death is valid although the younger widow does not consent and although such adoption divests the estate which she has inherited from her father-in-law.

The authority of a widow to adopt is at an end when the estate after being vested in her son has passed to the son's widow.

[417] An adoption by a widow in a divided family cannot divest any estate other than her own and her co-widow's except perhaps with the consent of the heir in whom the estate has vested.

SECOND APPEAL from the decision of Rao Bahadur C. N. Bhat, Joint First Class Subordinate Judge of Satara with appellate powers, confirming the decree of Rao Saheb Venkatrao Pandurang Deshpande, Subordinate Judge of Tasgaon.

The plaintiff sued to recover possession of certain property, alleging that he had been adopted by Sarasvatibai, senior widow of Kalgauda, in October 1880, and that the property was in the possession of defendant No. 1 (Amava), younger widow of Kalgauda who had predeceased his father Daulatgauda.

Amava (defendant No. 1) pleaded that the property of her father-in-law had devolved upon her and her co-widow Sarasvatibai and was now vested in them; that Sarasvatibai had no right to adopt without her (Amava's) consent, and that the plaintiff was, therefore, not validly adopted.

The defences of other defendants were immaterial.

The Subordinate Judge found that the adoption of the plaintiff by Sarasvatibai was valid, and that the consent of defendant No. 1 to the adoption was not necessary. He, therefore, awarded the plaintiff's claim subject to the maintenance due to defendant No. 1 the amount of which was to be determined in execution.

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*Second Appeal, No. 620 of 1895.

On appeal by defendant No. 1 the Judge confirmed the decree.

Defendant No. 1 preferred a second appeal.

*Vasudev R. Joglekar*, for the Appellant (Defendant No. 1).

*Daji A. Khare*, for the Respondent (Plaintiff).

**Fulton, J.** :—The parties to this appeal are Jains. The question to be decided is whether the senior widow of a son who predeceased his father can adopt after that father's death without the consent of the junior widow.

Daulatgauda, the owner of the estate, had a son Kalgauda, who died childless in his father's life-time, leaving two widows Sarasvatibai and Amava. On Daulatgauda's death, leaving neither widow nor descendants, Sarasvati and Amava inherited **[418]** the estate as the nearest sapindas. Subsequently Sarasvati, the elder co-widow, adopted the plaintiff Mahadgauda without the consent of Amava.

That by custom Jains are governed in matters of adoption by the ordinary rules of Hindu law is established by the case of *Bhagvandas* v. *Rajmal.** We must, therefore, consider whether according to Hindu law the above adoption would be valid.

If Sarasvati had been a sole widow it is difficult to see on what ground the adoption could have been impugned.

By Hindu law, according to the Maratha school, a sole widow in a divided family may without express authority adopt to her deceased husband, but cannot by so doing divest any estate already vested by inheritance other than her own. In such a case the assent of kinsmen is not required. In a united family she can, if not specially authorized by her husband, adopt only with the assent of the co-parceners. In the present case, Daulatgauda and his son Kalgauda were presumably united. During Daulatgauda's life, Kalgauda's widow could have adopted with the consent of her father-in-law. After Daulatgauda's death, the widow having gained independence of control by reason of there being no other co-parcener in existence could, in conformity with the presumption of implied authority from her husband recognized by the Maratha school, have adopted a son. Thus, in the case of *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep. (A. C. J.) 114, it was held that the authority to adopt subsisted in the case of the widow of a predeceased co-parcener and could be exercised after the death of the last surviving member of the co-parcenery, the sanction of the last survivor's widow being required not to supplement that authority but to divest the estate which had been inherited by the last survivor's widow. This view is in no way inconsistent with the decision in *Krishnarav* v. *Shankarrav*, I. L. R., 17 Bom., 164, in which it was held that the authority given by implication by the deceased husband of a widow was at an end and incapable of execution **[419]** after the estate having vested in deceased's son had passed on that son's death by inheritance to the son's widow. The principle on which this decision rests will be found explained in *Bhooban Moyee* v. *Ram Kishore*, 10 Moo. I. A., 279 at p. 309, in which their Lordships remarked as follow :—" How then is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption ; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites and to succeed to his property ; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been

*10 Bom. H. C. Rep., p. 241. See also *Chotay Lall* v. *Chunno Lall*, L. R., 6 I. A., p. 28.

that Bhowani had left a son, natural born or adopted, and that such son had died himself leaving a son, and that such son had attained his majority in the lifetime of Chandrabullee Debia. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great-grandfather of the last takor when all the spiritual purposes of a son according to the largest construction of them would have been satisfied."

In *Pudma Coomari* v. *The Court of Wards*, L. R., 8 I. A., 229, the Privy Council applying the principle of a limit of authority explained in the above passage said that upon the vesting of the estate in the son's widow the power of adoption by the son's mother (proceeding in that case from an express authority to adopt given by the husband) was at an end. In *Krishnarav* v. *Shankarrav*, I. L. R., 17 Bom., 164, this Court merely applied the above principle to a case governed by the law of the Maratha school in which the authority from the husband was implied instead of being express. In so doing the Court followed the decision in *Keshav* v. *Govind*, I. L. R., 9 Bom., 94, in which Mr. Justice WEST very clearly explained the doctrine of the limitation of a widow's implied authority. In the case of *Shri Dharnidhar* v. *Chinto*, I. L. R., 20 Bom., 250, it was held that the widow of a [420] predeceased son could not adopt so as to divest the estate inherited by the widow of her father-in-law. This decision apparently proceeded on the principle explained in *Chandra* v. *Gojarabai*, I. L. R. 14 Bom., 463, that an estate which had once passed away to a separated heir could not be affected by a subsequent adoption, for it must be remembered that the widow of the last survivor of a group of co-parceners takes by inheritance as if that survivor had been a separated householder, and that consequently when the estate has been inherited by the widow of the last survivor it cannot be divested (at least without the consent of the person in whom it is vested) by an adoption made by the widow of a predeceased co-parcener. The same view was expressed in another way by the Privy Council in *Bhubaneswari* v. *Nilkomul*, L. R., 12 I. A., 137, in which their Lordships said: "An adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral"—for this would be contrary to the rule that on the death of a separated householder or last surviving member of a co-parcenery the inheritance passes at once to the nearest heir or group of heirs and cannot be held in suspense subject to a possible adoption. In *Babu Anaji* v. *Ratnoji*, I. L. R., 21 Bom., 319, it was held, following *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep. (A. C. J.), 114, that the general rule that an adoption by a widow could not divest an estate vested by inheritance in an heir was subject to the exception that it might divest such estate if made with such heir's consent. This proposition was disputed by Mr. Justice CANDY in *Vasudev* v. *Ramchandra*, P. J. for 1896, p. 299, his opinion being in accordance with the decision in *Annammah* v. *Mabbu*, 8 Mad. H. C. Rep., 108, and a dictum in *Dharnidhar* v. *Chinto*, I. L. R., 20 Bom., 250, but not deriving support from the case of *Krishnarav* v. *Shankarrav*, I. L. R., 17 Bom., 164, if our view of the principle of this decision be correct.

From the cases above referred to, it seems to us that two rules are established which govern adoptions by widows:—

First. That having regard to the doctrine of satisfaction of spiritual purposes the authority of a widow to adopt is at an [421] end when the estate, after being vested in her son, has passed to the son's widow.

2ndly. That an adoption by a widow in a divided family cannot divest any estate of inheritance other than her own (and her co-widow's) except perhaps with the consent of the heir in whom the estate has vested in regard to which exception the decisions are conflicting.

In the case of *Sangapa* v. *Vyasapa*, P. J., 1896, p. 528, which came before Mr. Justice BAYLEY and Mr. Justice FULTON, the Court was asked to extend the first of these rules by holding that the authority of the mother was at an end when the son died unmarried after attaining full age and ceremonial competence. To this request they did not consider that the authorities justified them in acceding, but as the case is under appeal to the Privy Council, the matter cannot be treated at present as settled.

Now it seems clear that an adoption by a sole widow of a son who died childless in his father's lifetime made after that father's death and after the estate has been inherited by such widow as nearest sapinda is not inconsistent with either of these rules. It is certainly not in conflict with the second. It appears evident also that it is not at variance with the first when the reasoning on which that rule is based is borne in mind, for as the widow's husband never had a son, it cannot be contended that all (or any) of the spiritual purposes of a son have been satisfied. If it be objected that under this decision the widow of a childless separated householder however remote who may have inherited an estate as nearest sapinda will be able by adoption to divert the inheritance on her death from the next heir, the answer seems to be that during the widow's life the next heir has no vested interest in the inheritance, that the widow has a right to adopt a son to her own husband, that the right cannot be defeated by the accident of her having inherited the estate of a sapinda, and that the adoptive son will be in precisely the same position in regard to the inheritance of that estate on his adoptive mother's death as if he had been born in the family. There remains, therefore, no ground for doubting **[422]** the validity of an adoption by the sole widow of a son who has died in his father's lifetime after the father's death and after the estate has been inherited by the son's widow.

The next question to consider is whether the fact of there being a younger co-widow not consenting invalidates the adoption by the elder widow. Amongst Hindus the question is settled by the decisions in *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. Rep. (A. C. J.), 181, and *Ramji* v. *Ghamau*, I. L. R., 6 Bom., 498, which show that as it is the younger widow's duty to assent to the adoption in order to secure spiritual and other benefits to her husband, her omission to do so does not affect its validity notwithstanding the fact that it divests her estate. The reasoning on which the law is based is probably not wholly applicable to Jains, just as a similar objection may be urged in regard to many other rules of adoption. But as it has been decided that by general custom the Jains are governed by Hindu law in matters of adoption, and as no special custom affecting adoption by co-widows has been proved to exist among Jains, there is no ground for holding that the general law ought not to be applied. We, therefore, confirm the decree with costs.

*Decree confirmed.*

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**NOTES.**

[1. The general Hindu Law is applied to Jains :—(1898) 23 Bom. 257 ; (1899) 27 Cal. 379 ; (1910) 33 Mad. 439 at 446 ; (1910) 32 All. 247 ;

2. As regards the right of the senior widow to adopt without the consent of the junior widow, see also (1910) 32 All. 247 affirming (1908) 30 All. 197 ; (1905) 28 Mad. 315 ; (1914) 16 M. L. T. 612 ; (1904) 28 Bom. 461 ; (1911) 38 Cal. 694 at 698 ; affirmed in (1912) 39 Cal. 582 at 586 ; (1913) 37 Mad. 199.

3. The power to adopt can be exercised by those who are the immediate heirs as widow or mother, (1900) 25 Bom. 306, in a divided family ; it comes to an end if they are not the immediate heirs, and is not revived by the subsequent vesting in them :—(1902) 26 Bom. 526 ; (1906) 33 Cal. 1306. Although an immediate heir, a woman cannot adopt when she succeeds as *gotraja sapinda* widow, (1908) 32 Bom. 499.]

[22 Bom. 422]

# APPELLATE CIVIL.

*The 1st September, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Bhimapaiya............(Original Plaintiff) Appellant

*versus*

Ramchandra Bhimrao and others.............(Original Defendants) Respondents.*

*Resumption—Land granted with condition of service—Land granted as remuneration for service—Service attached to grant of hereditary office—Adverse possession—Limitation.*

Land granted with a condition of service attached to the grant cannot be resumed when the service is no longer required.

But land granted as remuneration for service may be resumed when the service is no longer required, except when there has been a grant of an hereditary office to those who are to perform the service. In that case the land can only be resumed when the need of such service altogether ceases. Where the [423] services are still required, and the grantee has a right to the hereditary office, he cannot be deprived of the land on the mere ground that the grantor prefers to appoint some one else to officiate.

The ancestors of the plaintiff appointed the ancestors of the defendants as hereditary kulkarnis and granted to them certain lands as remuneration for service as kulkarni, and as karkun. The service required as karkun ceased in 1863-64. Members of defendants' family officiated as kulkarnis for more than two hundred years. They continued to officiate till 1887. Their services were then dispensed with, and a stranger was appointed kulkarni by the plaintiff. In 1894 the plaintiff sued to recover all the lands.

*Held* (1) that the appointment of the defendants' family as hereditary kulkarni was valid.

(2) That the claim to recover possession of part of the lands assigned for the remuneration of the defendants as karkun was time-barred by the defendants adverse possession since 1863-64.

(3) That the defendants' possession of the lands assigned for the remuneration of the defendants as kulkarni was not adverse to the plaintiff previously to 1887, but that as the hereditary kulkarnis of the village the defendants were entitled to enjoy the land so long as the services of a kulkarni were required, whether their services were accepted or were refused, provided they duly discharged the duties of the office should their services be required.

APPEAL from the decision of J. J. Heaton, District Judge of Dharwar.

The plaintiff sued to recover from the defendants certain lands situate in the village of Annigeri, known as the Wat Gadag or Gadagindari lands, Sironhallidari lands and Hebsurdari lands.

The plaint alleged that the ancestors of the plaintiff had granted these lands to the ancestors of the defendants as remuneration for service as karkun to plaintiff's family and as kulkarni of the village of Annigeri; that defendants had continued to render service as kulkarni of Annigeri till August 1887, when plaintiff dispensed with defendants' services both as karkun and kulkarni, since which time the defendants had wrongfully held the lands and refused to give them up. The defendants contended that the plaintiff was not entitled to resume the lands merely because he declined to accept service from the defendants as kulkarni, *i. e.*, that the defendants were willing to do such services

* Appeal, No. 9 of 1896.

as were lawfully required from them, and that the plaintiff's claim was barred by limitation.

**[424]** The Judge held that the plaintiff was not entitled to resume the lands in suit, or any of them, without giving the defendant the option of continuing to render service for which they were granted, and that the claim as regards Wat Gadag lands was time-barred. He, therefore, dismissed the suit.

The plaintiff appealed with respect to Wat Gadag lands only.

Rao Saheb *V. J. Kirtikar* (Government Pleader) :—Our appeal relates to Wat Gadag lands in respect of which the lower Court has held our claim barred. But there has been no adverse possession of them. The defendants have always held the land as our agents (mutaliks).

But further we contend that when there has been a grant of land for service, the land is resumable when the service ceases. The appointment of an hereditary mutalik (agent) is invalid—*Ravji* v. *Mahadevrav*, 2 Bom. H. C. Rep., 237; *Krishnaji* v. *Vithalrav*, I. L. R., 12 Bom., 80; *Bhimaji* v. *Girapa*, I. L. R., 14 Bom., 82. The case of *Narainsing* v. *Mahadevsing*, 6 Cal. W. R., 199, is not in point, as the grant there was made by Government. He cited section 83 of Bombay Act V of 1879.

*Daji A. Khare*, for Respondent (Defendant) :—The defendant ceased to do service as karkun in 1863, but he has held the land granted as remuneration for such service ever since. The plaintiff's claim to it is, therefore, barred. The office of mutalik may be hereditary—Bombay Act III of 1874, section 56. We rely on *Krishnarav* v. *Rangrav*, 4 Bom. H. C. Rep., 1 (A. C. J.); *Gopal* v. *Sakharam*, I. L. R, 4 Bom., 254; *Radhabai* v. *Anantrav*, I. L R., 9 Bom., 198; *Bhimaji* v. *Girapa*, I. L. R., 14 Bom., 82; if the defendants are willing to perform the services for which the lands were granted, the plaintiff cannot resume the lands—*Forbes* v. *Meer Mahomed*, 13 Moo. Ind. Ap., 438.

**Farran, C. J.** :—This action was instituted by Bhimapaiya Deshpande to recover possession of certain lands in the village of Annigeri in the Dharwar District, known as Wat Gadag lands, and certain other lands. Plaintiff alleged that his ancestor granted the said lands to the ancestors of defendants as **[425]** remuneration for service as karkun and as kulkarni, and that in 1887 he dispensed with the services of defendants, and demanded that the lands should be given up, but that defendants refused to comply with his demand. The defendants replied (*inter alia*) that the lands had been granted as *sarva inam*, and that they had never refused to perform service.

The District Judge found that the lands claimed other than the Wat Gadag lands had been granted to defendants' ancestors as *sarva inam*, and that the Wat Gadag lands were permanently granted as remuneration for service, and that defendants had been in adverse possession for over twelve years before suit, and he rejected the whole claim. Plaintiff appeals as to the Wat Gadag lands only.

The earliest evidence which defendants have produced as to their title to the Wat Gadag lands consists of a document executed by the Deshpande to their ancestors in A. D. 1716. It sets out that the defendants' family had from old times held six mars of land Wat Gadag as mushahira (salary) for service (the nature of the service is not stated) done by two men; that the Deshpande had taken money from them; that they had objected they were writers, and not cultivators, and would prefer that the Deshpande should get the lands tilled by cultivators rather than they would continue to hold the land on such terms; that the Deshpande having considered their complaint guaranteed the return of the money taken from them and would allow them to hold the land free from all exactions in return for the service they did. It is admitted

that the service required from defendants as karkun ceased in 1863-64, as Government no longer required such service from the Deshpande. Members of the defendants' family continued to officiate as kulkarni of Annigeri till 1887, and then their services were dispensed with, and a stranger was appointed kulkarni as the deputy of the Deshpande. Only one instance has been shown in which a person who was not a member of defendants' family officiated as kulkarni before 1887; this was the appointment in July 1858, of Anant Ganesh, but he was appointed by Venkapa, a member of defendants' family.

The defendants have never denied that the kulkarniship of Annigeri belongs to the Deshpande, but they claim to be the [426] hereditary deputy kulkarnis. It is contended for defendants that the Wat Gadag land was granted to their ancestor with a condition of service attached to the grant, while, on the other hand, the contention for plaintiff is that the land was granted as remuneration for service.

The distinction between these two kinds of grants was recognized by the Privy Council in *Forbes* v. *Meer Mahomed Tuquee*, 13 M. I. A., at p. 464. In the case of a grant of the first kind, the land cannot be resumed when the service is no longer required; in the case of a grant of the other kind the land may be resumed. This rule as to the resumption of land granted as remuneration for service can only be applied (in a case where there has been a grant of an hereditary office) when the need of such service altogether ceases. In the present case the services of a kulkarni are still required, and if defendants have a right to the hereditary deputy kulkarniship they cannot be deprived of the land which they hold as remuneration for such office, on the mere ground that plaintiff prefers to appoint some one else to officiate as kulkarni.

We have then first to consider the nature of the grant of the Wat Gadag land. It appears to us that it was a grant of land as remuneration for future service. The wording of the instrument passed by the Deshpande in A. D. 1716 shows this. It is also evidenced by a letter written by the Deshpande on the 24th February 1850, (Exhibit 73) to a member of defendants' family, when, as the Government Pleader argues, he could not have anticipated that the Courts would distinguish between a grant burdened with a condition of service and a grant of land as remuneration for service. In that letter the Deshpande wrote on account of a dispute about the pay of the officiating kulkarni. "This is, therefore, to inform you that you cousins should arrange among yourselves what work each is to do. For this you receive lands and cash allowances. Divide that among yourselves and do the work." Mr. Khare points out that in 1844 Anandibai, who was then Deshpande, spoke of the grant of land to defendants as their inam. Wilson, in his Glossary, says that the term 'Inam' is sometimes vaguely applied to grants of rent-free lands, without reference to perpetuity or any specified conditions; it is not [427] unlikely that Anandibai used the word in this vague sense. Were the defendants hereditary deputy kulkarnis? We think the question must be answered affirmatively. Members of their family alone have officiated, so far as the evidence shows, certainly for over 200 years, and probably for over 300 years, with the exception before referred to and explained, and the necessary inference from this long continued term of office is, we think, that defendants' ancestors were permanently appointed to the office. It is true that the Deshpande has been consulted by Government as to who should officiate, but the pedigree (Exhibit 98) shows that for many years there have been several members of defendants' family available for service, and it was necessary that one should be selected for service from time to time. The Deshpande appears always to have selected a member of the defendants' family until the year 1887.

Was the appointment of a hereditary gumasta kulkarni valid? The decision of FORBES and TUCKER, JJ., in *Ravji* v. *Mahadevrav*, 2 Bom., H. C. Rep. (A. C. J.), 237, is against the validity of such an appointment though made before any British legislation on the subject. The learned Judges, without citing any specified authority, say : "The holder of an hereditary office being simply a tenant for life, as has been frequently decided, the nomination of an hereditary substitute to his successors in the office is an act clearly beyond his competency." In *Krishnaji* v. *Vithalrav*, I. L. R., 12 Bom., 80, this case of *Ravji* v. *Mahadevrav*, is mentioned as an authority on the point, but the appointment which was held to be invalid was one made in 1850, and the distinction between appointments to hereditary offices made before Regulation XVI of 1827 came into force and appointments made subsequently does not seem to have been considered. On the other hand in *Krishnarav* v. *Rangrav*, 4 Bom. H. C. Rep. (A. C. J.), at p. 11, WESTROPP, J., upon the strength of a large number of authorities which he cites, says : "As to civil hereditary offices and the inams (vatan) annexed to them, the balance of authority seems to incline in favour of the alienability in permanence (*previously to British legislation*) as well of the offices as of the inams appendant to them, together or separately." This view of the law **[428]** has been followed in several cases —*Radhabai* v. *Anantrao*, I. L. R., 9 Bom., at p. 208 ; *Bhimaji* v. *Giriapa*, I. L. R., 14 Bom., 82; *Lakshman* v. *Narayanrao*, P. J., 1896, p. 355,—and may now be taken to be the law on the subject. See also section 56 of the Bombay Hereditary Offices Act, 1874. We find, then, that the defendants are the hereditary gumasta kulkarnis of Annigeri, and that so long as the services of a kulkarni are required for that village, the defendants are entitled to enjoy so much of the Wat Gadag land as has been assigned to them as remuneration for such services whether their services are accepted or are refused, provided they duly discharge the duties of the office should their services be required.

As has been already stated, the Wat Gadag land was assigned for remuneration for the services of a karkun and of a kulkarni. Plaintiff has not distinguished in the plaint between the part assigned as remuneration for one office and the part assigned for the other office, but there is some evidence that half the land was assigned for each office, and as there were two persons whose services were required, this seems probable. The claim to recover possession of the part assigned for remunerating the karkun has been long since time-barred. In the view we have taken as to the nature of defendants' tenure of the office of kulkarni, possession of the part of the land assigned for the remuneration of the kulkarni was not adverse to the Deshpande before 1887. For these reasons we confirm the decree of the District Judge with costs.

*Decree confirmed.*

**NOTES.**

[ See also (1908) 33 Bom., 509 ; (1900) 2 Bom. L.R., 845 ; in (1904) 29 Mad., 24, this was not followed as regards the powers of the second appellate Court with regard to custom or usage. ]

[22 Bom. 428]

## APPELLATE CIVIL.

*The 1st September, 1896.*

PRESENT.

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Vedu............(Original Defendant) Applicant

*versus*

Nilkanth............(Original Plaintiff) Opponent.*

*Landlord and tenant—Possessory suit by landlord—Lease—Tenant can show that lease determined by sale.*

In a possessory suit before a Mamlatdar though it is not competent to a tenant to deny his landlord's title at the date of his lease, it is open to him to [429] show that it has since determined, *e.g.*, by a sale to him by the landlord, in which case the tenant no longer holds under a title derived from the landlord.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb Shankar Krishna, Mamlatdar of Jalgaon.

The plaintiff brought a summary suit to recover possession from the defendant of four fields, alleging that they had been let by him to the defendant for a year under a lease which terminated on Chaitra Shudh 1st, Samvat 1952, (15th March 1896), but the defendant refused to deliver up possession.

The defendant pleaded that he had purchased the fields from the plaintiff five days before the expiry of the lease under a deed of sale.

At the hearing the defendant applied for time to enable him to produce the deed of sale from the Registrar's office. The Mamlatdar rejected the application and awarded the plaintiff's claim, holding that even if the deed of sale was produced, it would not help the defendant, as he could not deny his landlord's title, and under the lease he was bound to give up possession.

The defendant applied to the High Court under its extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), and obtained a rule *nisi* calling on the plaintiff to show cause why the decision of the Mamlatdar should not be set aside.

*Mahadeo V. Bhat*, appeared for the Applicant (Defendant) in support of the rule.

*Gokuldas K. Parekh*, for the Opponent (Plaintiff) showed cause.

**Farran, C.J** :—From the judgment of the Mamlatdar it would appear that he would have allowed the defendant an opportunity of producing his alleged sale deed from the office of the Registrar had he not been under the impression that it would not, if produced and proved, have been a good answer to the plaintiff's claim. This was a mistake on his part. Had the plaintiff sold the land to the defendant, the defendant would no longer be holding under a title derived from the plaintiff. [430] Though it is not competent to a tenant to deny his landlord's title at the date of his lease, it is open to him to show that it has since determined. We set aside the decree and remand the case for a retrial having reference to the above remarks. Costs, costs in the cause.

*Decree set aside and case remanded.*

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* Application, No. 188 of 1896 under the Extraordinary Jurisdiction.

[22 Bom. 430]

## APPELLATE CIVIL.

*The 2nd September, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Bai Shirinbai............(Original Plaintiff) Appellant

*versus*

Kharshedji Nasarvanji Masalavala............(Original Defendant) Respondent.*

*Parsis—Marriage—Infant marriage among Parsis—Custom—Suit for declaration of nullity of infant marriage—Age of majority applicable in case of such suit—Indian Majority Act (IX of 1875), Secs. 2 and 3—Parsi Marriage and Divorce Act (XV of 1865), Sec. 3—Limitation Act (XV of 1877), Art. 120—Practice—Second appeal—Finding of lower Courts as to custom.*

A Parsi female, within three years after she had attained the age of twenty-one, brought a suit in the Court of the Subordinate Judge at Broach for a declaration that a marriage ceremony performed in 1869, when she was not three years old, did not create the *status* of husband and wife between her and the defendant. She had never lived with the defendant as his wife. The Subordinate Judge held that the marriage was valid and binding, being of opinion that the custom of infant marriage among the Parsis was well established and recognized. On appeal the Judge confirmed the decree, holding that at all events in 1869, when the marriage took place, the custom was common and recognized as binding. On second appeal the High Court concurred with the opinion expressed in *Peshotam* v. *Meherbai*, I. L. R., 13 Bom., 302, that the Zoroastrian system did not contemplate marriage in infancy, but the lower Courts having found a custom had grown up among Parsis in India validating such marriages, and that the custom was in force in 1869, did not consider it open on second appeal to arrive at an independent finding as to whether the evidence established the existence of such a custom.

*Held*, that a Parsi suing to have a marriage declared void is "acting in the matter of marriage" and, therefore, the Indian Majority Act (IX of 1875), which makes the age of eighteen the age of majority, does not apply to a question of limitation with regard to such suit. The age of majority in such a case is that prescribed by the Parsi Marriage and Divorce Act (XV of 1865), *viz.*, twenty-one years.

[431] *Held*, also, that article 120† of the Limitation Act (XV of 1877) was applicable to the above suit and that the plaintiff having for the purpose of bringing the suit attained her majority at twenty-one, the suit was not barred.

Act XV of 1865 contains no provision as to the age at which a Parsi marriage can be validly contracted, the matter being left to the general law which governs Parsis in that particular, just as the English Marriage Act (4 Geo. IV, c. 76) leaves it to be dealt with by the common law of England.

* Second Appeal, No. 117 of 1896.

† [Art. 120 :—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| Suit for which no period of limitation is provided elsewhere in this schedule. | Six years. | When the right to sue accrues. ] |

SECOND APPEAL from the decision of C. Fawcett, Assistant Judge of Broach, confirming the decree of Rao Saheb Chunilal D. Kavishvar, Subordinate Judge of Broach.

Suit by a wife for a declaration of nullity of marriage. The parties were Parsis. The suit was filed on 11th September 1890.

The plaintiff alleged that she was born on the 20th September 1866; that on the 25th January 1869, she being then between two and three years old, she went through the ceremony of marriage with the defendant; that she had never lived with him as his wife and had never ratified or acquiesced in the alleged marriage, but on the contrary had always repudiated it and had refused to live with the defendant. She contended that the pretended marriage was null and void, as she, being at the time an infant three years old, was incapable of consenting to the contract. She, therefore, prayed for a declaration that the marriage ceremony had not created the *status* of husband and wife, and that the alleged marriage was null and void.

The defendant contended (*inter alia*) that the suit was time-barred by limitation; that the marriage was legal and binding; and that plaintiff could not repudiate it.

The Subordinate Judge held that the marriage was valid and binding on the plaintiff. In his judgment he said:—

"The suit was not time-barred, because the cause of action accrued to plaintiff when she was informed of the marriage on reaching years of discretion, that is, at the age of fourteen. The ordinary period of limitation was six years under article 120 of Schedule II of the Limitation Act (XV of 1877), but under section 7 of the same Act the period was extended to three years from the date of plaintiff's attaining majority. She was proved to have been born on the 20th September 1866, and in the matter of the marriage the plaintiff attained her majority under section 3 of the Parsi Marriage and Divorce Act (XV of 1865) at the age of twenty-one and not at the age of eighteen under the Indian Majority Act (IX of 1875). The plaintiff was, [432] therefore, entitled to institute the suit at any time before she completed her twenty-fourth year, and the suit having been brought on the 11th September 1890, was not time-barred.

"The marriage was valid, as the custom of infant marriages among Parsis was well established and recognized as valid and was not prohibited by the Parsi Marriage and Divorce Act. The requisites to the validity of a Parsi marriage had also been observed in the present case. The marriage was, therefore, binding upon the plaintiff.

"The plaintiff could not repudiate the marriage. There was no authority for holding that she could, and the contrary opinion was expressed by SCOTT, J., in *Peshotam* v. *Meherbai*, I. L. R., 13 Bom., 302."

On appeal by the plaintiff the Judge confirmed the decree. He was of opinion that the suit was barred by limitation. The following is an extract from his judgment:--

"As to the custom, it is clearly established by the evidence in the case. Even the plaintiff's witnesses admit that the custom was formerly very prevalent and was recognized as valid among the Parsis. * * The custom is fast dying out, and it may be that it has now ceased to be a well-established custom having the force of law. That, however, is not the question for me to decide. It is beyond any doubt whatever that in 1869, when this marriage took place, the custom was common and recognized as binding

"The Subordinate Judge bases his decision upon section 2 (*a*) of the Indian Majority Act, 1875, read with section 3 of Act XV of 1865. He argues that as a Parsi boy or girl is not *sui juris* for the purpose of entering into a marriage contract until he or she reaches the age of twenty-one, *a fortiori*, he or she cannot file such a suit as this without being represented by a guardian or next friend within that period. I do not, however, think this argument sound. As laid down in the case reported at I. L. R., 3 Mad., 248, section 2 of Act IX of

1875 refers only to the capacity to contract, and not to the capacity to sue. It does not, therefore, follow that because the plaintiff was not *sui juris* so as to contract a valid marriage between eighteen and twenty-one, that she was not in a position to bring a suit in a case like this. The word 'minor' in section 7 of Act XV of 1877 must, in my opinion, be construed with reference to the general law as laid down in the Indian Majority Act, 1875, under which the plaintiff attained her majority at the age of eighteen. She should accordingly have brought her suit within three years from 20th September 1884, and as she failed to do so, her suit is time-barred."

The plaintiff preferred a second appeal.

*Macpherson* with *Ardesir, Hormusji and Dinsha* appeared for the Appellant (Plaintiff):—The suit is not barred by limitation. The [433] age of majority for marriage among Parsis is twenty-one years under section 3 of the Parsi Marriage and Divorce Act (XV of 1865); the Indian Majority Act (IX 1875) is not applicable. Under the provisions of section 2, clause (*a*), that Act is not applicable to marriage, dower, divorce and adoption. The words in the clause are "the capacity of any person to act." We contend that instituting a suit is a capacity to act; otherwise a person who is disabled from contracting marriage before he is twenty-one years old, would be entitled to bring a suit to set aside a marriage made with the consent of guardians. Under article 120, Schedule II of the Limitation Act (XV of 1877) the period of limitation for a suit of this nature being six years our claim is within time.

There is no custom of infant marriage among Parsis. The sacred books do not sanction it. If there had been such a custom the Legislature would have given binding effect to it by the Parsi Marriage and Divorce Act. The Legislature would not have ignored a recognized custom.

Marriage among Parsis is a contract between the husband and wife. The contracting parties must understand and be capable of consenting to the contract. Here the parties were infants when the marriage was performed and quite incapable of understanding or consenting to it.

According to the sacred books of the Parsis the earliest age at which the marriage ceremony can be performed is between seven and twelve years, but the plaintiff's marriage took place when she was only three years old.

*Scott* with *Manekshah J. Taleyarkhan* appeared for the Respondent (Defendant):—As to the question of limitation, it is true that the provisions of the Indian Majority Act do not apply to marriage, dower, divorce and adoption. But these exceptions cannot prevent a person *sui juris* from bringing a suit within the statutory period after attaining the age of eighteen years. The present suit is not brought under the Parsi Marriage and Divorce Act.

[FARRAN, C. J.:—The question is whether repudiating a marriage is acting in the matter of marriage.]

We submit it would be so.

[434] If the suit is in time then the question is whether the marriage is binding on the parties. Both the lower Courts have concurred in finding on the evidence that it is binding. That finding is a finding of fact and cannot be upset in second appeal. There is overwhelming evidence in the case with respect to the custom of such marriages among Parsis. The Parsi Marriage and Divorce Act does not lay down that infant marriages are illegal. Marriage may be a contract under that Act, but it is not necessarily a contract under the Contract Act.

**Farran, C. J.**.—The first question which has to be considered in this appeal is whether the suit is within time. The plaintiff Shirinbai, as found by the lower Courts, was born on the 20th September 1866. Her marriage with

the defendant, which she impeaches, took place in or about the year 1869. On the 20th September 1884, she, therefore, attained the age of eighteen, and on the 20th September 1887, the age of twenty-one years. On the 11th September 1890, within three years of the latter date she filed the present suit in which she prays for a decree declaring that the marriage ceremony performed in her infancy did not create the *status* of *wife* and *husband* between her and the defendant.

It is admitted that article 120 of the schedule to the Limitation Act governs the present case, as no other article in the schedule applies specifically to it. That article allows a period of six years within which to sue from the time when the right to sue accrues. We agree with the Lower Appellate Court that the right to sue—the cause of action—accrued during the plaintiff's infancy at the time when being of years of discretion she knew of the marriage and understood its consequences, which is found to be at latest when she was fourteen years of age. That being so, the effect of section 7 of the Act is to allow the plaintiff three years' time within which to sue after attaining her majority. We must, therefore, inquire whether for the purpose of bringing this suit the plaintiff attained her majority on reaching the age of eighteen or of twenty-one years. The question is by no means free from difficulty.

When the Parsi Marriage and Divorce Act (XV of 1865) was passed, twenty-one was the age of majority for Parsis in [436] the Presidency Town, as the English law in that respect applied to them—*Peshotam* v. *Meherbai*, I. L. R., 13 Bom., 309; *Naoroji* v. *Rogers*, 4 Bom. H. C. Rep., 1. There is no evidence before us to show that a different law as to the age of majority amongst Parsis prevailed in the mofussil. The Legislature in Act XV of 1865 adopted twenty-one years as the age of majority for Parsis, enacting by section 3 that no marriage contracted after the commencement of the Act should be valid, unless in the case of any Parsi who should not have completed the age of twenty-one years the consent of his or her father or guardian should have been previously given to such marriage. The schedule to the Act shows that the age of twenty-one was inserted in section 3 as denoting the limit of the age of infancy. For the purpose of the Act it must, therefore, we think, be taken that minority did not cease amongst Parsis until the age of twenty-one, and it was so held by CANDY, J., in *Sorabji* v. *Buchoobai*, I. L. R., 18 Bom., 366. The present suit is not, however, brought under the provisions of that Act, as (probably by an oversight) no provision is contained in it dealing with a case like the present where it is alleged that a marriage though in form a marriage is invalid in law, the element of consent being absent—*Peshotam* v. *Meherbai* (*supra*). It is, we think, to be regretted that a case like this cannot be tried before the special Parsi tribunal constituted by the Legislature for the trial of cognate cases.

The "Indian Majority Act" (IX of 1875) enacts generally (subject to a certain specific exception which does not apply here) that "every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before" (section 3), but by section 2 nothing in the Act "shall affect the capacity of any person to act in the following matters (namely), marriage * * * divorce, &c." The question is whether filing a suit like the present is "acting in the matter of marriage." If it is, a Parsi's minority is not in that respect altered—his capacity is not affected--by Act IX of 1875. On the best consideration which we can give to the subject we think that the question must be affirmatively answered. A Parsi suing for a divorce must, we [436] think, be an "acting by him in the matter of divorce." It is the only way in which a Parsi can act in that matter. A

Parsi suing to have a marriage declared void appears to us similarly an acting by him in the matter of marriage. It would be, as pointed out in argument, a strange anomaly if a Parsi between eighteen and twenty-one years of age could not contract a marriage without the consent of his guardian, but could sue to set it aside of his free will as though he were a major." This view is not perhaps wholly reconcileable with the judgment of the Madras High Court in *Puyikuth* v. *Kairhirapokil*, I. L. R., 3 Mad., 248, but that case was not argued, and the decision can be supported on other grounds. The Majority Act does not use the expression "capacity to contract," but "capacity to act," which is of much wider import. We have, therefore, come to the conclusion that the suit is not time-barred.

Turning to the merits of the appeal it is first to be observed that Act XV of 1865 contains no provision as to the age at which a Parsi can contract marriage. Though the Legislature in section 37 impliedly recognizes the validity of the marriage of a Parsi woman under the age of fourteen and of a Parsi male under the age of sixteen years, it does not deal with the age at which a Parsi marriage can be validly contracted. That matter is left to the general law which governs Parsis in that particular just as the English Marriage Act (4 Geo. IV, c. 76) leaves the same matter to be dealt with by the Common Law of England. Now in *Ardeseer* v. *Perrzeboye*, 6 M. I. A., 348, it is assumed by the Privy Council that the validity of a Parsi marriage must be determined by Parsi law and not by English law. That opinion was expressed in a case which was brought in the late Supreme Court on its Ecclesiastical Side, but the *dictum* is of general application and applies with even more force outside the limits of the Presidency Town where under Regulation IV of 1827 the law to be observed is, in the absence of Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone.

[437] The difficulty in this case is to ascertain what the Parsi law on the subject of infant marriage is. Mr. Justice SCOTT seems to have been of opinion that the Zoroastrian system did not contemplate marriage in infancy—*Peshotam* v. *Meherbai* (*supra*) at page 311. In that opinion we concur. The authorities referred to by him and those cited before us appear to be inconsistent with any other view.

In the present case, however, we are met by the finding of the lower Courts that there has grown up in India a custom amongst Parsis which validates and renders binding marriages between Parsis though contracted between children of tender age, and that that custom was in full force as a custom in 1869. Sitting as we are in second appeal we feel that it is not open to us to arrive at an independent finding as to whether the evidence establishes the existence of such a custom, as there is indisputably a large body of evidence upon the record in support of it.

It may well be, as contended by Mr. Macpherson, that the Assistant Judge might have treated that evidence as establishing, not a custom binding as law but a mere practice, the validity of which as embodying a customary law the backwardness and ignorance of Parsis generally in former times and of Parsi children especially as to their rights on attaining years of discretion or of majority and the habit of adhering to the wishes of their parents prevented from being questioned. "*Communis error*" (he argues) "*non facit jus.*" Such a finding, it is contended, would not have invalidated infant marriages where the parties on attaining years of discretion had not repudiated them, but would only have severed the marriage tie in rare instances like the present

in which the married pair or one of them at the proper time repudiated the marriage performed during their infancy. It would have illegitimized no children, but would have afforded relief in cases of hardship. That is an argument which is, we think, entitled to much consideration, but it is not open to us on second appeal to give effect to it. It no doubt was pressed upon the Assistant Judge, and he declined to accede to it; and we may add, that Mr. Justice SCOTT in the case which we have above referred to appears not to have been inclined to accept it, though he decided the case upon a different ground. It is also contended [438] for the appellant that the Assistant Judge has not understood the distinction between practice and custom, and that his finding amounts to nothing more than (what is conceded) a finding as to the common practice of infant marriages amongst Parsis. The Assistant Judge, however, finds that *the custom was both common and recognized as binding*, which shows that he fully appreciated the distinction as we should expect that a judge of the judicial acumen and knowledge of the Assistant Judge in this case would certainly do.

It is lastly urged that by the upheaval of opinion amongst enlightened Parsis upon this subject which resulted in the passing of Act XV of 1865 the custom, if it prevailed as a custom, was as it were broken up, and that after that time no such custom could as a binding custom exist, but we cannot accede to that argument. No doubt the more enlightened amongst Parsis revolted against the practice and desired that it should cease to be treated as a custom, but it is impossible to read the passages to which our attention was directed without seeing that the writers of them believed that the custom against which they inveighed in their view existed as such. If they thought that infant marriages allowed children the option of repudiating them on attaining years of discretion, there would have been no need for their asking for special legislation in the matter. The Parsi law would in this view have been in accord with the English law upon the same subject. The practice only would have needed reformation. We must confirm the decree with costs.

*Decree confirmed.*

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[ 22 Bom. 438 ]

## CRIMINAL REFERENCE.

*The 3rd September, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Imperatrix
*versus*
Narayan Vamanaji Patil.*

*Criminal Procedure Code (Act X of 1882), Sec. 545—Compensation—Injury caused by the offence committed—Indirect consequences resulting from the offence.*

**Compensation for loss caused by inability of the complainant to attend to his work on account of his time being taken up with the prosecution of the accused [439] cannot be ordered to be paid under section 545 of the Code of Criminal Procedure (Act X of 1882), which deals with expenses incurred in the prosecution and with compensation for the injury only.**

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* Criminal Reference, No. 86 of 1896.

THIS was a reference by H. F. Silcock, District Magistrate of Nasik, under section 438 of the Code of Criminal Procedure (Act X of 1882). The accused was convicted by the Second Class Magistrate of Dindori under section 504* of the Indian Penal Code (Act XLV of 1860) and sentenced to pay a fine of Rs. 12.

Rs. 5 out of the fine, which was recovered, were ordered by the Magistrate to be given to the complainant as compensation for the trouble and annoyance he had to suffer in prosecuting the accused and for the loss sustained by him for stoppage of his work.

Thereupon the District Magistrate of Nasik referred the case for the orders of the High Court under section 438 of the Code of Criminal Procedure (Act X of 1882). He was of opinion that the Magistrate's order was illegal "inasmuch as the section (section 545, clause *b)* allows the fine to be applied in compensation for the injury caused by the offence committed." He referred to 7 Mad H. C. Rep., Appx. XIII and to the *Queen* v. *Reddon*, I. L. R., 6 Mad., 286.

There was no appearance either for the accused or for the Crown.

The reference was heard by a Division Bench (PARSONS and RANADE, JJ.)

*Per* CURIAM :—The Magistrate has ordered compensation for loss of time, in that the complainant could not go on with his field work on account of the prosecution of the accused. We do not think that this comes within the provisions of section 545 of the Criminal Procedure Code which deals with expenses incurred in the prosecution and with compensation for the injury only.

We reverse the order of compensation.

*Order reversed.*

## [440] APPELLATE CIVIL.

*The 5th September, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Kamaya Naik............(Original Defendant No. 1) Appellant

*versus*

Devapa Rudra Naik and another............(Original Plaintiffs) Respondents.†

*Mortgage—Redemption—Mortgagee in possession—Payment by mortgagee of assessment payable by mortgagor—Right of mortgagee to tack amount so paid to mortgage-debt—Tender—Offer by letter to pay debt.*

Where a mortgagee in possession pays the assessment on the mortgaged land which was payable by the mortgagor, he has a right to tack on the amount so paid to his mortgage debt.

A mere offer by a debtor by letter to pay an amount cannot be treated as a tender either in law or in equity. In order to stop interest, a strict tender should be proved.

SECOND APPEAL from the decision of E. H. Moscardi, District Judge of Kanara, amending the decree of Rao Saheb N. B. Muzumdar, Subordinate Judge of Honavar.

*[Sec. 504:—Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

Intentional insult with intent to provoke a breach of the peace.

† Second Appeal, No. 318 of 1896.

Suit for redemption. The plaintiffs' vendors had mortgaged the land in question to the first defendant with possession for Rs. 80.

Under the mortgage the first defendant was to take all the profits of the land in lieu of interest and pay the Government dues, and the mortgage was to be redeemed in ten years.

In April 1890, plaintiffs sent a written notice to the first defendant calling on him to receive payment of the money and surrender the land. The defendant refused, and the plaintiffs thereupon brought this suit praying for redemption in payment of Rs. 80, and that the first defendant might be ordered to pay mesne profits to them from October 1890, amounting to Rs. 94-4-0.

It appeared that at the date of the mortgage the assessment on the mortgaged land was annas 12-3, but subsequently it had been increased to Rs. 4-3-10. The defendant (mortgagee) had paid this additional assessment. He now contended (*inter alia*) that he ought to be allowed to add the amount so paid by him to the amount due to him under the mortgage and to recover it [441] from the plaintiff, and that the increased assessment with interest was a charge on the land.

Defendants Nos. 2 and 3, who were brothers of defendant No. 1, did not appear.

The Subordinate Judge found (*inter alia*) that the first defendant was entitled to add the sum of Rs. 10-6-9 on account of the enhanced assessment paid by him and that the plaintiffs were not entitled to mesne profits, the alleged tender by them in April 1890, being insufficient. He, therefore, passed the following order :—

"Plaintiffs do recover possession of the land on payment to defendant No. 1 of Rs. 90-6-9 and his costs within four months from to-day. On default to pay, the right of plaintiffs to redeem the land shall for ever be foreclosed."

The following is an extract from his judgment :—

"The mortgage-deed was passed in 1867 and is duly registered. It is admitted by both parties. It stipulates that the land, which is a garden, is mortgaged for Rs. 80 ; that the mortgagee should enjoy possession of the garden ; that its annual profits are about 385 cocoanuts worth Rs. 5-12-3 ; that from this interest Rs. 5 per year and Government dues Re. 0-12-3 should be paid by the mortgagee ; that the mortgagee should never complain that the profits have fallen, and the mortgagor should not demand the increase in case the profits increase ; that the money should be paid within 10 years before the end of the cultivating season. Thus both parties knew that the profits would either increase or decrease, and stipulated that whatever the amount of the same it should be retained by the mortgagee in lieu of interest. But there is nothing in the deed showing that the parties expected that the Government dues of the land would be enhanced, or that it was their intention that the enhanced portion should be paid by the mortgagee. The Government dues at the date of the deed were annas 12-3 but since the introduction of the revenue survey in 1860 they have been Rs. 4-4-0 including the local-fund cess. The mortgagor, like the landlord of a mulgeni tenant, should, therefore, pay the excess. It is admitted by both parties that defendant No. 1 has paid all the Government dues till now. He is, therefore, entitled to recover the excess from the plaintiffs. But the amount is not a charge on the land. The deed shows that only Rs. 80 are a charge on the land. In *Mahadaji* v. *Joti*, I. L. R., 17 Bom., 425, it was held that in the case of a usufructuary mortgage if the deed charges only the principal on the land, the land cannot be security for interest. In the present case the mortgagee ought to have recovered the excess of Government dues from the mortgagor personally from time to time as was done in *Nikka Mal* v. *Sulaiman*, I. L. R., 2 All., 193.

[442] "Defendant No. 1 can, therefore, recover from plaintiffs only the last three years' excess, namely Rs. 10-6-9."

The plaintiffs appealed and defendant No. 1 preferred cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

The Judge found that under the terms of the mortgage the plaintiffs were liable to recoup the defendant the amount of assessment paid by him over and above the amount which had been payable at the date of the mortgage, but that such an amount was not a charge on the land (*Nugender Chunder* v. *Sreemutty Kaminee Dossee*, 11 Moo. I. Ap., 241), and that the plaintiffs were not bound to repay such amount before recovering possession of the land; that the notice given by the plaintiff in April 1890, was a sufficient tender of the redemption money; that the plaintiffs were entitled to mesne profits from the date mentioned by them in the plaint to the date of payment or delivery of possession less any amount paid by the defendant as assessment in excess of Re. 0-12-3, and that the plaintiffs were entitled to recover their costs from the defendant. He, therefore, passed a decree in the following terms:—

"Accordingly I amend the decree of the lower Court, and direct that, if the plaintiffs within six months of this date shall pay into Court the sum of Rs. 80, the defendants shall give them possession of the land in suit; otherwise, the plaintiffs shall be for ever foreclosed from redeeming the same. And I further direct that on the plaintiffs making such payment they shall be entitled to recover from the money so paid into Court, and from the defendant No. 1 personally, mesne profits at the rate claimed in the plaint from October 1890, to the date of delivery of possession, and their costs of this suit and appeal, less any payments in excess of annas 12-3 per annum, that defendant No. 1 may have made in respect of the Government assessment and local-fund cess of the land in suit. Defendant No. 1 to bear his own costs throughout."

The first defendant preferred a second appeal.

*Dattatraya A. Idgunji*, for the Appellant (Defendant No. 1):—When the defendant became mortgagee, the assessment on the land was annas 12-3. Subsequently it was enhanced to Rs. 4-3-10, that is, Rs. 3-7-7 were added to the original amount. The question is whether he is entitled to tack on the enhanced assessment to the amount of the mortgage. No doubt the mortgage is, [443] according to its terms, to be redeemed on payment of Rs. 80 only. But the defendant is mortgagee in possession and he had to look both to the safety of his security and the interest of the mortgagor. If he had not paid the increased assessment, the property would have been sold for arrears of revenue and he would have lost his security, and the mortgagor would have lost his right of redemption. The increased assessment is, therefore, a charge on the mortgaged property and the defendant has a lien on the property for the amount and is entitled to retain it till it is paid. See section 72 of the Transfer of Property Act (IV of 1882); *Shaik Idrus* v. *Vithal Rakhmaji*, P. J., 1879, p. 407; *Girdharlal* v. *Bholanath*, I. L. R., 10 All., 611. The Judge has relied on *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee*, 11 M. I. App., 241. But that decision is not against us. It supports our contention.

In April 1890, the plaintiff gave the defendant a notice offering to redeem on payment of Rs. 80. That notice was not equivalent to a tender of the redemption money, first, because the sum offered was not sufficient; secondly, because the notice ought to have been given, according to the terms of the mortgage, before the beginning of the cultivating season, that is, before the 31st March; and thirdly, because the money was not actually produced and tendered—Fisher on Mortgages, p. 739; section 84 of the Transfer of Property Act (IV of 1882). There having been no sufficient tender, mesne profits ought not to have been awarded against the defendant.

The order as to costs is wrong—*Sadashiv* v. *Bhivji*, P. J., 1886, p. 10.

*Vasudev G. Bhandarkar*, for the Respondents (Plaintiffs):—We would support the decree, but on grounds different from those taken by the Judge. Under the terms of the mortgage we were not liable to pay enhanced assessment.

The question whether the defendant as mortgagee is entitled to add the increased assessment to the amount of the mortgage depends upon the circumstances of the case—*Shaik Idrus* v. *Vithal Rakhmaji*, P. J., 1879, p. 407; *Achut* v. *Hari*, I. L. R., 11 Bom., 313.

**[444]** The Transfer of Property Act (IV of 1882) is not applicable. It came into force in this Presidency in January 1893. The present suit was filed in 1893, but we had made the tender in April 1890.

In the lower Courts the defendant did not contend that the notice which we gave in April 1890, did not amount to a tender. Even in the written statement no contention on this point was raised.

When we made the tender in 1890, section 14 of Regulation V of 1827 was in force, and it laid down that as soon as tender was made, interest should cease. The notice we gave requested the defendant to go to a certain house and there receive Rs. 80. The tender was sufficient. The plaintiffs then believed that they had offered the whole amount that was due—*Haji Abdul Rahman* v. *Haji Noor Mahomed*, I. L. R., 16 Bom., 141; *Rameshar Singh* v. *Kanahia Sahu*, I. L. R., 3 All., 653.

The award of mesne profits and costs depends on whether we made a good tender. If the tender was good, then the mortgagee would not be entitled to mesne profits and costs. If a mortgagee refuses to accept a proper tender, he becomes liable to pay the mortgagor's costs—Fisher on Mortgages, p. 912; *Dhondo* v. *Balkrishna*, I. L. R., 8 Bom., 190.

**Farran, C. J.**:—We agree with the District Judge in the construction which he agreeing with the Subordinate Judge has put upon the mortgage-deed in this case, *viz.*, that the produce of the land was to be taken at Rs. 5-12-3 both in favourable and unfavourable years and that out of the produce calculated on that basis the mortgagee was to pay himself his interest, *viz.*, Rs. 5 each year—and to pay the assessment 12 annas 3 pies on account of the mortgagor. The mortgage was for Rs. 80 and was made redeemable on payment of that sum.

Upon this construction the addition to the assessment of Rs. 3-7-7 which was laid upon the land in 1880 became payable by the mortgagor and not by the mortgagee. The latter, however, paid it.

**[445]** The next question is whether this payment of the addition to the assessment upon the land can be tacked to the mortgage or (as held by the lower Courts) gives rise to merely a personal remedy against the mortgagor to the extent of the payments made by the mortgagee on his account. The authority cited by the District Judge—*Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee*, 11 M. I. App., 241,—when carefully read does not bear out the proposition for which the District Judge has cited it. It is usually referred to as an authority for the opposite view. The actual decision turned upon a question of pleading. The representative of the mortgagee paid the arrears of the Government revenue to save the mortgaged estate from sale while it was in the possession of the widow of the mortgagor. He then brought a suit against the widow which did not raise any claim against the estate, but sought only a personal decree against her. This he obtained, but finding that he could not execute it against the estate he filed a supplemental suit against the widow and the reversioners praying that the amount of the original decree might be realized by selling the estate. The Privy Council affirming the judgment of the High Court held that the decree which the plaintiff had obtained could only be enforced against the widow's interest in the estate of her husband. The Judicial Committee, however, intimated their opinion

(p. 267 of the Report) that the plaintiff in a properly constituted suit would have been entitled to have had an additional charge on the estate declared in his favour by reason of his having saved the estate by payment of the Government revenue.

In *Shaik Idrus* v. *Vithal Rakhmaji*, P. J., 1879, p. 407, WESTROPP, C. J., and MELVILL, J., allowed a mortgagee in possession who had paid the Government assessment from his own funds a lien on the estate for the amount. That case is on all fours with the present. The same law was applied in *Girdhar Lal* v. *Bhola Nath*, I. L. R., 10 All., 611, where the Court held that the rules contained in section 72 of the Transfer of Property Act "only reproduce the doctrines which the Courts of Justice in India have uniformly adopted, and it reproduces the older law." The right of a mortgage to tack [446] assessment paid on account of the mortgagor to his mortgage-debt is also recognised in *Achut* v. *Hari*, I. L. R., 11 Bom., 313. We are, therefore, of opinion that the mortgagee-defendant had a lien on the mortgaged property for the amount of the added assessment which he paid on behalf of the mortgagor with interest thereon at the rate of 6 per cent. per annum. The lien for the extra assessment is given by the law and not by the terms of the mortgage-deed. The case cited by the Subordinate Judge—*Mahadaji* v. *Joti*, I. L. R., 17 Bom., 425,—where the decision turned on the terms of the mortgage-bond, is not, therefore, in point here.

It follows that the offer to redeem by paying Rs. 80, which the plaintiff-mortgagor made by his registered letter in April 1890, (Exhibit 35), was an offer of an insufficient amount which the defendant was not bound to accept. The lower Courts have treated this offer as a tender, and no objection appears to have been made to its sufficiency as such by the defendant. A mere offer by letter to pay an amount is not, however, usually treated as a tender either in law or in equity—Fisher on Mortgages, p. 912. In order to stop interest, a strict tender should be proved—Coote on Mortgages, p. 959 (5th Ed.).

The award of mesne profits against the defendant from the date of the notice of April 1890, cannot, therefore, be sustained, nor the order directing the mortgagee-defendant to pay the plaintiff's costs. The mortgagee not being in default is entitled to be paid his costs of the suit to redeem him—*Jamal* v. *Mahomedbhai*, P. J., 1874, p. 7; *Sadashiv* v. *Bhivji*, P. J., 1886, p. 10.

Unless the pleaders agree on the amount, we must remand the case to have the accounts taken on the footing of this judgment. The appellant is entitled to his costs in this Court.

*Case remanded.*

**NOTES.**

[See also (1904) 14 M. L. J., 493; (1907) 18 M. L. J., 31; (1910) 32 All., 612 P. C., ; as regards the liability of the mortgagee, and (1914) 36 All., 189, as regards tender.]

## [447] INSOLVENCY JURISDICTION.

*The 10th December, 1897.*

PRESENT:

SIR. C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

*In re* Bhagwandas Narotamdas, an Insolvent.

Chunilal Dharamdas and others............Appellants

*versus*

Harilal Ramdas............Respondent.

*Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vict., C. 21), Sec. 36—Order for examination of witnesses where witnesses are defendants in a suit brought by insolvent prior to his insolvency—Practice—Procedure.*

One Bhagwandas Narotamdas filed a suit against the three appellants Chunilal Dharamdas, Dharamdas Dullabram and Chotalal Ishwardas praying for a declaration that he was their partner in a certain business, &c Chunilal Dharamdas and Dharamdas Dullabram filed their written statements, and affidavits of documents were made and inspection given and taken on either side; but Chotalal Ishwardas did not file either his written statement or his affidavit of documents. On the 28th July 1897, the plaintiff Bhagwandas was adjudicated an insolvent, and on the 4th September, Chotalal Dharamdas and Dharamdas Dullabram obtained an order under section 370 of the Civil Procedure Code (Act XIV of 1882), directing the Official Assignee to elect, on or before the 18th September 1897, whether he would proceed with the suit, and if so, to give security for costs.

On the 4th October 1897, one Harilal Ramdas, a creditor of the insolvent, obtained an order from the Insolvent Court under section 36 of the Insolvent Act (Stat. 11 and 12 Vict., C. 21) for the examination of Chunilal Dharamdas, Dharamdas Dullabram and Chotalal Ishwardas with reference to the estate and effects of the said insolvent, and the 10th November 1897, was appointed for their examination. On the said 10th November they obtained a rule from the insolvent Court to set aside the said order for their examination, or in the alternative to postpone their examination until after the above suit, in which they were defendants, should be heard. The rule was subsequently discharged and the examination was ordered to proceed On appeal,

*Held*, that Chunilal Dharamdas and Dharamdas Dullabram ought not to be prejudiced in their defence in the suit brought against them by the insolvent by being subjected to an examination until that case was heard. By filing their written statements, and giving inspection of documents, they had given all the information they could be required to give until the hearing should take place.

As to Chotalal Ishwardas, however, the order for examination was confirmed, he not having filed any defence in the civil suit nor given inspection.

[448] APPEAL from STRACHEY, J.

This was an appeal from an order made by STRACHEY, J., as Commissioner of the Insolvent Court, discharging a rule obtained by the appellants to set aside an order made for their examination under section 36 of the Indian Insolvent Act (Stat. 11 and 12 Vict., C. 21), or to postpone their examination until after the hearing of a certain suit in which they were defendants.

On the 10th December 1896, Bhagwandas Narotamdas filed a suit (No. 653 of 1896) against the three appellants, Chunilal Dharamdas, Dharamdas Dullabram and Chotalal Ishwardas, praying for a declaration that he was their

partner in a certain business and for accounts and other relief. Two of the said defendants, *viz*., Chunilal Dharamdas and Dharamdas Dullabram, duly filed their written statements of defence, and affidavits of documents were made and inspection given and taken on either side; but the third defendant, Chotalal Ishwardas, did not file either his written statement or his affidavit of documents.

On the 28th July 1897, the plaintiff Bhagwandas Narotamdas was adjudged an insolvent under section 9 of the Indian Insolvent Act at the instance of one Pranjiwandas Laldas, and was directed to file his schedule within thirty days from that date.

On the 4th September 1897, Chunilal Dharamdas and Dharamdas Dullabram obtained an order under section 370 of the Civil Procedure Code (Act XIV of 1882) in Suit No. 653 of 1896, directing the Official Assignee to elect, on or before the 18th September 1897, whether he would proceed with the said suit, and if so, to give security for costs.

On the 4th October 1897, one Harilal Ramdas, a creditor of the insolvent Bhagwandas, obtained an order from the Commissioner of the Insolvent Court under section 36 of the Insolvent Act for the examination of the three defendants Chunilal Dharamdas, Dharamdas Dullabram and Chotalal Ishwardas with reference to the estate and effects of the said insolvent, and by the said order the 10th November 1897 was appointed for their examination.

On the said 10th November 1897, they applied for and obtained from the Commissioner of the Insolvent Court a rule *nisi* calling upon the said Harilal Ramdas to show cause why the [449] aforesaid order for their examination should not be revoked or set aside, or in the alternative why their examination should not be postponed until after the hearing of the Suit No. 653 of 1896, in which they were defendants.

On the 24th November 1897, this rule was discharged and the examination was ordered to proceed.

Against this order they appealed, and on the 30th November 1897, they obtained a rule *nisi* from the Appeal Court calling upon Harilal Ramdas to show cause why execution of the order of the Insolvent Court of the 24th November should not be stayed. The Appeal Court also granted an *interim* stay of the said order pending the argument of this rule.

The rule now came on for hearing.

*Lang* (Advocate-General), for Chunilal Dharamdas and Dharamdas Dullabram:—My clients have taken no part in the insolvency proceedings. They are defendants in a civil suit brought against them by the insolvent which has not yet been heard. In that suit they have given inspection of the documents in their possession to the solicitors of the insolvent plaintiff. These solicitors are now acting for the Official Assignee, who represents the creditors. The creditor Harilal should not be permitted to examine them until after the suit is heard. Such a proceeding may greatly prejudice them in their defence in that suit. The order directing their immediate examination is wrong—*In re Franks*, (1892) 1 Q. B., 646; *In re Metropolitan Bank*, 15 Ch. D., 139; *In re North Australian Territory Co.*, 45 Ch. D., 87.

*Starling*, for Chotalal Ishwardas:—Although my client has not yet filed his defence in the civil suit, he ought not to be examined until that case is heard—*In re Imperial Continental Water Corporation*, 33 Ch. D., 314; *In re North Brazilian Sugar Factories*, 37 Ch. D., 83.

*Mankar*, for the Creditor-Respondent, Harilal Ramdas:—My client appears in the schedule filed by the insolvent as a creditor to a large amount. The

Official Assignee, who now represents him and the other creditors, is required by the order of the 4th September 1897, to elect whether he will proceed with the [460] Suit No. 653 of 1896 against the three appellants, and if so, to give security for costs. My client and other creditors are entitled, before providing such security for the Official Assignee, to ascertain whether that suit, if proceeded with, is likely to bring in any assets for distribution among the creditors. That information can only be obtained by examining the three appellants under section 36 of the Insolvent Act. They are alleged to be debtors of the insolvent. It is unreasonable to require the creditors and the Official Assignee to elect and to give security in the dark. My client in his affidavit alleges that the insolvent and the appellants are acting in collusion. He cited *In re Metropolitan Brush Electric Light and Power Co.*, 51 L. T. (N.S.), 817; *Massey* v. *Allen*, 9 Ch. D., 164.

**Farran, C.J**:—We think that the two appellants who have filed their written statements in Suit No. 653 of 1896, and who have in that suit given inspection of the documents in their possession, ought not to be examined until that case is heard. They have given all the information they can be required to give in that suit until the hearing takes place. They ought not to be prejudiced in their defence by being subjected to an examination under section 36 of the Insolvent Act. That section was not intended to enable an insolvent plaintiff to cross-examine persons against whom he has filed a suit. Here it is not the Official Assignee who desires further information; it is a creditor of the insolvent.

As to the third appellant Chotalal Ishwardas, we think his position is different from that of the others. He has not filed any defence to the suit, nor has he given any inspection. His examination under section 36 may proceed. He, of course, need not answer any questions to his prejudice, if so advised. As to him we confirm the order of the Insolvent Court. The examination of the other two appellants should be postponed until the disposal of Suit No. 653 of 1896.

The respondent Harilal must pay the costs of the two successful appellants.

*Order varied.*

Attorneys for Appellant:—Messrs. *Hiralal, Mulla and Mulla.*

Attorneys for Respondent:—Messrs. *Mulji and Raghowji.*

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## [461] ORIGINAL CIVIL.

*The 27th and 28th January, 1898.*

PRESENT:

MR. JUSTICE FULTON.

Stevens and another............Plaintiffs

*versus*

Bedford............Defendant.*

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*Friendly society—Rules—Power to alter rules.*

The Bombay Uncovenanted Service Family Pension Fund was a voluntary society established in 1850. Its object was to provide pensions for the widows of its members. One of its rules provided that the rules of the society were subject to such additions and alterations as might from time to time be sanctioned by the general body of subscribers, and, by

* Suit, No. 386 of 1897.

the form of application for admission as a member, each applicant promised and engaged to abide by the rules of the society.

The plaintiff became a member in 1875. At that time one of the rules (which had been passed in 1871) provided that the pensions of widows resident in Europe should be payable to them at the rate of 2*s.* per rupee.

On the 20th July 1895, the society passed a new rule which provided that all pensions due or becoming due after the 31st July 1895, should be paid to incumbents residing in Europe or the colonies at the market rate of exchange on the day of remittance.

The plaintiff contended that the society was not competent to alter the rule passed in 1871 by which he had been induced to join the society, and he prayed for a declaration that his wife, if and when she became a widow, would be entitled to have her pension paid at par.

*Held*, dismissing the suit, that the society, was competent to alter its rules and that the plaintiff was bound by such altered rules. The contract with the plaintiff was that his widow, if he left one, should receive such pension as the rules prescribed and the rules were liable to alteration by a majority at a general meeting to which he would be subject so long as he remained a member.

THE defendant was the chairman of the managing committee of a voluntary society, established in 1850, called the Bombay Uncovenanted Service Family Pension Fund. The society was not incorporated or registered under any Act. Its funds were formed by the subscriptions of its members.

The object of the society was to provide pensions for the widows of its members. Its membership was restricted to those who were or had been uncovenanted servants of Government employed in the Bombay Presidency.

[452] The first plaintiff was a subscriber and member of the society. He had become a member in 1875. At that date, by a rule of the society which had been passed in 1871, the pensions of widows who resided in Europe were payable to them at the rate of 2*s.* per rupee. A prospectus had been issued by the society which set forth the advantages it offered to its members and amongst them was mentioned the payment of pensions at par as provided by the rule of 1871. This rule was altered in 1887 as to widows of those who became members after the 1st January 1888, but it was still maintained as to the widows of those who were members prior to that date. On the 20th of July 1895, however, the society passed a rule making the pension to all widows who should become incumbents on the fund after the 1st August 1895, payable at the market rate of exchange on the day of remittance. The rule of 1871 was thus wholly repealed.

The first plaintiff and his wife (the second plaintiff) brought this suit to have it declared that this last mentioned rule was *ultra vires* of the society, and that the second plaintiff would be entitled, in case she became a widow, to recover her pension at par as provided by the rule of 1871, which was in force when the first plaintiff joined the society.

The plaint stated that the first plaintiff had joined the society in 1875 and had become a subscriber for a pension of Rs. 60 a month to his wife if and when she should become a widow; that the rule as to pensions then in force was a rule passed in 1871 which provided that incumbents on the fund residing in Europe should be paid their monthly pension at the rate of two shillings to the rupee; that this rule had been passed in 1871 in order to protect such incumbents from loss by exchange which had then fallen to about 1*s.* 10½*d.*, and that it was prominently printed on the outside of the printed rules as constituting one of the most valuable advantages to be obtained by joining the society, and that the first plaintiff was, in fact, mainly induced by reason of such advantage to join the society.

The plaint further stated that in 1887 a new rule was made providing that only widows of subscribers who had joined the [453] society prior to 1st January 1888, should receive their pensions at par.

It then set forth the new rule passed on 20th July 1895, which repealed the rule of 1887 and provided that all pensions falling due after the 31st July 1895, should be paid at the market rate of exchange.

With reference to this rule the plaintiffs stated their case as follows :—

"7. The plaintiffs submit that it was not competent to the Association to deprive the plaintiff Mary Elizabeth Stevens of her right to be paid her pension at par, inasmuch as the said Frederick William Stevens joined the said Association on the faith of payment at such rate of par and the Association contracted with him to that effect."

The prayer of the plaint was as follows :—

"(a) That it may be declared that it was and is not competent to the Association to deprive the plaintiff Mary Elizabeth Stevens of her right to receive her pension, if and when the same becomes and so long as the same is payable, at par.

"(b) That the plaintiff Mary Elizabeth Stevens if and when she becomes widow of the plaintiff Frederick William Stevens will as such widow for her life, except during any period of remarriage, be entitled to receive her pension at par.

"(c) That the plaintiffs' costs may be paid out of the funds of the Association."

The defendant was sued as one of the parties interested, and notice of the suit was published under section 30 of the Civil Procedure Code (Act XIV of 1882).

The defendant filed a written statement in which he contended that the new rule of July 1895, was valid and binding on the plaintiffs; that at the time the first plaintiff joined the society he had notice that the rules were subject to such alterations and amendments as the subscribers might from time to time think necessary or desirable; and that he had become a subscriber on the terms and conditions contained in the rules then in force, or in such other rules as might afterwards be adopted by the subscribers or the majority of them.

[454] The application of the first plaintiff in 1875 to be admitted as a subscriber was in the following form :—

"TO THE SECRETARY TO THE BOMBAY UNCOVENANTED SERVICE FAMILY PENSION FUND.

"Sir,—I request to be admitted a subscriber to the Bombay Uncovenanted Service Family Pension Fund, and I hereby promise and engage to submit to and abide by the Rules of the Institution."

In reply to the above application he received a formal notice of his admission enclosing a copy of the rules of the fund and a certificate in the following form :—

"Certified that Mr.——————has been admitted a member of the Bombay Uncovenanted Service Family Pension Fund, and that, provided he conforms to the requirements of that Institution, his widow will be entitled to a monthly pension of Rs.————."

Amongst the rules in force at the date of the first plaintiff's admission to the society were the following :—

"VI. No proposition affecting the stability of the Institution, or for the alteration of its rules, nor any special question shall be discussed at any of the meetings of the subscribers, unless notice thereof be given in writing to the Secretary four weeks before the meeting is held, and a copy of such notice shall be circulated to subscriber at least three weeks before the day of meeting."

"XLVII. These rules are subject to such additions and alterations as may from time to time be deemed necessary."

The rules were revised and altered from time to time, and in the copy issued in 1894 the latter of the above rules stood as follows :—

"68. These rules are subject to such additions and alterations as may from time to time be sanctioned by the general body of subscribers."

It appeared that under the rules of the fund as altered in 1887 the first plaintiff's subscription, which originally was Rs. 19-13-6 per mensem, had been reduced by abatement to Rs. 4-1-10 per mensem for the years 1895 to 1897, and from the year 1897 he would not be required to pay any subscription.

It further appeared that by accretions made under the rules of the fund the pension which would be payable to the first plaintiff's wife in case of his death would be upwards of Rs. 84 a month instead of Rs. 60 as originally subscribed for.

**[455]** The written statement set forth the heavy loss the society had suffered by reason of the fall in exchange and the representations made to it by the Actuary to whom its affairs were submitted every two years as required by Government. The following paragraph of the written statement states the case of the defendant:—

"15. Under the above stated circumstances it became necessary in the common interest of all the subscribers to the said fund and to save the said fund from insolvency to adopt the following resolution which was duly passed by a majority of 98 (*i.e.* 147 to 49) at a special general meeting of the subscribers duly convened and held on the 20th July 1895, *viz.*, 'that pensions already due or becoming due before the 1st August 1895, on risks accepted before the 1st January 1888, shall be payable to incumbents residing in Europe or the colonies at the fixed rate of 2s. to the rupee, but that all other pensions due or becoming due after the 31st July 1895, shall be paid to incumbents residing in Europe or the colonies at the market rate of exchange on the day of remittance.' The said resolution is the resolution complained of by the plaintiffs and is Rule No. 62 of the Rules now in force."

*Scott* (with *Inverarity*), for Plaintiffs.—The first plaintiff became a member of the society because of the then existing rule of 1871 under which his widow would receive her pension in England at par. That was the inducement to him and to many other Europeans, and was part of his contract with the society. It is upon these terms that he has continued to be a member and has paid his subscription. The society is bound to fulfil its obligations to him. It cannot now alter the terms of its contract by merely passing a new rule. The society having secured for itself the benefit of the large sums paid by the European members who were induced to join by the old rule of 1871 ought not to be allowed to deprive those members of the advantage for which they subscribed. The society is prosperous and cannot plead necessity. It is breaking faith with those who subscribed under the rule of 1871 merely in order to apply its superfluous funds towards the general abatement of subscriptions. By the new rule of 1895 the society in effect confiscates part of the pension for which the plaintiff has subscribed. If it has power to confiscate a part, it has power to confiscate the whole. A majority cannot deprive a member of his rights. The fact that the plaintiff has benefited with others by the abatement of his subscription does not take away his right to claim the **[456]** special benefit as to the pension for which he subscribed. Further, we submit that the "general body" of subscribers in Rule 68 means all the subscribers. The members must be unanimous The rule does not give a mere majority any power. He referred to *Falle* v. *MacEwen*, I. L. R., 7 Cal., 1; *East India Company* v. *Robertson*, 12 Moo. P. C. C., 400; *Secretary of State for India* v. *Underwood*, L. R., 4 Eng. and Ir. Ap., 580; *Edwards* v. *Warden*, L. R., 9 Ch., 495 *per* JAMES, L. J., at p. 502. The first plaintiff received no notice of the meeting by which the new rule was made. He was in England at the time.

*Kirkpatrick* (with *Lang*, Advocate-General), for the Defendant:—There was no contract with the first plaintiff as to the amount of his widow's pension or the mode of its payment. The contract with him was to admit him as a member of the society and to such benefits as the rules from time to time might allow to its members. The members themselves framed those rules and they claimed and exercised the right to alter them as they thought desirable. (See Rules 6 and 47 *supra.*) The first plaintiff had full notice of this, and elected to join the society on these terms. (See his application *supra.*) All the rules stood on an equal footing. There was no agreement with the plaintiff that any one of them should be fixed and permanent as regards him. All were equally subject to alteration. As a member he had an equal voice with the other members in making and altering them, but he is bound by the vote of the majority. As to the power of a majority, see Lindley on Partnership (5th Ed.), p. 313; Lindley on Companies (5th Ed.), p. 578-79; Contract Act (IX of 1872), section 253, clause (5). Notice of the meeting in July 1895, was sent to him by registered post. The members can deal with their common property among themselves just as a partnership can—*Silver* v. *Barnes*, 6 Bing. N. C., 180, *Burbidge* v. *Cotton*, 5 DeG. & Sm., 17 at p. 27. They can decide whether any and how much of it is available for division. A person may be induced to join a firm because it divides large profits, or a company because it declares high dividends, but that fact would not preclude the partners from determining in their common interest not to divide all the profits, or the company from refusing to continue to pay high dividends. Nearly all the [457] rules have been altered since the plaintiff became a member, and he has acquiesced. By some of these alterations he has largely benefited, *e.g.*, by abatement of his subscription. He cannot now question the right to alter the rules. The words "general body" in Rule 68 mean majority at a general meeting. The necessity or expediency of changing the rule as to pensions is not a question for the Court. If the society had no power to make the new rule of 1895, it had none to make the rule of 1871 which the plaintiffs want to enforce. In any case the decree prayed for cannot be made, nor are the plaintiffs in a position to sue, the pension in respect of which this suit is brought having never become payable at all, nor can any decree be made against defendant—Collett on the Specific Relief Act, pp. 276, 78, 82; Specific Relief Act I of 1872, section 42. He referred to the following cases:—*East India Company* v. *Robertson*, 12 Moo. P. C. C., 400; *Boldero* v. *East India Company*, 11 H. L. C., 405; *Secretary of State for India* v. *Underwood*, L. R., 4 Eng. and Ir. Ap, 580; *Edwards* v. *Warden*, L. R., 9 Ch., 495; 1 Ap. Cas., 281; *Smith* v. *Galloway*, (1898) 1 Q. B., 71; *Falle* v. *MacEwen*, I. L. R., 7 Cal., 1.

*Scott* in reply:—The fact that other rules have been altered is of no importance. It is not shown that any member objected, or that any question was raised, as to the validity of the alteration. The plaintiff had a vested interest. The contract was partly performed—*Gerhard* v. *Bates*, 2 Ell. and B., 476; *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q. B., 256 at pp. 265, 271-2.

**Fulton, J.**:—This is a suit against the chairman of the committee and the members of the Bombay Uncovenanted Service Family Pension Fund, to establish the right of members who joined before the 1st January 1888, to have the pensions of their widows when resident out of India paid at the rate of two shillings to the rupee.

The first plaintiff became a member of the fund in 1875. Before doing so he received a prospectus, in the form of Exhibit B, in which it was stated under the heading of "advantages" that pensions to widows in England were paid at the fixed rate of two [458] shillings per rupee. At that time exchange

was a little under 1*s*. 10½*d*. and to a gentleman domiciled in England the offer of a fixed rate of exchange at 2*s*. for the widow's pension naturally rendered the scheme far more attractive than would otherwise have been the case. The rule on the subject is to be found in the last sentence of No. 30 of the Rules of 1873, which provides that incumbents on the fund residing in England shall be paid their monthly pensions at the fixed rate of two shillings to the rupee. This proviso was added in 1871. At the end of 1887, in consequence of the continued fall of exchange, the rule was amended so as to exclude from the benefit of the fixed rate the widows of members who joined after the 1st January 1888. The benefits secured to members who had joined before that date were left untouched : *vide* No. 62 of the Rules of 1894.

On the 20th July 1895, in consequence of a report of the Actuary on the position of the fund, it appeared necessary to guard still further against loss by exchange, and another amendment of the rule was made abrogating the privilege of the two-shilling rate previously secured to the members who had joined before the 1st January 1888. The amendment did not touch the pensions of widows who became incumbents on the fund before the 1st August 1895, but abolished the privileged rate in the case of all who might become entitled to their pensions after that date.

Now on behalf of the first plaintiff it is contended that it was not competent to a majority of the members of the fund to make such an alteration in the rules against the wishes of a minority, and, secondly, that the proceedings of the meeting were invalid, because notice had not been sent to Mr. Stevens.

The first of these questions is the more important of the two, and will, therefore, be first considered. The society is not incorporated in any way, and the rights of the members *inter se* depend entirely on contract. When a member joins, he enters into a contract with the other members of the society who are represented by their agent or secretary authorized to admit him. The same process is repeated as each new member is accepted. In this way the members mutually contract with each other to provide benefits for widows and others on certain prescribed [459] terms. For convenience the terms are embodied in rules which are liable to alteration from time to time. As each new member joins, "he promises and engages to submit to, and abide by, the rules of the institution," and receives a copy of the rules on the acceptance of his application. We have, therefore, to look to the rules as they stood when Mr. Stevens joined. The clause of Rule 30, which had been added in 1871, provided for the payment, at two shillings, of the pensions of incumbents residing in England; and the 47th Rule declared that the rules were subject to such additions and alterations as might, from time to time, be necessary. The earlier rules prescribed the procedure to be followed and the provision of Rule 22, that votes of subscribers at all their meetings should count and have effect singly, implied clearly that the decision of any question was to be determined by vote. In the Rules of 1894 there was some change of phraseology. And in the 68th of those rules it was declared that they were subject to such additions and alterations as might from time to time be sanctioned by the general body of subscribers. Upon this rule it was argued that the words "general body" meant the whole body and required unanimity, but I am unable to accept this view. The earlier portion of these rules, like those of 1873, prescribed the procedure for general meetings, and the 11th rule repeated the provision about the votes of subscribers having effect singly. The phrase "general body" then was evidently used simply to indicate that the rules could only be altered by the subscribers acting as a body and deciding questions in the usual way by vote at a meeting, and cannot bear the meaning for which Mr. Scott argued,

The expression occurs in several other rules. In the 32nd rule it was declared that at each annual general meeting one of the auditors should be elected by the "general body" of the subscribers; but no one, I think, would contend that unless there were unanimity at the meeting no auditor could be elected. If it had been intended that there was to be no alteration of the rules in general, or of any particular class of rules, without the unanimous assent of all the members, such a provision would certainly have been expressed in clear and unmistakeable phraseology. It appears then to me that the contract with Mr. Stevens was that his widow, if he left one, **[460]** was to receive such pension as the rules prescribed, and that the rules were liable to alterations by a majority at a general meeting to which he would be subject so long as he remained a member. The prospectus, it is true, raised expectations which were not guaranteed by the rules, but it is, I think, impossible to treat the prospectus as part of the contract which was embodied in the application and acceptance. The application specifically referred to the rules which contained a provision for amendment, and though I cannot but sympathize with persons who rested their expectations on the prospectus, it seems impossible to say that they were justified in doing so, for if they had referred to the rules which they agreed to submit to, they would have noticed that they were liable to alteration. The prospectus was, I feel sure, issued in perfect good faith. In 1875 the necessity for altering the rules was not foreseen. But though there was probably no thought of such an alteration as has actually been made, the right of making alterations was expressly reserved. Doubtless the right to alter rules was subject to the limitations noticed by Lord HATHERLEY in the *Secretary of State for India* v. *Underwood*, L. R., 4 Eng. and Ir. Ap., 580 at p. 588, that "the power of making general rules must surely be one of making rules that operate equally on all subscribers: they could not, by a majority, determine that all subscribers of ten years' standing should pay twice as much or half as much as those of five years' standing......No rules, unless the expressions were insuperably the other way, would ever be so construed as to enable a majority having an interest directly opposed to the vested interest of a minority to confiscate that interest." Mr. Scott referred to *Edwards* v. *Warden*, L. R., 9 Ch., at p. 504, to show that the majority of the members of a fund could not deprive another member of his vested right. He argued, moreover, that Mr. Stevens having for many years subscribed to the fund on certain terms had a vested right to the performance, by the other members, of their contract with him. These propositions will not be disputed; but what was that contract? It seems to me that it was simply that the widow was to receive such benefits as the rules in force when she became entitled to them might prescribe. Mr. Stevens has at present no vested interest in any particular benefit. Can it then be argued **[461]** that the new rule was not binding on him, because having regard to the probabilities arising from the different positions and nationalities of the members it was so inequitable that a majority should be entitled to abolish the privileged exchange that it could not be held to be an alteration authorized by Rule 68? If the matter had been *res integra* the answer to this question might, perhaps, have been doubtful, for it is a subject in regard to which the decision of Lord HATHERLEY shows that there is room for doubt: but the case seems governed by the decision of the Calcutta High Court in *Falle* v. *MacEwen*. It was urged that this decision was erroneous. I am unable to take this view. Irrespective of the deference due to the Court by which the case was decided, I think that the conclusion arrived at is very firmly based on the judgments of the majority of the House of Lords in the *Secretary of State* v. *Underwood*. If by a vote of the Civil Service Mr. Underwood could be deprived of future accumulations which his position in that service rendered it almost certain

that he would enjoy, and in spite of the fact that his chances of doing so were infinitely greater than those of the majority of the members who were probably his juniors by many years, and had before them much greater risk of never realizing their annuities, it seems hardly possible to contend that a vote passed by members of this fund with a view to restore the equality of widows' pensions which had been disturbed by the rule of 1871 was beyond the competence of the subscribers, merely because the expectations of some members under the former rules were considerably greater than those of others: for it must be admitted that the uncertainty whether Mr. Stevens' estate will suffer by the alteration of the rule is greater than was the uncertainty in Mr. Underwood's case.

I have arrived at this conclusion with some reluctance and hesitation, but I find no argument to justify my dissenting from the carefully considered decision of the Calcutta High Court. The case of the *East India Company* v. *Robertson*, 12 Moo. P. C. C., 400, in no way militates against this view, for the Judicial Committee of the Privy Council decided in Mr. Robertson's favour only on the ground that before the revised rules were passed he had acquired a title to the refund of the excess of his subscriptions, because in the **[462]** year 1852 he had accepted the annuity on condition that the excess of his payments should be refunded to him. The question whether the apprehended deficit in the fund now under consideration could more properly have been guarded against by withdrawing the abatements of subscriptions instead of by abolishing the privileged rate of exchange, was one within the power of the meeting to determine, and does not appear to me to fall within the province of the Court to decide.

Mr. Kirkpatrick suggested that the rule of 1871 was *ultra vires*, but as there is no evidence to show that there was any opposition to it at the time, and it has been assented to by all members joining between 1871 and 1895, it is now far too late to take such an objection.

The other point to be considered is about the alleged want of notice to Mr. Stevens of the proposal to convene the meeting. The facts appear to be as follows:—Mr. Stevens was in England at the time; but he has not shown that before his departure he had given any special address to which communications were to be sent. Notices of the meeting of the 20th July were sent out on the 6th June. The notice for Mr. Stevens was apparently addressed to Rampart Row School of Art residence and was, I think, sent by post. It never reached Mr. Stevens. What became of it, it is impossible to say; but from the mere fact that it was not forwarded from the School of Art, I cannot infer that it was not sent there as stated by the clerk. Having regard, then, to the presumption usually drawn as to the regularity of official acts, I think it is but reasonable, in the absence of any statement by Mr. Stevens to the contrary, to hold that the School of Art residence was the last address he had given to the office, and that the transmission of the notice to that address fulfilled the requirements of Rule 7. The rule must be construed reasonably, and if the prescribed notice is sent to the last address given by the subscriber, its provisions seem to be complied with. Otherwise, if any member changed his residence without informing the secretary, it would be impossible to make any alterations in the rules during his absence, and the position of the fund might be seriously imperilled.

**[463]** In these circumstances I must reject the claim, but as this was a test case, and the litigation was in some measure occasioned by the careless wording of the prospectus, I shall follow the precedent set by the Calcutta High Court and make no order as to costs, excepting that the defendant may get

all his costs, charges and expenses properly incurred to be taxed as between attorney and client, including costs (if any) preliminary to suit, out of the fund.

*Suit dismissed.*

Attorneys for the Plaintiffs:—Messrs. *Crawford, Burder and Co.*

Attorneys for the Defendant:—Messrs. *Brown and Moir.*

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[ 22 Bom. 463 ]

## FULL BENCH.

### APPELLATE CIVIL.

*The 8th September, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS, MR. JUSTICE RANADE AND MR. JUSTICE HOSKING.

Laldas Narandas............(Original Defendant No. 2) Appellant

*versus*,

Kishordas Devidas and others............(Original Plaintiffs) Respondents.*

*Civil Procedure Code (Act XIV of 1882), Sec. 244—Amending Act VII of 1888—Agreement before decree by the decree-holder not to recover costs which the decree might award—Question to be determined in execution and not by a separate suit.*

Devidas and Harilal obtained a decree on an award with costs against Shankarlal and Laldas. When they applied for its execution against Laldas in order to recover his half share of the costs, he pleaded that before the proceedings had commenced, the plaintiffs had entered into an agreement with him that none of the costs which might be awarded by the Court should be recovered from him.

*Held*, that the existence and validity of such an agreement ought to be determined in execution under the provisions of section 244 of the Civil Procedure Code (Act XIV of 1882) and not in a separate suit.

APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Thana, in execution of a decree.

[464] Harjivandas, Shankarlal and Laldas were three brothers. A disagreement having arisen between them with respect to the division of the family property, they referred the dispute to an arbitrator, who made an award dividing the property. Subsequently, Harjivan having died, his sons Devidas and Harilal sued to enforce the award, the filing of which had been opposed. They obtained a decree which (*inter alia*) ordered the defendants Shankarlal and Laldas to pay the plaintiffs' costs.

Devidas and Harilal both died and their sons applied to execute the decree against Laldas for his half-share of the costs awarded by it. Laldas pleaded that the original plaintiffs to this suit (the fathers of the present applicants) had entered into an agreement with him that he should not be required to pay any of the costs which might be awarded by the decree. The Subordinate Judge held that the alleged agreement could not be set up as a ground for not executing the decree. He, therefore, held Laldas liable for a moiety of the costs, namely, Rs. 900-8-0.

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* Appeal No. 29 of 1896.

Laldas appealed.

*Trimbak R. Kotval*, for the Appellant (Original Defendant No. 2, Laldas).

*Manekshah J. Taleyarkhan*, for the Respondents (Original Plaintiffs).

The appeal was argued before a Division Bench consisting of FARRAN, C. J., and HOSKING, J.

FARRAN, C. J. :—This is an appeal from an order passed by the Subordinate Judge, First Class, at Thana, in execution of a decree in a suit in which Devidas and Harilal Harjivandas were the plaintiffs, and Shankarlal and Laldas Narandas were the defendants. The suit was on an award, the filing of which had been opposed. The decree directed the defendants to pay the plaintiffs' costs.

The present application was made by the minor sons of the original plaintiffs (who were placed on the record as representatives of their respective fathers), *inter alia*, for payment by the defendant Laldas Narandas of Rs. 900-8-0, being a moiety of the costs by the decree directed to be paid to the plaintiffs. In answer to the application, the defendant Laldas put in a written statement, [465] in which he alleged that the award had been filed with his consent, and that before the proceedings for filing it commenced, the present plaintiffs' father and uncle (Devidas and Harilal) had entered into an agreement with him that no such costs as the Court might award should be recovered from him, and that if the whole of the costs which should be incurred for having the award filed should not be recovered from Shankarlal, then as to whatever amount might fall short the same should be borne by the plaintiffs' father and uncle (Devidas and Harilal) and himself half and half; and that in the matter of having the award filed he was really a plaintiff though nominally made a defendant.

The pleader for the defendant Laldas asked the Subordinate Judge to raise an issue on the above allegations as to whether having regard to the agreement (which the Subordinate Judge erroneously calls an oral agreement) the defendant Laldas was liable for the costs of the decree. The Subordinate Judge declined to raise the issue asked for, as to grant it would be to go behind the decree which he could not do. In fact, he decided that the alleged agreement could not be set up as a ground for not executing the decree. He would, we consider, have acted more regularly if he had raised the issue asked for and decided it.

The first question which we have to consider is, whether the existence and effect of such an agreement can be inquired into and decided upon in execution proceedings, or whether they ought to form the subject of a separate suit. Section 244 of the Civil Procedure Code enacts that "the following questions shall be determined by order of the Court executing a decree and not by separate suit." Sub-clauses (*a*) and (*b*) mention specific questions which are to be so determined. Sub-clause (*c*) is more general: "Any other questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof." The corresponding section in Act XXIII of 1861 as there worded was considered by WEST and NANABHAI HARIDAS, JJ., in *Sakharam* v. *Govind*, 10 Bom. H. C. Rep., 361, where WEST, J., in giving the judgment of the Court says that "the general words 'any other question arising between the parties to the suit in [466] which the decree was passed and relating to the execution of the decree' according to the familiar rule of construction are to be understood of matter *ejusdem generis* with those more particularly specified in the same enactment. The only questions

which can properly arise in the execution of a decree are (1) as to the contents of the order made, (2) as to the jurisdiction to make it, and (3) as to how far it has been carried out." That view of the law was adopted and followed in *Mukund* v. *Haridas*, I. L. R., 17 Bom., 23, by SARGENT, C. J., and TELANG, J. It has been contended before us that this latter decision cannot now be supported, having regard to the expression of opinion by the Judicial Committee of the Privy Council contained in *Prosunno Coomar* v. *Kasi Das*, L. R., 19 I. A., 166, that the clause in question should not receive a narrow construction. The contention derives support from the decision in *Azizan* v. *Matuk Lal*, I. L. R., 21 Cal., 437, and especially from the judgment of PIGOT, J., at page 458 of the Report. After an exhaustive consideration of decided cases that learned Judge says: "I find myself unable to come to any other conclusion than this, that for reasons of policy, which it is not for a Court to contravene, the Legislature has deliberately so framed section 244 as to prohibit in a separate suit between the parties to a decree any relief being granted which shall interfere with the conduct of the execution proceedings by the Court executing the decree. I do not see any escape from that conclusion, nor do I think it should be avoided, because possibly individual cases of inconvenience (not of absolute denial of all remedy) may arise from it." And as to the decision in *Mukund* v. *Haridas* he says (p. 460): "I own that as to the relief by way of injunction granted in that case it does seem to me not to be consistent with the decision of the Privy Council as to the scope of the words 'relating to the execution, &c.' and I think, therefore, that I am bound to conclude that had that decision been before the Court the case of *Mukund Harshet* v. *Haridas Khemji* would have been otherwise decided."

We are ourselves inclined to take the same view. The addition of the words "or to the stay of execution thereof" to clause (c), section 244, does not seem to have been brought to the notice of [467] the Court in *Mukund* v. *Haridas* when it followed the ruling in *Sakharam* v. *Govind* which was decided before the introduction of these words into the section. We think that the matter ought to be considered by a Full Bench.

We accordingly refer to a Full Bench the question :—

"Whether the existence and validity of such an agreement as the defendant Laldas Narandas relies on, ought to be determined in execution under the provisions of section 244 of the Civil Procedure Code or in a separate suit?"

The question being thus referred, it came on for argument before a Full Bench consisting of FARRAN, C. J., and PARSONS, RANADE and HOSKING, JJ.

*Trimbak R. Kotval*, for the Appellant (Original Defendant No. 2, Laldas) :— Laldas had not opposed the award and he was really a plaintiff, though nominally a defendant. The Judge should have considered the question as to the agreement and should have determined what was the effect of it in the execution proceedings. No separate suit would lie on the agreement—section 244 of the Civil Procedure Code (Act XIV of 1882). The object of the section being to benefit the parties, it should receive a liberal construction. Matters relating to execution must be determined as cheaply and as speedily as possible by the Court executing the decree—*Azizan* v. *Matuk Lal*, I. L. R., 21 Cal., 437; *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*, L. R., 19 I. A., 166. A narrow construction was given to the corresponding section of Act XXIII of 1861 in *Sakharam* v. *Govind*, 10 Bom. H. C. Rep., 364. That view of the law was adopted and followed in *Mukund* v. *Haridas*, I. L. R., 17 Bom., 23. The words "or to the stay of execution" were added to section 244 later on by the amending Act of 1888 and it seems that these words were not brought to the notice of the Court which decided *Mukund* v. *Haridas*, I. L. R., 17

Bom., 23. The Bombay cases are overruled by implication by the ruling of the Privy Council in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*, L. R., 19 I. A., 166.

*Manekshah J. Taleyarkhan* for the Respondents (Plaintiffs):—The defendant cannot rely upon the agreement and seek redress in execution proceedings. To consider the agreement in the execution proceedings would be tantamount to going behind the **[468]** decree. The defendant ought either to have appealed or applied for review or applied to the High Court under its extraordinary jurisdiction to get the order as to costs corrected. There would be no finality to decrees if an agreement like the present were allowed to be set up in execution proceedings. The Bombay rulings support our contention and we submit that they were correctly decided. The decision of the Privy Council relied on has no bearing upon the facts of the present case.

**Farran, C. J.**:—After hearing the argument addressed to us in this case, I am confirmed in the view which I was inclined to take when the case came before us as a Division Bench. There appears to me to be no reason for not giving to the wide words of section 244, clause (c) of the Civil Procedure Code, their full significance and force. I would, therefore, for the reasons given in the referring judgment, answer the question referred to us by saying that the existence and validity of such an agreement as is referred to in the submitting judgment ought to be determined in execution and not by separate suit.

**Hosking, J.**:—I concur with the Chief Justice.

**Parsons, J.**:—I concur in the view expressed by the Division Bench which made the reference. Having regard to the language of section 244 of the Code of Civil Procedure and the opinion expressed by the Judicial Committee of the Privy Council in *Prosunno Coomar* v. *Kasi Das*, L. R., 19 I. A., 166, it is clear that clause (c) of that section should not be construed narrowly, it follows, therefore, that it ought to be construed as it was in *Azizan* v. *Matuk Lal*, I. L. R., 21 Cal., 437, and not as it was in *Mukund* v. *Haridas*, I. L. R., 17 Bom., 23. In the present case the existence and validity of the agreement set up by the defendant relate to the execution of the decree, that is to say, they have to be inquired into and found upon in order to determine how the decree is to be executed. The inquiry and determination, therefore, ought to be made in execution. I answer the question in the affirmative.

**Ranade, J.**:—In this case, the appellant Laldas and his brother Shankarlal were co-defendants in a partition proceeding instituted **[469]** by Devidas and another, who were the sons of their deceased third brother Harjivandas. The matters in dispute were referred to private arbitration under section 525, and the award made was duly filed in Court, and had then the force of a decree under section 526. The respondents, who are the heirs of Devidas and another, then gave a darkhast for the execution of the award decree and for recovery of costs, and it was in the course of these execution proceedings that appellant Laldas pleaded that there was an agreement, entered into between himself and the deceased respondents before the award was filed, to the effect that they would not hold him responsible for costs, but that they would recover the same from Shankarlal, and if the full sum was not recovered, they would bear the loss half and half with Laldas.

The Court of First Instance refused to raise any issue on this point, as in its opinion it was not open to that Court in execution proceedings to go behind the decree. In the present appeal the contention was accordingly raised that the lower Court was in error in not inquiring into the question of this agreement, and the following question has been referred for the consideration of the Full Bench, whether the existence and validity of the agreement relied on by

the appellant ought to be determined in execution under section 244, Civil Procedure Code, or in a separate suit.

This reference has become necessary from the apparent conflict of the rulings of this Court in *Sakharam* v. *Govind*, 10 Bom. H. C. Rep., 361, and *Mukund* v. *Haridas*, I. L.R., 17 Bom., 23, with the decisions of the Calcutta High Court, approved by their Lordships of the Privy Council in *Prosunno Coomar* v. *Kasi Das*, I. R., 19 I. A., 166. As far as the decision in *Sakharam* v. *Govind* is concerned, all that the Court really decided in that case was that an agreement between parties defining the manner in which a decree should be executed, if entered into before the decree was passed, and not pleaded in the course of the hearing of the suit, cannot be set up as a bar against the execution of the decree, which, for its own purposes, is to be held final as to what one party must do or forbear for the benefit of the other. The decision, in other words, was that the agreement ought to have been pleaded in the course of the hearing of the suit, and not being so pleaded, it could not be urged as a plea in bar of the execu-[470]tion of the decree according to its terms. This case is, therefore, not so much an authority upon the question directly raised in this reference as upon another question, *viz*, whether a plea which a party might have raised before decree can be set up as a defence in execution proceedings. It is true Mr. Justice WEST in the course of his remarks gave expression to his view that the only questions which can properly arise (under section 11 of Act XXIII of 1861) in execution of a decree were questions relating to the contents of the decree, the jurisdiction to make it, and the extent of its satisfaction. This enumeration was obviously not meant to be exhaustive, and, as observed above, no great stress was laid on it. Under the law as it now stands, with the final addition made to section 244 by Act VII of 1888, if the agreement relates to the stay of execution, it must be pleaded in execution, and no separate suit can be brought in respect of such an agreement. The case of *Mukund* v. *Haridas* can also be distinguished to some extent from the circumstances of the present case. There the undertaking relied upon was that the plaintiff agreed not to secure a decree against one of the defendants, and even if a decree were passed, he would not execute it. This agreement was made during the pendency of a suit, and after the decree was obtained, plaintiff broke his agreement, and sought to execute the decree. The defendant thereupon brought a separate suit to restrain the plaintiff in the former suit from executing the decree. Sir C. SARGENT made a point of this special agreement not to execute the decree at all, and distinguished the case before him on this ground from another case, *Chenvirappa* v. *Puttappa*, I. L. R., 11 Bom., 708, where the agreement provided, as in *Sakharam* v. *Govind*, for the execution of the decree in a manner inconsistent with its terms. He observed that in these latter cases the agreement could be and ought to be pleaded before the decree was passed. When the agreement is not to execute the decree at all, then by its very nature it could not be pleaded before the decree was passed. This seems to have been the real ground on which Sir C. SARGENT held in this case that a separate suit to enforce the agreement and restrain its breach by injunction might be maintained.

[471] In the one case, as in the other, the question really turned upon the point whether the prior agreement could or could not be pleaded as defence before the decree was passed. When it could be so pleaded, and was not pleaded in the course of the hearing of the suit, Mr. Justice WEST held that it could not be so pleaded afterwards in bar of execution. When it could not be pleaded, Sir C. SARGENT held that it might furnish a cause of action for a suit to restrain the other party from breaking his agreement. It is true, in arriving at this last conclusion, Sir C. SARGENT referred with approval to the restricted

interpretation suggested in the previous judgment of Mr. Justice WEST, but his main point obviously appears to be that when the prior agreement was not to execute the decree at all, it could not be said that such an agreement involved a question relating to the execution of the decree within the terms of section 244. The attention of the Court was not apparently drawn to the addition of the last words in section 244, and it is open to question how far this decision can be regarded as binding in the present case, where the agreement was not to execute the decree at all, but to execute it in respect of costs first against Shankarlal, and next to share the loss half and half.

To come next to the consideratior of the Calcutta cases, most of which are reviewed in *Azizan* v. *Matuk Lal*, I. L. R., 21 Cal., 437, it is to be noted that even Mr. Justice MACPHERSON admitted in his judgment that, although a separate suit cannot be brought to stop execution on the ground that the judgment-creditor did not give credit for an uncertified adjustment or payment, there may be another form of suit in which plaintiff can claim relief of a different kind. Mr. Justice PIGOT also in his judgment admitted the possibility of the relief by injunction being open to parties in certain contingencies. The authority of the decision in *Azizan* v. *Matuk Lal*, I. L. R., 21 Cal., 437, though it interprets section 244 more liberally than was done in the two Bombay cases noted in the reference, must in view of these admissions be confined to the point actually decided in that case, *viz.*, that no separate suit can be maintained to recover uncertified payments so as to stop the decree-holder's right to execute his decree according to its terms. Similarly, suits in which it is sought to set aside sales on the ground of the judgment-creditor's fraud in [472] bringing them about, stand in the same category with those which relate to uncertified adjustments or payments. Both classes of cases refer to transactions after decree, and to disputes which arise in the execution of the decree; and such transactions properly fall within the terms of section 244, and no separate suit will lie. The extension of this prohibition to cases where the auction-purchasers are parties was approved of by their Lordships of the Privy Council in *Prosunno* v. *Kasi Das*, I. L. R., 19 I. A., 166. On both these points there is now complete agreement in the decisions of all the High Courts—*Sakharam* v. *Damodar*, I. L. R., 9 Bom., 468; *Kuriyali* v. *Mayan*, I. L. R., 7 Mad., 255; *Patankar* v. *Devji*, I. L. R., 6 Bom., 146; *Haji Abdul Rahiman* v. *Khoja Khaki Aruth*, I. L. R., 11 Bom., 6. In fact, the interpretation placed by this Court on section 258 as it stood at first was stricter than what was placed on it elsewhere.

There is not a similar agreement on the point whether when fraud is practised in obtaining a decree, or in securing its execution, a separate suit to restrain the decree-holder may or may not lie at the instance of the party defrauded. This point, however, does not arise here.

As far as the present case is concerned, I am clearly of opinion that as the agreement relied upon by the appellant was pleaded by him to stay execution of the decree in regard to costs as against him, the inquiry fell within the terms of section 244 as finally amended in 1888. It is not clear if appellant could have urged it before the award was filed, and as it affected the manner of the execution of the decree in regard to costs, the appellant had a right to require the executing Court to investigate the matter, and there was nothing like going behind the decree in such an inquiry. Such an agreement cannot be made the cause of action for a separate suit.

I am, therefore, of opinion that a reply in favour of the first alternative must be given to the question under reference. The existence and validity of the agreement relied upon must be determined in execution under section 244, Civil Procedure Code, and not in a separate suit.

**NOTES.**

[See, however, (1902) 29 Cal., 810; (1903) 31 Cal., 480; 179; (1908) 31 Mad., 467; (1908) 9 M. L. T., 464.]

## [473] APPELLATE CIVIL.

*The 17th September, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Varajlal Motichand............(Original Decree-holder) Applicant

*versus*

Kachia Garbad Khushal............(Original Applicant) Opponent.*

*Execution—Attachment—Attachment of property of third person—Payment into Court of amount of decree by owner of property in order to release property—Application in execution for refund of money so paid—No jurisdiction to order refund—Separate suit necessary—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Sec. 278.*

A certain box was attached in execution of a decree against one Mathur, whose father, alleging that it was his property and not Mathur's, paid the bailiff the amount of the decree in order to release it from attachment. He then applied to the Judge to have the money refunded to him. The Judge held the box to be his property, and directed repayment.

*Held*, that in making the order for repayment the Judge acted without jurisdiction, there being no provision in the Civil Procedure Code (Act XIV of 1882) under which it could be made. The proper course was to have taken steps under section 278 of the Code to have the attachment on the property raised. By paying the amount of the decree into Court it became necessary to file a suit for the recovery of the money so paid.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Khan Saheb Nowroji Byramji, Subordinate Judge of Umreth, in the Ahmedabad District.

In execution of a decree obtained by Varajlal against one Mathur Garbad, the bailiff attached a certain box in the house in which Mathur Garbad resided with his father Kachia.

Kachia alleged that the box was his, and was not liable to attachment, but in order to save it he was obliged to pay the bailiff the amount of the decree, and two days afterwards he applied to the Court to have the amount refunded to him. The money was still in Court and had not been paid over to the decree-holder.

The Subordinate Judge granted the application and directed repayment to be made, holding that Kachia had proved that the box was his.

[474] Varajlal, the decree-holder, thereupon applied to the High Court and obtained a rule *nisi* calling upon Kachia to show cause why the order of repayment made by the Subordinate Judge should not be set aside.

*Chimanlal H. Setalvad* appeared for the Applicant (Varajlal) in support of the rule:—The order of repayment was made in execution. There is no provision in the Civil Procedure Code for such a refund. Kachia should have brought a separate suit for the money—*Dulichand* v. *Ramkishen*, I. L. R., 7 Cal., 648; *Jugdeo Narain Singh* v. *Raja Singh*, I. L. R., 15 Cal., 656.

* Application No. 144 of 1896 under the Extraordinary Jurisdiction.

*Nagindas T. Marphatia*, for the Opponent (Kachia) showed cause:—The money being still in the custody of the Court, and not having been paid over to the decree-holder, the Subordinate Judge had power to order the refund. He has found that the money was paid under protest, and that the box was really Kachia's property and was not liable to attachment. The Court surely has power to restore money which it finds after inquiry its own officer has wrongfully taken, and which is still in its hands, without putting the person wronged to the trouble, delay and expense of bringing a suit and having a fresh inquiry.

**Farran, C. J.**:—We think that in making the order which the Subordinate Judge has made in this case he acted without jurisdiction. The property in question, a box, was attached by the Nazir, and to procure its release the opponent paid to the Nazir the amount of the decree against his son. The Subordinate Judge has ordered the amount so paid to be repaid to the opponent. There is no provision in the Civil Procedure Code to which we have been referred under which such an order can be made.

Under similar circumstances the plaintiff in the case of *Dulichand* v. *Ramkishen*, I. L. R., 7 Cal., 648, brought a suit to recover the amount he had paid under compulsion, which went on appeal to the Privy Council. Their Lordships (at page 653) say: "It was also objected that the remedy is not the proper one, and that some further proceedings should have been taken in the execution suit; [476] but none were pointed out by Mr. Arathoon which would afford a suitable remedy or which would preclude such an action as the present." The opponent's course, if he desired the matter to be summarily disposed of, was to have taken steps under section 278 to have the attachment on the box raised. By paying the amount of the decree into Court he has entailed upon himself the necessity of filing a suit if he desires to recover it.

Rule absolute to set aside the order as made without jurisdiction. The applicant is entitled to his costs.

*Rule made absolute.*

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**[ 22 Bom. 475 ]**

APPELLATE CIVIL.

*The 24th September, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Chintaman bin Vithoba............(Original Defendant) Appellant

*versus*

Chintaman Bajaji Dev and others............(Original Plaintiffs) Respondents.*

*Decree—Execution—Powers of Court in executing decree—Code of Civil Procedure (Act XIV of 1882), Sec. 244.*

**The validity of a decree of which execution is sought cannot be disputed in execution proceedings under section 244 of the Code of Civil Procedure (Act XIV of 1882).**

APPEAL from the decision of G. Jacob, District Judge of Poona, in darkhast No. 7 of 1893.

In 1874 one Chintaman Bajaji succeeded to the office of manager and trustee of the Chinchwad Savasthan.

In 1880 he instituted Suit No. 1 of 1880 in the Court of the District Judge of Poona against Chintaman bin Vithoba to obtain a declaration that certain

* Appeal, No. 32 of 1895.

mortgages of savasthan property made to the said Chintaman bin Vithoba by Lakshmibai, one of the widows of Dharnidhar the predecessor of Chintaman Bajaji as trustee and manager of the Chinchwad Savasthan, were not binding upon him.

That suit was settled by a consent decree passed on the 13th July 1880, by which the defendant Chintaman bin Vithoba was to be paid Rs. 23 000 and interest, by annual instalments of [476] Rs. 2,000, out of the revenues of the village of Man, which was part of the savasthan property.

Subsequently Chintaman Bajaji was removed from the office of manager and trustee of the savasthan under a decree of the District Court of Poona, and other trustees were appointed. This decree was, on appeal, confirmed by the High Court. See *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*, I. L. R., 15 Bom., 612.

Chintaman bin Vithoba, in execution of the consent decree in Suit No. 1 of 1880, received Rs. 2,000 a year from the revenues of the village of Man till the beginning of 1891-92. Payment was then withheld. He died, and in 1893 Sadashiv and Vinayek, his sons and heirs, presented a darkhast (No. 7 of 1893) to the District Court of Poona, praying for an order for the attachment of the revenues of the village of Man and for payment from them of Rs. 2,195-8-2 in further execution of the decree in Suit No. 1 of 1880.

The trustees of the Chinchwad Savasthan, having been served with notice of the application, objected to the execution of the decree, contending (*inter alia*) that Lakshmibai had no authority to execute the mortgages upon which the consent decree was based; that Chintaman Bajaji had no authority to consent to the decree; and that the consideration for the mortgages had not been paid into the savasthan, and had not been applied for purposes of the devasthan.

For the decree-holders it was argued that these objections could not be taken in execution proceedings under section 244 of the Civil Procedure Code (Act XIV of 1882).

The District Judge held that the objections could be taken in execution proceedings, and upon consideration of the objections rejected the darkhast.

Against this decision the decree-holders appealed to the High Court.

*Macpherson* (with him *Mahadeo Bhaskar Chaubal*), for the Appellant (Decree-holder):— We are entitled to have the decree executed. The present trustees cannot question the validity of the acts of Chintaman Bajaji, who was the former trustee [477] and their predecessor in the management of the trust. Chintaman as such trustee consented to the decree in Suit No. 1 of 1880, and the validity of that decree cannot now be impeached in execution. This point is concluded by authority. Section 244 of the Civil Procedure Code does not authorize the impeachment of decrees in execution— *Ram Bhunjun Singh* v. *Mussamut Munder Korr*, 23 Cal. W. R., 127; *Ramanoogro Singh* v. *Kishen Kishore Narain Singh*, 23 Cal. W. R., 265; *Burtoo Singh* v. *Ram Purmessur Singh*, 24 Cal. W. R., 364; *Sudindra* v. *Budan*, I. L. R., 9 Mad., 80; *Prosunno Kumari* v. *Golabchand*, L. R., 2 I. A., 145.

The District Judge relies upon *Narayan* v. *Chintaman*, I. L. R., 5 Bom., 393; *Shri Ganesh Dharnidhar* v. *Keshavrav Govind*, I. L. R, 15 Bom., 625; and *Venubai* v. *Dhondo Ganesh*, P. J., 1892, p. 250, but in none of those cases was this particular point decided.

*Ganpat Sadashiv Rao* (with him *Narayan Ganesh Chandavarkar*, for Respondents:—In Suit No. 1 of 1880, Chintaman Bajaji did not sue as trustee of the savasthan property. This is clear from the terms of the decree in that suit,

which provided that in the event of there being obstruction in realizing the money due from the revenues of the village of Man, the money awarded should be paid by Chintaman Bajaji personally: *vide* the deposition of Chintaman Bajaji in *Chintaman Bajaji* v. *Dhondo Ganesh*, I.L R., 15 Bom., 612 at pp 616 and 617. It is thus clear that the liability of Chintaman Bajaji under that decree was personal, and did not devolve upon the succeeding trustees of the devasthan property, *viz.*, the respondents in this appeal.

Objection to the validity of the decree of which execution is sought can be taken under section 244 of the Code of Civil Procedure. Clause (*c*) of that section provides for the raising of questions as to the stay of execution of decrees. This shows that it was intended that the validity of a decree might be impeached in execution—*Trimbak* v. *Govinda*, I. L R, 19 Bom., 328; *Narayan* v. [478] *Chintaman*, I. L. R., 5 Bom., 393; *Shri Ganesh Dharnidhar* v. *Keshavrav*, I. L. R., 15 Bom., 625; *Venubai* v. *Dhondo*, P. J., 1892, p. 250.

**Farran, C J.**:—In 1874 Chintaman Bajaji succeeded to the office of manager and trustee of the Chinchwad Savasthan, and in 1880 he instituted Suit No. 1 of 1880 in the Court of the District Judge of Poona against Chintaman Vithoba to obtain a declaration that certain mortgages of savasthan property made to the said Chintaman Vithoba by Lakshmibai, one of the widows of Dharnidhar, the predecessor of Chintaman Bajaji in the management of the Chinchwad Savasthan, were not binding upon him. That suit was settled by a consent decree passed on the 13th July 1880, awarding the defendant Chintaman Vithoba Rs. 23,000 and interest, by annual instalments of Rs. 2,000, out of the revenues of the village of Man, which is part of the savasthan property.

Subsequently Chintaman Bajaji was removed from the office of manager and trustee of the savasthan under a decree of the District Court of Poona, and other trustees were appointed. This decree was on appeal confirmed by the High Court—*Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*, I. L. R., 15 Bom., 612.

Chintaman Vithoba in execution of the consent decree in Suit No 1 of 1880 received Rs. 2,000 a year from the revenues of the village of Man till the beginning of 1891-92. Payment was then withheld, and in 1893 Sadashiv and Vinayek. the sons and heirs of Chintaman Vithoba, deceased, presented darkhast No. 7 of 1893 to the District Court of Poona, praying for an order for the attachment of the revenues of the village of Man and for payment from them of Rs. 2,195-8-2 in further execution of the decree in Suit No. 1 of 1880.

The trustees of the Chinchwad Savasthan having been served with notice of the darkhast objected (*inter alia*) that Lakshmibai had no authority to execute the bonds upon which the consent decree was based, that Chintaman Bajaji had no authority to consent to the decree, and that the consideration for the bonds [479] was not lawfully paid into the savasthan or was not applied for purposes of the devasthan.

It was contended for the decree-holders that these objections could not be raised in execution proceedings under section 244 of the Civil Procedure Code.

The District Judge upon the authority of *Narayan* v. *Chintaman*, I. L. R., 5 Bom., 393; *Shri Ganesh Dharnidhar* v. *Keshavrav Govind*, I L. R., 15 Bom., 625; and *Venubai* v. *Dhondo Ganesh*, P. J., 1892, p. 250, held that the objections could be raised in execution proceedings, and upon consideration of the objections rejected the darkhast.

After hearing arguments upon the question whether objections impeaching the validity of the decree of which execution is sought can be entertained in execution proceedings under section 244 of the Civil Procedure Code, we hold

that the question must be answered in the negative. We think Mr. Macpherson has rightly argued that, so far as the reported cases show, this question has never before been fully argued and decided by this Court. In *Narayan* v. *Chintaman*, I. L. R, 5 Bom., 393, objections similar to the objections raised in this case were entertained in execution proceedings by this Court, but the report of the case shows that the point whether such questions could be dealt with under section 244 of the Civil Procedure Code was not raised, and apparently was not considered. In *Shri Ganesh Dharnidhar* v. *Keshavrav Govind*, I. L. R., 15 Bom., 625, this point did not arise. In *Venubai* v. *Dhondo Ganesh Dev*, P. J., 1892, p. 250, the present point arose, but was not pressed, and the learned Judges referred to the case of *Narayan* v. *Chintaman* as an authority without noticing that the point whether the validity of a decree of which execution is sought can be disputed in execution proceedings under section 244 was not actually decided in that case.

On the other hand there is strong authority for holding that the validity of a decree sought to be executed cannot be impeached in execution proceedings under section 244. In *Ram Bhunjun Singh* v. *Mussamut Munder Koer*, 23 Cal. W. R., 127, the Calcutta High [480] Court held that where the sons of a deceased judgment-debtor, whose estate is declared by the decree to be liable to sale, are admitted on the record as his representatives, they are not entitled in the execution stage to re-open the whole case, and to ask for a decision as to whether the debt incurred by the father was not for the benefit of the estate, or was in some other way invalid under the Hindu law and not binding on the joint family. In *Ramanoogro Singh* v. *Kishen Kishore Narain Singh*, 23 Cal. W. R., 265, the same Court held that the question whether property seized by a judgment-creditor in the hands of his deceased judgment-debtor's son, is held by the son under such circumstances as render him liable for his father's debts, cannot be tried in execution proceedings. These cases were cited and followed in *Burtoo Singh* v. *Ram Purmessur Singh*, 24 Cal. W. R., 364.

The Madras High Court has ruled that a question whether the decree was obtained by fraud or collusion is not one which relates to the execution of the decree, but which affects its very substance and validity, and that such a question can only be raised by a separate suit—*Pudindra* v. *Budan*, I.L.R., 9 Mad., 80. In *Prosunno Kumari* v. *Golabchand*, L. R., 2 I. A., 145, where the Sebaits of an idol sued to set aside decrees obtained against their predecessor on the ground that they were obtained by fraud or collusion, no objection was raised before the Lords of the Privy Council to the Sebaits seeking their remedy by suit. Had the suit been barred by section 244, Civil Procedure Code, there can be little doubt that the point would have been taken in argument.

It is contended by Mr. Rao that as clause (c) of section 244 provides for the entertainment of questions as to the stay of execution of decrees, therefore it was intended that the validity of a decree might be impeached in execution. We do not think that the words can be rightly understood in this sense. Questions as to the stay of execution refer, we think, to the stay of execution of valid decrees. Mr. Rao has also referred to the case of *Trimbak* v. *Govinda*, I. L. R., 19 Bom., 328. In that case a decree had been passed against *A*, and an inam jaghir village was attached in execution. [481] Thereupon *A* claimed that the attachment should be removed on the ground that the village being service vatan was not liable to attachment. The claim was rejected. *A* then sued for a declaration that the property was not liable to attachment and sale. The High Court, agreeing with the lower Courts held that no suit would lie, the Court which originally rejected the claim made in the execution proceedings having had jurisdiction under the words of section 244, clause (c).

In that case the decree of which execution was sought created no charge upon the property, but was merely a personal decree against A.

It is also contended by Mr. Rao that in Suit No. 1 of 1880 Chintaman Bajaji did not sue as trustee of the savasthan property, and that the decree directed that, in the event of there being obstruction in the way of realizing the money due from the revenues of the village of Man, the money awarded should be paid by Chintaman Bajaji personally. Mr. Rao referred to the deposition of Chintaman Bajaji reported at pages 616 and 617 of I. L. R., 15 Bombay.

"I am the proprietor of the savasthan and my son is the manager. I have been treating the davasthan as my private property. I and Dev (*i.e.*, the deity) are one. So I understand that I am the owner."

In the plaint in Suit No. 1 of 1880 plaintiff described himself as "Shri Chintaman Bajaji Dev Maharaj." He sued as if he considered himself the incarnation of the deity Mangal Murti, and as if all the savasthan property belonged to him. It seems clear that when he undertook to pay the money awarded, he intended to do so out of the savastuan property.

The trustees-respondents did not object in the lower Court that the decree was only against Chintaman Bajaji. They came in as his legal representatives, but they are only his representatives if the decree was passed against him as a trustee for the savasthan property. If the trustees-respondents are not the representatives of the judgment-debtor in Suit No. 1 of 1880, then they are not entitled to come in under section 244, Civil Procedure Code, and if they are his representatives, they cannot dispute the validity of the decree in execution proceedings.

[482] As no attachment has been placed upon the property, objections cannot be taken under section 278, and the only remedy for the trustees, if they have any, is by regular suit.

For these reasons we are unable to deal with the objections taken by respondents to the validity of the decree in Suit No. 1 of 1880, and we must reverse the decision of the District Court, and direct that the District Court do proceed with the execution of the decree as prayed in the darkhast. Respondents to bear all costs of this appeal and of the proceedings in the District Court.

*Order reversed and proceedings remanded.*

NOTES.

[ Similar decisions were given in (1904) 30 Bom., 101 ; (1902) 6 C.W.N., 796 ; (1904) 7 O. C. 199 ; (1906) 29 Mad., 556 ; (1911) 11 I. C., 192 (Sindh) ; (1911) 15 I. C., 832 (Sindh).]

[22 Bom 482]
# APPELLATE CIVIL.

*The 28th September, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Ramabai, widow of Ramkrishna Balkrishna............(Original Defendant) Appellant

*versus*

Raya............(Original Plaintiff) Respondent.*

*Adoption—Second adoption in the lifetime of first adopted son is invalid—Joint enjoyment of property by an owner and a trespasser—Adverse possession—Trespasser's rights by prescription—Compromise—Family settlement, effect of.*

Ramkrishna Yeshwant adopted Raya as his son but as Raya became sickly and was not expected to live, Ramkrishna afterwards adopted Balkrishna (Raya's brother). Ramkrishna died in 1846; and his widow Ramabai and the two adopted sons continued to live together until her death in 1868, and after her death Raya and Balkrishna still lived together until 1877, when Balkrishna died, leaving a widow Radhabai and a minor son (Ramkrishna). After that event Radhabai and the plaintiff Raya began to live separately.

After Ramkrishna Yeshwant's death in 1846, the lands were registered in Balkrishna's name. In August 1878, on the application of Radhabai on behalf of her minor son the management of the property was taken from Raya by the Collector, who himself assumed the management. A compromise of the dispute was, however, effected by which the property was to be shared equally between Raya and Ramkrishna, the minor son of Balkrishna, and from 1878 to 1882 the Collector paid them equal moieties of the produce.

In 1890, the plaintiff Raya brought this suit claiming as the adopted son of Ramkrishna Yeshwant either the whole of the property, or in the alternative a moiety of it.

[483] *Held*, that the adoption of Balkrishna in the lifetime of Raya was invalid. There can be no second adoption during the lifetime of the first adopted son.

*Held*, also, that Ramkrishna (the minor son of Balkrishna) was entitled to a moiety of the estate.

*Per* PARSONS, J.:—Ramkrishna's title to a moiety of the estate was obtained by adverse possession. The adoption of Balkrishna was invalid, and he was not originally entitled to any part of the property and was, therefore, a trespasser; but he (and afterwards his minor son Ramkrishna) and Raya, who was entitled to the whole of it, had been jointly in possession and enjoyment of it for forty-three years. By the adverse possession of Balkrishna and his minor son, Raya lost and Balkrishna and his son gained by prescription a moiety of the estate. That moiety became the absolute self-acquired property of Balkrishna and would descend to his heirs.

*Per* RANADE, J.:—There was no adverse possession by Balkrishna or his heirs until August 1878, when the management of the estate was taken from Raya on the application of Radhabai. The suit was brought within twelve years of that time, so that the plaintiff's claim was not barred by limitation. But it appeared that the disputes which had arisen in 1878 were settled by a compromise which had been acted on, and of which the plaintiff had received the benefit for many years. A *bonâ fide* family arrangement is specially favoured by Courts of Equity, and it binds the parties and their representatives. On that ground I hold that the plaintiff is only entitled to recover a moiety of the property of Ramkrishna as his share, and the other moiety must remain with the appellant.

* Second Appeal, No. 91 of 1895.

SECOND APPEAL from the decision of E. H. Moscardi, District Judge of Kanara.

One Ramkrishna Yeshwant in 1845 adopted his cousin's son Raya. Shortly afterwards, however, Raya being sickly, and not expected to live, Ramkrishna adopted Balkrishna (a brother of Raya). In 1846 Ramkrishna Yeshwant died. Raya was then less than two years old and Balkrishna was twelve, and both of them continued after Ramkrishna's death to live with his widow Ramabai. The lands were subsequently entered in Balkrishna's name on the statement apparently by Ramabai that he was her adopted son.

In 1861 Raya attained his majority and began to manage the property. Balkrishna went out in service. As already stated, the land was entered in Balkrishna's name, but Raya was given a moiety of the produce, and his right to a half share was repeatedly admitted and recognized.

[484] In 1868 Ramkrishna's widow Ramabai died, and Raya and Balkrishna still continued to live together.

In 1877 Balkrishna died leaving a minor son (Ramkrishna Balkrishna) and a widow named Radhabai. Raya then began to live separately from them.

On the 16th August 1878, the Collector of North Kanara on the application of Radhabai on behalf of her minor son Ramkrishna deprived Raya of the possession of the property and took it into his own hands. Subsequently the dispute between Radhabai and Raya was compromised, and it was agreed that the property should be shared equally between Raya and the minor Ramkrishna.

In 1890 Raya filed this suit against the minor Ramkrishna Balkrishna claiming as the adopted son of Ramkrishna Yeshwant the whole of his property, or in the alternative a moiety of it.

The defendant denied the plaintiff's adoption and pleaded limitation.

The Subordinate Judge dismissed the suit on the ground that plaintiff's adoption was not proved. On the decree being confirmed by the District Judge, the plaintiff appealed to the High Court, which reversed the decree and remanded the case for a fresh decision.

Pending the appeal the minor defendant Ramkrishna Balkrishna died, and his widow Ramabai, the present appellant, was put upon the record.

On remand the District Judge reversed the decree of the Subordinate Judge, and awarded the whole of the plaintiff's claim.

On second appeal to the High Court the case was again remanded for a finding as to whether the plaintiff's claim was barred by limitation. The District Judge found on remand that the suit was not barred.

The defendant appealed to the High Court.

*Branson*, and Rao Saheb *Vasudev J. Kirtikar*, for the Appellant (Defendant) :—We rely on *Mohesh Narain* v. *Taruck Nath*, I. L. R., 20 Cal., 487. [485] Article 127 of the Limitation Act (XV of 1877), has no application.

*Macpherson* and *Vasudev Gopal Bhandarkar*, for the Respondent (Plaintiff).

**Parsons, J.** :—The decision of this case would have been difficult were it not for authority. The contest is between the representatives of two persons who were both adopted by one and the same man (Ramkrishna Yeshwant). It was found as a fact that Raya (plaintiff) was first adopted and that Balkrishna (defendant) was subsequently adopted by Ramkrishna, because Raya suffered from rickets and was not expected to live. The District Judge considered that under these circumstances the adoption of Balkrishna was valid;

and, treating Balkrishna as a member of the family and the whole family as a joint one, held that, on the death of Balkrishna's son, Ramkrishna, without issue, during the pendency of the appeal, Raya became owner of the whole estate, the widow of Ramkrishna being entitled to maintenance only. This view of the case was clearly wrong, for the adoption of Balkrishna in the lifetime of Raya would be invalid and would confer no legal rights at all on him. The Judge had not then considered the issue of limitation raised in the case: so we remanded that issue to be found upon, and we are now in possession of that finding.

Ramkrishna died in 1846, and Raya attained majority in 1861. Though the land was entered in the name of Balkrishna, and Raya was never actually in possession or management, yet he was given a moiety of its produce, and his right to a half share of it was repeatedly admitted and recognized. The Judge on these facts found that, though Raya had never been in exclusive possession of the property, he had never been excluded, and, therefore, his suit now would not be barred under article 127 of the Limitation Act. The Judge, however, was still labouring under the mistaken idea that Balkrishna's adoption was valid and that the family was joint. As the adoption is invalid we have the fact that a person entitled to the whole of an estate and a person who is not entitled to any part of it and, therefore, a trespasser have been jointly in possession and enjoyment of that estate for some forty-three years. It was argued by Mr. Macpherson for Raya that [486] these two persons would become by prescription either members of a joint Hindu family, and co-sharers in the estate, or tenants-in-common, so that the estate on the death of one would vest in the survivor. This would be, in our opinion, a very curious result, and we can find no authority for the proposition. The case of *Mohesh Narain* v. *Taruck Nath*, I. L. R., 20 Cal., 487, cited for the appellant seems to us practically to dispose of the case; for though there the moieties may have been separated, we do not think that that can make any difference.

In the present case, by reason of the adverse possession of Balkrishna, Raya lost and Balkrishna gained by prescription a moiety of the estate. That moiety would become the absolute self-acquired property of Balkrishna, and would, therefore, descend to his heirs. There is no relationship subsisting between Raya and Balkrishna that would enable Raya to claim the property of Balkrishna at his death. We, therefore, vary the decree of the Lower Appellate Court by awarding plaintiff one moiety of the property in suit to be partitioned off in execution. We order the costs of the suit and appeals to be paid out of the estate.

**Ranade, J.** :—This is the third time that this case comes before us. It was first remanded for a distinct finding on the question of adoption. When that issue was found in favour of the original plaintiff, the respondent before us, we had to send down an issue for the determination of the question of limitation, and the case now comes before us for final decision.

The District Judge has found that the evidence fully established the priority of the original plaintiff's adoption. He at the same time held that under the peculiar circumstances of the case, the second adoption of the minor appellant's father Balkrishna was also proved, and that the two adopted sons were each entitled to a moiety; but as the original defendant No. 1 had died, the respondent-plaintiff was entitled to succeed to the whole property of the joint family.

On the question of limitation the District Judge has found that the respondent's claim for his moiety of the property was not barred under article 127 of the Limitation Act, but that, if [487] the second adoption were held to

be invalid, the respondent-plaintiff's claim to recover possession of the whole of the property was barred by the appellant's and his father's adverse possession.

As regards the question of adoption, the rulings of their Lordships of the Privy Council in *Rungama* v. *Atchama*, 4 M. I. A., 1 *Gopee Lal* v. *Shri Chandraolee*, 19 Cal. W. R., 12, and *Mohesh Narain* v. *Taruck Nath*, I. L. R., 20 Cal., 487, may be held to have settled the law that there can be no valid adoption during the lifetime of the first adopted son. In the present case the direct evidence of the second adoption is chiefly confined to the fact that the thread ceremony of the original defendant No. 1's father was performed by Ramkrishna, and that Ramkrishna's funeral rites were performed by the original defendant No. 1's father. Neither of these acts by themselves are sufficient to prove the *factum* of adoption, and, therefore, their value is only inferential. As the first adopted son was only a sickly child, less than two years old at the time of Ramkrishna's death, the performance of Ramkrishna's funeral rites by the other child, who was at the time twelve years old, can easily be accounted for. Even if the gift and acceptance of Balkrishna as adopted son be held sufficient to prove the adoption, it is clear that, under the rulings quoted above, that adoption had no validity, and could confer no rights, as such, on Balkrishna to the prejudice of the first adopted son.

As regards the question of limitation, the principal point to be considered is the time when the alleged adverse possession of the appellant before us must be held to have commenced. The evidence shows clearly that the original plaintiff was less than two years old when Ramkrishna died in 1846. His natural brother Balkrishna was then twelve years old. Both lived with Ramkrishna's widow Ramabai, and after her death in 1868 they lived together till Balkrishna's death in 1877. There were no open differences and no separation in food or residence till after Balkrishna's death, when apparently Balkrishna's widow Radhabai and the respondent-plaintiff began to live separate.

The only overt act in derogation of the respondent's rights in the interval between 1846 and 1877 was the entry of the lands in **[488]** Balkrishna's *khata* after Ramkrishna's death, the transfer being apparently made on the admission of Ramkrishna's widow Ramabai that Balkrishna was her adopted son. As respondent was at the time only two years old, and not expected to live long, the transfer of *khata* cannot be held to have been the commencement of Balkrishna's title by adverse possession from 1847, seeing that Ramabai took care of respondent and Balkrishna alike, and they both lived together apart from their natural father, not only during Ramabai's but also during Balkrishna's lifetime for thirty years. It is further in evidence that when respondent attained majority he managed the household affairs, while Balkrishna was for many years away on service and business. This management of the household by the respondent is not only sworn to by the witnesses (Exhibits Nos. 82, 83, 47, 34), but Balkrishna's widow Radhabai in 1878 admitted this fact before the village authorities and before the Mamlatdar in statements made by her before these officers. The assertion made by her in her deposition that she did not make these statements is entitled to no credit since they are satisfactorily proved by the evidence of the Mamlatdar and his karkun, and the patel and kulkarni.

The adverse possession, if any, must be held to have commenced when, on Radhabai's application, the management of the lands was taken away from the respondent, and, under the Collector's order, made over to Appaji Subrao on 16th August 1878. It appears, however, from the Mamlatdar's and his karkun's depositions that at the time the differences between Radhabai, representing the minor son of Balkrishna, and the respondent-plaintiff were settled by a

compromise arranged by a panch to which both parties agreed. This compromise is set forth in Radhabai's statement, and furnished the basis of the Mamlatdar's report, by which after making provision for Radhabai, the property was to be shared equally between the respondent-plaintiff and the appellant. The Collector approved and gave effect to this family arrangement by directing that Rs. 109-12 should be paid each year to appellant, and Rs. 110-11 to respondent for their maintenance. The Collector's manager Appaji and, after he was removed, the Collector actually paid equal moieties to both parties from 1878—1882.

**[489]** It is in reference to this circumstance that the respondent, original plaintiff, claimed alternative relief, the first prayer being for the recovery of the possession of the whole property, and the second for the recovery of an equal moiety. It is the second prayer which must, under the circumstances, be held to be the proper relief to which the respondent-plaintiff is entitled. The parties began to live separate from the time of Balkrishna's death in 1877, and the cause of action accrued when the management of the property was taken away out of respondent's hands. His plaint was filed within twelve years from that time, but in the meanwhile he became party to the amicable settlement of which he enjoyed the benefit for many years. A *bona fide* family arrangement is specially favoured by Courts of Equity—*Mantappa* v. *Baswuntrao*, 14 M. I. A., 24,—and it binds the parties and their representatives. On this ground I hold that the respondent-plaintiff is only entitled to recover a moiety of the property of Ramkrishna as his share, and the other moiety must remain with the appellant.

On these grounds I agree with Mr. Justice PARSONS in the final decree. As my reasons for coming to that decision are somewhat different from his, I have deemed it necessary to state them separately at some length.

*Decree varied.*

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**NOTES.**

[Arrangements made to settle family disputes are binding on all :—(1905) 1 C. L. J., 388 ; (1906) 4 C. L. J., 323.]

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[22 Bom. 489]

APPELLATE CIVIL.

*The 29th September, 1896.*

PRESENT :

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Amtul Nissa Begam............(Original Plaintiff) Appellant

*versus*

Mir Nurudin Hussein Khan............(Original Defendant) Respondent.*

*Mahomedan law—Gift—Nooshaa—Gift of an undivided share—Gift of future revenues of villages.*

According to Mahomedan law a gift cannot be made of anything to be produced *in futuro*, although the means of its production may be in the possession of the donor. The subject of the gift must be actually in existence at the time of its donation.

* Appeal, No. 73 of 1891.

**[490]** A Mahomedan executed a deed of gift in favour of his wife, by which he agreed to give her and her heirs in perpetuity a sum of Rs. 4,000 per annum out of his undivided share in certain jaghir villages which he had inherited from his father.

*Held*, that the gift was invalid, as it was a gift in effect of a portion of the *future* revenues of the villages to the extent of Rs. 4,000 per annum.

THIS was an appeal from the decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat.

The plaintiff Amtul Nissa Begam was the widow of Nawab Mir Kamaludin Hussein Khan, a First Class Sirdar of Baroda.

On 9th March 1869, Nawab Mir Kamaludin executed a deed of gift in favour of his wife (the plaintiff), by which he agreed to give her in perpetuity a sum of Rs. 4,000 a year out of the income of his share of certain jaghir villages, and other property which he had inherited from his father. This document was to the following effect :—

"Out of the villages, acquired as jaghir by inheritance, which are situated in the Surat District, as to whatever share I have got according to the Mahomedan law in the property left by my father, out of the same I have willingly and of my own accord given to my wife Amtul Nissa Begam *alias* Mahomed Begam for ever and continually from generation to generation, and descendant after descendant, a sum of Rs. 4,000 belonging to me and have made her the owner thereof. Whereas the management and the authority in respect thereof have been under my control from ancient times, and as I have always been paying moneys in cash to my other co-sharers, who jointly own this jaghir with me, according to their respective shares, I will in like manner always pay to my wife and her descendants the money out of the income of the said property belonging to my wife as I pay to other sharers, without excuse or objection. If she should find on my part any treacherous action or remissness in payment of the amount due to her, which is ascertained and fixed, then she is fully authorized to take from me what is due to her in such a way as she may desire."

Under this deed of gift the plaintiff received the annuity of Rs. 4,000 out of the income of the jaghir villages during the lifetime of her husband.

The jaghir villages were joint family property and were managed by plaintiff's husband for himself and for his co-sharers till his death in March 1885.

On the death of her husband plaintiff filed a suit for partition and to enforce her claim under the deed of gift to the annuity of Rs. 4,000 out of the revenues of jaghir villages.

**[491]** The First Class Subordinate Judge of Surat decreed partition, but rejected her claim to the annuity, holding that the deed of gift was invalid under the Mahomedan law, as it was a gift of *mooshaa* or an undivided share in property capable of division.

The plaintiff appealed to the High Court.

*P. M. Mehta* (with him *M. M. Munshi*), for Appellant (Plaintiff) :—The doctrine of *mooshaa* does not apply. The gift is not of an undivided share, but only a certain sum out of the annual income of his share. The doctrine of *mooshaa* ought not to be extended. It has been held by the Privy Council to be wholly unadapted to a progressive state of society, and should be confined within the strictest rules—*Shekh Muhummad* v. *Zubaida Jan*, L. R., 16 I. A., 205. The deed of gift has been acted upon and the annuity enjoyed for nearly eighteen years without interruption. It is too late now to impeach its validity.

*Ganpat Sadashiv Rao*, for Respondent :—The gift is void, being a gift of *mooshaa*. It is a gift of a portion of the donor's share in the income of the villages. If the gift of an undivided share be invalid, a gift of a portion of such share is equally invalid. The gift is, moreover, invalid, because it is a gift of the future revenues of the villages. According to Mahomedan law a gift

cannot be made of a thing to be produced in future. It must be in existence at the date of the gift—Macnaghten's Mahomedan Law, pp. 50 and 203; *Emnabai* v. *Hajirabai* I. L. R., 13 Bom., 352.

**Farran, C.J.** :—The sole question in this appeal is whether the gift by the late Nawab Kamaludin of Rs. 4,000 per annum to his wife in perpetuity is valid. It was originally made while he was a minor, but was ratified when he attained his majority. The documents evidencing the gift are Exhibits 99, 100 and 101. Counsel for the appellant relies solely on the last mentioned document, so its terms only need be considered. It is dated the 9th March 1869. The material portion of it runs thus. (His Lordship read the portion of the deed above set forth and continued :)—The boundaries and descriptions of the six villages are given at the end of the document, which is registered. The Rs. 4,000 per annum were paid to the plaintiff by her husband **[492]** Kamaludin while he lived. The document appears to be a gift of Rs. 4,000 annually, or, as English lawyers would term it, a covenant to pay Rs. 4,000 per annum, payable out of the declarant's interest in the six villages and out of the property which he inherited from his father. It is not contended that it is a gift in consideration of marriage or anything other than a gift without consideration.

Now if the gift had been of Kamaludin's undivided share in the villages and in his father's estate the gift would have been bad under the ruling in *Emnabai* v. *Hajirabai*, I. L. R., 13 Bom., 352. It would seem to follow *a fortiori* that a gift of an annual sum payable out of an undivided share would be invalid, but since the decision of the Privy Council in *Shekh Muhammad* v. *Zubaida Jan*, L. R., 16 I. A., 205, the application of the doctrine of *mooshaa* cannot, it is clear, be extended by analogy, and we should hesitate to base our judgment on its consequences.

On the ground, however, that this is a gift in effect of a portion of the future revenues of the villages to the extent of Rs. 4,000 per annum, we think that it is invalid according to Mahomedan law. The law is express upon that subject. A gift cannot be made of any thing to be produced *in futuro* although the means of its production may be in the possession of the donor. The subject of the gift must be actually in existence at the time of the donation—Macnaghten's Principles, Chapter V, section 5. No attempt has been made to support the validity of the document Exhibit 101 except as a gift. The finding of the Subordinate Judge on issues 2 and 15 must be confirmed and the appeal will stand dismissed with costs.

*Appeal dismissed.*

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**NOTES.**

[ See also (1912) 34 All., 465 where this case was distinguished. ]

[493] APPELLATE CIVIL.

*The 30th September, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Damodar Bhatji and others............(Original Plaintiffs) Appellants

*versus*

Bhat Bhogilal Kasandas and others........ (Original Defendants) Respondents.*

*Religious endowment—Hindu temple, manager of—Trustees—Removal of trustees—Trustees misapplying funds by mistake—Jurisdiction of Courts in India—Code of Civil Procedure (Act XIV of 1882), Sec. 539—Scheme of management of Hindu temple, form of.*

Courts of Equity in England have always allowed themselves some latitude in dealing with the trustees of a public charity who under a mistake have misapplied the funds of the institution; and Courts in India can similarly allow themselves some degree of latitude in dealing with the managers and *pujaris* of public Hindu temples, who for a long time have been accustomed to deem themselves owners of the temples of which in law they are only trustees, managers and priests, and to overlook the past while taking care that for the future the administration of the temple is placed on a sound footing.

The Courts have jurisdiction to deal with the managers of public Hindu temples, and, if necessary for the good of the religious endowment, to remove them from their position as managers. There is, however, no hard and fast rule that every manager of shrine, who has arrogated to himself the position of owner, should be removed from his trust; each case must be decided with reference to its circumstances.

*Chintaman* v. *Dhondo*, I. L. R., 15 Bom., 612, referred to.

CROSS APPEALS from the decision of G. McCorkell, District Judge of Ahmedabad.

Plaintiffs sued under section 539 of the Code of Civil Procedure (Act XIV of 1882) to have the defendants removed from the management of the temple of Koteshwar Mahadev and of the lands appertaining thereto; to have new trustees appointed; to have accounts taken from the defendants of the temple and its appurtenances, and to have a scheme prepared for the future management of the temple.

Defendants pleaded (*inter alia*) that the temple property was not public, charitable or religious property, but private property of their own, and that the suit was brought merely out of enmity [494] and not from any genuine desire to benefit the institution and the public.

The District Judge held that the property in dispute was public property; that the defendants held and managed it as trustees and that they were bound to render accounts. Being, however, of opinion that the suit was the outcome of enmity against the defendants he declined to make an order removing them from their position as trustees and managers of the temple. He, therefore, passed a decree directing the defendants to continue to manage the temple and requiring them to keep accounts, &c., &c.

Both parties appealed to the High Court.

*Ganpat Sadashiv Rao* for the Appellants in Appeal No. 3 and Respondents in Appeal No. 7.

*Macpherson* (with him *S. G. Ajinkya*) for Respondents in Appeal No. 3 and Appellants in Appeal No. 7.

* Cross Appeals, Nos. 3 and 7 of 1896.

**Farran, C. J.**:—We have come to the conclusion in this case not to disturb the decree of the District Court. Courts of Equity in England have always allowed themselves some latitude in dealing with the trustees of a public charity who under a mistake have misapplied the funds of the institution, and we think that we can similarly allow ourselves some degree of latitude in dealing with the managers and *pujaris* of public Hindu temples who for a long time have been accustomed to deem themselves owners of the temples of which in law they are only trustees, managers and priests, and to overlook the past while taking care that for the future the administration of the temple is placed on a sound footing. The judgment in the Chinchwad case (*Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*, I. L. R., 15 Bom., 612), while it established the jurisdiction of the Courts to deal with the managers of public Hindu temples, and, if necessary, for the good of the religious endowment to remove them from their position as managers, did not, we think, intend to lay down a hard and fast rule that every manager of a shrine who arrogated to himself the position of owner should be removed from his trust. though the Court in that case did remove the manager and appoint new trustees, deeming that course to be for the [496] advantage of the endowment. Each case must, we think, be decided with reference to its own circumstances.

Here the District Judge on a review of all the circumstances relating to the temple of Koteshwar Mahadev at Ahmedabad has arrived at the opinion that it is not necessary in the interests of the temple and of the public who resort to it to remove the defendants from the office of *pujaris* and managers. The devotees of the temple do not appear to desire that course. The suit, the Judge considers, has been brought by an individual out of enmity to the defendants rather than from a genuine desire to benefit the institution and the public. There are no endowments attached to the temple, which is supported by the offerings of the devotees and worshippers at the shrine, by the rents of some buildings, and land in the vicinity of the temple; and the origin of the temple is so ancient that there is some excuse for the defendants believing and acting on the belief that their uncontrolled and undisputed authority over the funds constituted them in truth the owners of them.

We vary the decree of the District Judge by substituting the following scheme for the management of the temple of Koteshwar Mahadev at Ahmedabad:—

1. The defendants and their heirs shall, during their good conduct, be the trustees and managers of the temple of Koteshwar Mahadev at Ahmedabad, and of the property belonging to the said temple.

2. They shall, as Tapodhan Brahmins, be bound to maintain a proper system of worship. The doors of the temple shall be open daily from 7 A. M. till noon and from 2 to 9 P. M.

3. The income of the temple consists of offerings made to the idol, of rents for temple buildings and temple lands, and of an annual cash allowance of two rupees from Government.

4. The managers shall not allow persons of low caste to reside on the temple lands either inside or outside the temple compound, and they shall not allow Kolis or Marwadis to reside within the temple compound.

5. It shall be the duty of the managers to keep the compound and other temple lands in a clean and sanitary condition, and to keep the temple buildings in repair so far as the funds permit.

[496] 6. One-third of the rents shall be expended in repairing the temple compound wall, and buildings belonging to the temple. Out of the remaining

income of the temple, the managers shall defray the temple expenses and maintain themselves.

7. The managers shall keep regular accounts of all rents, and of expenditure on repairs. The accounts shall be submitted to the District Court annually within one month after the Devali, and shall be examined by an auditor appointed by the Court at the cost of the managers. A copy of the accounts shall be supplied by the managers and shall be affixed to the notice-board of the District Court for the information of the public.

These accounts shall be kept from the date of the High Court's decree.

8. This scheme shall be subject to such modifications as may be made hereafter by the High Court on the application of the parties interested in the said temple.

The appellants in each case to bear the costs of the appeal.

*Decree varied.*

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**NOTES.**

[See also (1905) 2 C. L. J. 460, where it was held that the trustee should not be removed where the breach was due not to wilful default but to misunderstanding.]

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[22 Bom 496]

## APPELLATE CIVIL.

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*The 1st October, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

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Miya Vali Ulla............(Original Plaintiff) Applicant

*versus*

Sayed Bava Saheb Santi Miya and others............(Original Defendants) Opponents.*

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*Civil Procedure Code (Act XIV of 1882), Sec. 539—Pensions Act (XXIII of 1871), Sec. 4—Cash allowance allowed to worship of idol—Personal grant.*

A plaintiff claimed to be a co-trustee of certain dargas and entitled to a share in the management and in the profits thereof, which consisted of a certain cash allowance from Government. He sued the defendants for an account and for the recovery of his share.

*Held*, that the suit did not come within the purview of section 539 of the Civil Procedure Code (Act XIV of 1882) and did not require sanction under that section.

[497] *Held*, also, that the suit, so far as it related to the cash allowance from Government, required a certificate under section 4 of the Pensions Act (XXIII of 1871.)

A cash allowance attached to the worship of an idol is a grant of money within the meaning of section 4 of the Pensions Act, 1871.

The Pensions Act applies to religious endowments as well as to personal grants.

*Vyankoji* v. *Sarjarao*, I. L. R., 16 Bom., 537, concurred in.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) to set aside an order made by Gilmour McCorkell, District Judge of Ahmedabad.

The applicant in his plaint alleged that he and defendant No. 1 were equal sharers in a four-annas' share in the management of certain dargas and in the cash allowance made by Government and other property belonging thereto,

* Application, No. 129 of 1893, under Extraordinary Jurisdiction.

and that the defendants had excluded him from his share in the management and property. He, therefore, prayed for an account and to recover his share of the allowance and rents and to have a sum of Rs. 176, which he had expended, debited to the darga accounts and recovered from the defendants.

The Subordinate Judge directed the plaint to be returned to the plaintiff, holding that he could not entertain the suit, inasmuch as it was a suit under section 539 of the Civil Procedure Code (Act XIV of 1882) and required sanction under that section. He also held that it required a certificate under the Pensions Act (XXIII of 1871).

On appeal by the plaintiff the District Judge confirmed that order.

The plaintiff applied to the High Court in its extraordinary jurisdiction and obtained a rule *nisi* to set aside the order of the Judge.

*C. H. Setalvad*, for the Applicant (Plaintiff) in support of the rule.

Rao Saheb *Vasudev J. Kirtikar* (Government Pleader), appeared for the Opponents (Defendants) to show cause.

[498] The following cases were referred to in the arguments:—*Sayad Hussenmian Dadumian* v. *The Collector of Kaira*, P. J., 1895, p. 329; I L. R., 21 Bom., 48; *The Secretary of State* v. *Abdul Hakkim*, I.L R., 2 Mad., 294; *Kolandai Mudali* v. *Sankara Bharadhi*, I. L. R., 5 Mad., 302; *Athavulla* v. *Gouse*, I. L. R., 11 Mad., 283; *Vyankaji* v. *Sarjardo*, I. L. R., 16 Bom., 537; *Maharval Mohansingji* v. *The Government of Bombay*, L. R., 8 I. App., 77.

**Hosking, J.**:—The applicant Sheth Miya Vali Ulla valad Habibulla presented a plaint in the Court of the First Class Subordinate Judge at Ahmedabad, in which he alleged that he and defendant No. 1, Sayed Bava Saheb Santi Miya, were equal sharers in a four annas' share in the management of two dargas and the cash allowances and other property belonging to the dargas, and that the defendants acting in collusion had excluded him from sharing in the management and in the property; accordingly he prayed for an account and for the recovery of his share of allowances and rents, and also to have Rs. 176-4 expended by him in holding four *urus* debited to the darga accounts and recovered from defendants.

The First Class Subordinate Judge held that the suit fell under section 539 of the Civil Procedure Code and could not be entertained by him; that it required the sanction prescribed by that section, and that it also required a certificate under the Pensions Act, 1871. The Subordinate Judge further expressed an opinion that the claim for Rs. 176-4-0 should be brought in the Small Cause Court. He, therefore, directed the return of the plaint to the plaintiff.

On appeal the District Judge agreed with the Subordinate Judge in holding that the suit falls under section 539 of the Civil Procedure Code, and also requires a certificate under the Pensions Act.

We are of opinion that the lower Courts have erred in holding that section 539 of the Civil Procedure Code is applicable to the present suit. A suit has only to be brought under section 539 " in case of any alleged breach of any express or constructive trust created for public, charitable or religious purposes, or whenever [499] the direction of the Court is deemed necessary for the administration of any such trust." The plaintiff does not sue on account of any such breach of trust as is contemplated by these provisions, nor can he be said to require the direction of the Court for the administration of the trust. His complaint merely is, that he, claiming to be a co-trustee, has been excluded from a share in the management and in the profits of such management. We hold that such a suit does not come within the purview of this section. The case cited

by the Government Pleader—*Sayad Hussenmian Dadumian* v. *The Collector of Karia*, P. J., 1895, pp. 329 and 473; I. L. R., 21 Bom., pp. 48 and 257, deals with the nature of the reliefs which may be given under section 539 and the necessity that the sanction should cover the relief sought, but before those questions arise it must be shown that the suit comes within the section.

We think that the lower Courts have rightly held that the suit, so far as it relates to the cash allowances from Government, cannot be entertained with out a certificate under section 4 of the Pensions Act, 1871. It has been ruled in several cases by the Madras High Court that the provisions of the Pensions Act are applicable to personal grants and not to endowments for religious purposes—*The Secretary of State* v. *Abdul Hakkim*, I. L. R., 2 Mad., 294; *Kolandai Mudali* v. *Sankara Bharadhi*, I. L. R., 5 Mad., 302; *Athavulla* v. *Gouse*, I. L. R., 11 Mad., 283. These rulings are relied upon by applicant's counsel, but this Court has taken a different view of this question. In *Vyankaji* v. *Sarjarao*, I. L. R., 16 Bom., 537, JARDINE and PARSONS, JJ., have held that a cash allowance attached to the worship of certain idols is a grant of money within the meaning of section 4 of the Pensions Act, and that a suit by the trustee of the devasthan to recover such an allowance would not lie in the absence of the Collector's certificate. The Madras rulings are not mentioned in the judgment, but the learned Judges refer to *Maharaval Mohansingji* v. *The Government of Bombay*, L. R., 8 I. A., 77, in which the Lords of the Privy Council say that the expression 'grant of money or land revenues' in the Pensions Act is not to be limited to rights *ejusdem generis* with pensions. We concur [500] in the view taken in *Vyankaji* v. *Sarjarao*, and hold that the Pensions Act applies to religious endowments as well as to personal grants.

We accordingly reverse the decrees of the lower Courts, and direct that the First Class Subordinate Judge do accept the plaint, and allow the plaintiff a reasonable time to obtain a certificate as to the cash allowances under section 4 of the Pensions Act, as we presume that there will be no objection on the part of the Collector to grant it, but should the certificate not be granted, the Subordinate Judge will proceed with the hearing of the rest of the claim. Costs of this application to be costs in the suit.

*Decree reversed.*

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**NOTES.**

[1. Similar views were taken of the scope of sec. 539 of the C.P.C., 1882 in (1899) 24 Bom., 170; (1906) 33 Cal., 789; (1900) 3 O.C., 299.

2. As regards the scope of sec 4 of the Pensions Act, 1871, the Madras High Court dissented from this decision and from (1905) 29 Bom., 480.]

[22 Bom. 500]

# APPELLATE CIVIL.

*The 5th October, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Abdul Rahiman and another.........(Original Defendants Nos. 1 and 4) Appellants

*versus*

Maidin Saiba and others............(Original Plaintiffs) Respondents.*

*Limitation—Limitation Act (XV of 1877), Sch. II, Art. 179—Decree—Appeal against part of decree only—Appeal dismissed—Execution—Application for execution of original decree—Time runs from date of appellate decree.*

On the 26th June 1891, in a suit against seven persons who were members of a Mahomedan family, the plaintiff obtained a decree on a mortgage. The decree directed the sale of 65/72 of the mortgaged property, but it exonerated from liability the share of a female member (defendant No. 2) of the family, which was 7/72 of the whole estate. The plaintiff appealed as to the 7/72 share only. He made all the defendants respondents to the appeal, but the name of the first defendant was afterwards struck out, as he could not be served with notice. His interests, however, were identical with those of defendants Nos. 3 to 7. On the 30th July 1892, the plaintiff's appeal was dismissed. On the 3rd July 1895, the plaintiff applied for execution of the original decree. The defendants contended that as the appeal related only to that part of the decree which related to the 7/72 share of the second defendant, the rest of the decree was unaffected by the appeal, and that consequently the plaintiff's application for execution of that [501] decree was barred under article 179 of the Limitation Act (XV of 1877), not having been made within three years from the 26th June 1891.

*Held*, that the application was not barred. The date of the appellate decree and not that of the original decree was the date from which limitation began to run.

*Per* PARSONS, J.:—The word "appeal" in article 179 does not mean only an appeal against the whole decree and by which the whole decree is imperilled: it means any appeal by any party.

*Per* RANADE, J.:—Except in the case where a nominally single decree awards separate reliefs against separate defendants, the words of article 179 must be construed in their natural sense as permitting an extension of limitation where an appeal is preferred and is not withdrawn.

SECOND APPEAL* from the decision of E. H. Moscardi, District Judge of Kanara, confirming an order passed by Rao Saheb N. B. Muzamdar, Subordinate Judge of Honavar, in an execution proceeding.

On the 26th June 1891, one Maidin Saiba bin Hasan Saiba obtained a decree on a mortgage against seven persons who were members of a Mahomedan family. The decree directed the plaintiff Maidin Saiba to recover his mortgage-debt and costs by selling 65/72 share of the mortgaged property,—the share of 7/72, belonging to defendant No. 2, who was a female member of the defendants' family, being held not liable to the debt.

The plaintiff appealed with respect to this 7/72 share. The first defendant was originally a party respondent to the appeal, but his name was afterwards struck out, as he could not be served with notice. His interests, however, were identical with those of defendants Nos. 3 to 7. The plaintiff's appeal was dismissed on the 30th July 1892.

On the 3rd July 1895, the plaintiff having died, his heirs applied for the execution of the original decree. The first defendant contended (*inter alia*)

* Second Appeal, No. 452 of 1896.

that this application was barred by limitation, as it was not made within three years from the 26th June 1891, the date of the original decree.

The Subordinate Judge found that under article 179, Schedule II of the Limitation Act (XV of 1877), time began to run from the date of the appellate decree, and as the application for execution was presented within three years from the date of that [502] decree, it was not barred. He, therefore, granted the application.

On appeal by defendants Nos. 1 and 4, the Judge confirmed the order. They, therefore, preferred a second appeal.

*Scott* with *S. R. Bakhle* for the Appellants (Defendants Nos. 1 and 4):—The first defendant was not a party to the appeal, and the appellate decree which was passed in his absence cannot affect him. Further, the plaintiff's appeal related only to a part of the decree, *viz.*, the liability of the second defendant's share (7/72) of the mortgaged property. The whole decree was, therefore, not imperilled by the appeal. The part of the decree which dealt with 65/72 share was not appealed against and was not judicially before the appellate Court. So far, therefore, as the first defendant is concerned, the decree which can be executed against him is the original decree, and the present application being made after the expiration of three years from the date of that decree, is time-barred.

[PARSONS, J., referred to *Sakhalchand* v. *Velchand*, I. L. R., 18 Bom., 203.]

In that case, the liability of the parties against whom execution was sought, was in question both in the original suit and in appeal, while in the present case the shares of the parties were defined and the appeal related to one definite share, the other shares being excluded from it.

*Branson* with *Shamrav Vitthal* and *Dattatraya A. Idgunji* for the Respondents (Plaintiffs):—When a decree is appealed against, the whole decree is before the appellate Court and it can deal with it as a whole. It cannot be said that one portion of the decree is before the Court and the other not. Article 179, Schedule II of the Limitation Act is quite explicit on the point. It does not refer to portions of a decree. Our application for execution was made within three years from the date of the appellate decree and was, therefore, in time. There is a conflict of cases on the point, but the ruling of our High Court in *Sakhalchand* v. *Velchand*, I. L. R., 18 Bom., 203, supports our contention.

[503] The following cases were cited during arguments:—*Muthu* v. *Chellappa*, I. L. R., 12 Mad., 479; *Raghunath Pershad* v. *Abdul Hye*, I. L. R., 14 Cal., 26; *Mashiatunnissa* v. *Rani*, I. L. R., 13 All., 1; *Sakhalchand* v. *Velchand*, I. L. R., 18 Bom., 203; *Nur-ul-Hasan* v. *Muhammad*, I. L. R., 8 All., 573; *Nundun Lall* v. *Rai Joykishen*, I. L. R, 16 Cal., 598; *Kristo Churn Dass* v. *Radha Churn Kur*, I. L. R., 19 Cal., 750.

**Parsons, J.**:—The suit, in which the decree now sought to be executed was passed, was brought against the members of a Mahomedan family to recover a debt by the sale of the whole estate. The Court of First Instance exonerated from liability the share of a female member, the second defendant, which amounted to 7/72 of the whole estate, and ordered the sale of the remaining 65/72. The plaintiffs appealed as to the 7/72 share only. They made, however, all the defendants respondents in the appeal, and though the name of the first defendant was afterwards struck out, as he could not be served with notice, his interests and those of the defendants Nos. 3 to 7 were identical. The appellate Court confirmed the decree.

Within three years of the date of the appellate decree, but more than three years after the date of the decree of the Court of First Instance, the

plaintiffs have now applied for execution. The appellants (original defendants Nos. 1 and 4) contended that the application was time-barred.

The decision depends upon whether the date of the decree or the date of the appellate decree is to be taken as the starting point from which limitation begins to run as against them. Article 179 of the Limitation Act provides that an application for execution must be made within three years from the date of the decree, or (where there has been an appeal) the date of the final decree of the appellate Court. Here there has been a decree and there has been an appeal, so that if the clause is construed in its plain and natural sense the application would be in time. The decision in *Sakalchand* v. *Velchand*, I. L. R., 18 Bom., 203, adopts this construction. The other High Courts in India have, however, [504] placed a different construction on the clause. The Madras High Court considered that the appeal referred to in the clause must be one that imperils the whole decree, and it consequently held that where an appeal was presented only against that portion of a decree which exonerated the shares of defendants Nos. 5 to 9, the time for applying for execution against the shares of defendants Nos. 3 and 4 was not extended though they were actually parties to the appeal—*Muthu* v. *Chellappa*, I. L. R., 12 Mad., 479. The majority of the Judges of the Allahabad High Court considered that the appeal referred to in the clause could not be taken advantage of by persons who were in no way concerned with the appeal and whose rights under the decree could not be affected by the appeal to which they were not parties, or whose liabilities under the decree could neither be limited nor extended nor varied by the appeal to which they were not parties, unless such appeal came within the scope of section 544 of the Code of Civil Procedure. The other two Judges following *Nur-ul-Hasan* v. *Muhammad Hasan*, I. L. R., 8 All., 573, considered that the clause applied, without any exceptions, to decrees from which an appeal had been lodged by any of the parties to the original proceedings—*Mashiatunnissa* v. *Rani*, I. L. R., 13 All., 1. A Division Bench of the Calcutta High Court in *Nundun Lall* v. *Rai Joykishen*, I. L. R., 16 Cal., 598, laid down the following principle, namely, that as regards parties who were not parties to the appeal, where the appeal made by one of the parties to the suit did not and could not affect the decree as against others of the parties concerned in the case, the decision in the appeal would not alter the period of limitation in respect of the execution of the decree as between other parties to the suit. In order to alter the period the whole decree must be imperilled by the particular appeal which is preferred. In *Kristo Churn Dass* v. *Radha Churn Kur*, I. L. R., 19 Cal., 750, however, another Division Bench refused to go into the question whether or not the whole decree was or might have been or became imperilled in the Court of appeal, and applied the clause because all the defendants were parties to the appeal. There is, therefore, this difference between the Courts. The [505] Madras High Court construes the word "appeal" to mean an appeal by which the whole decree is imperilled. The Allahabad and Calcutta High Courts construe it to mean an appeal to which the parties seeking to profit by the clause must either be parties or come within the scope of section 544 of the Code of Civil Procedure. This High Court and a minority of the Judges of the Allahabad High Court give the word "appeal" its plain meaning, and hold that it means any appeal by any party. In our opinion, the latter is the correct construction. Even if it were otherwise, the clause ought, we think, to be applied in the present case, for all the defendants except the defendant No. 1 were parties to the appeal, and the interests of the defendants Nos. 1 and 3 to 7 were identical, so that it is impossible to say that the decree was not imperilled by the appeal presented by the plaintiffs,

since the defendants could in it have taken any objection to the decree that they could have taken by way of appeal, and the appeal as regards the defendant No. 1 would come within the scope of section 544 of the code. We, therefore, confirm the order of the Lower Appellate Court with costs.

**Ranade, J.**:—In this case the respondent-plaintiffs obtained on 26th June 1891, a decree on a mortgage bond, which directed that the mortgage-debt should be recovered by the sale of 65/72 share of the mortgaged property; the remaining 7/72 share belonging to defendant No. 2 being held not liable to satisfy the mortgage-debt. The plaintiffs appealed against the decree in respect of the rejected portion of the claim, but the decree was confirmed in appeal on 30th July 1892. Defendant No. 1 was not a party to the appeal, and when the plaintiffs applied for execution on 3rd July 1895, this defendant pleaded that as against him the execution was time-barred, counting the three years' period from 26th June 1891, the date of the original decree. This objection was overruled by both the lower Courts. Mr. Scott on behalf of the appellants contended before us that the lower Courts were in error in over-ruling the objection, because the decree of the appellate Court could not be executed as against the appellant, original defendant No. 1, who was not a party to the appeal. Mr. Scott sought to distinguish the present case from *Sakhalchand* **[506]** v. *Velchand*, I. L. R., 18 Bom., 203, on the ground that in that case the amount of money due was not fixed till the appellate Court confirmed the decree; whereas here the appeal was confined to the 7/72 share, and did not imperil the claim as against the 65/72 share.

The question we have thus to decide is, whether, under the circumstances of this case, the three years' limitation should be held to commence from the date of the original or the appellate decree, when the person against whom execution is sought, was not a party to the appeal. Clause 2 of article 179 of Limitation Act is general in its terms, and does not specify any details about parties or subject-matter. Admittedly where all the parties to the original suit are parties to the appeal, the original decree is merged in the appellate decree, whether the latter confirms, amends or reverses the original decree, and it is the appellate decree which can alone be executed—*Shohrat Singh* v. *Bridgman*, I. L. R., 4 All., 376; *Muhammad Sulaiman* v. *Muhammad Yar Khan*, I. L. R., 11 All., 267; *Sakhalchand* v. *Velchand*, I. L. R., 18 Bom., 203; *Daulat* v. *Bhukandas*, I. L. R., 11 Bom., 172; *Noor Ali* v. *Koni Meah*, I. L. R., 13 Cal, 13; *Kistokinker Ghose* v. *Burrodacaunt Singh*, 10 Ben. L. R., 101. Similarly, where an appeal is preferred, but subsequently withdrawn, it is the original decree which has to be executed, and the three years' term has to be computed from the date of that decree—*Mahant Ishwargar* v. *Chudasama Manabhai*, I. L. R., 13 Bom., 106; *Patloji* v. *Ganu*, I. L. R., 15 Bom., 370; *Chudasama Manabhai* v. *Mahant Ishwargar*, I. L. R., 16 Bom., 243. While there is no dispute in regard to both these positions, there is some difference of opinion in regard to the intermediate classes of cases, where the whole of the subject-matter is or is not involved in peril by the appeal, or the parties to the appeal do not include all the parties to the original suit.

It is true that in *Sangram Singh* v. *Bujharat Singh*, I. L. R., 4 All., 36, it was held that where there are more defendants than one, against whom the first decree is passed, and only one defendant appeals, it is the first Court's decree, and not the appellate decree which can be executed against the non-appealing defendant, where there **[507]** is no common ground or interest between the several defendants. Where there is such a common ground, as, for instance, where the decree is a joint decree; or is a joint and several decree, and only one defendant appeals, execution can only be taken out of the appellate decree, even as against the non-appealing defendant—*Mullick Ahmed*

v. *Mahomed Syed*, I. L. R., 6 Cal., 194; *Gungamoyee Dassee* v. *Shib Sunkur*, 3 Cal. L. R., 430. Where the decree is for separate sums found to be due from separate defendants, and only one defendant appeals, execution as against the non-appealing defendant can only be of the original decree—*Muthu* v. *Chellappa*, I. L. R., 12 Mad., 479; *Hur Proshad* v. *Enayet Hossein*, 2 Cal. L. R., 471; *Wise* v. *Rajnarain Chuckerbutty*, 10 B. L. R, 258; *Raghunath Pershad* v. *Abdul Hye*, I. L. R., 14 Cal., 26; *Mashiatunnissa* v. *Rani*, I L. R., 13 All., 1.

The principle underlying these cases is stated to be that the whole decree is not in peril, and plaintiff might execute his decree against the non-appealing defendants without waiting for the decision of the appeal—*Nundun Lall* v. *Rai Joykishen*, I. L. R., 16 Cal., 598; *Kristo Churn Dass* v. *Radha Churn Kur*, I. L. R, 19 Cal., 750; *Nur-ul-Hasan* v. *Muhammad Hasan*, I. L. R., 8 All., 573. Where, therefore, the whole claim is or may be in danger either on an appeal by the plaintiff or by the defendant, there the period for execution must be counted from the date of the appellate decree. The Judges who decided these last cited Calcutta cases, while holding themselves bound to follow the previous rulings as far as they went, have expressed themselves against introducing further refinements or limitations, not suggested by the general words of article 179, clause 2.

In the remarks made above, I have tried to reconcile as far as may be the apparent conflict of opinions between the several Courts. The words of the article contain no limitations or conditions such as those which have been laid down in these conflicting rulings. They appear, evidently, to have been intended to give the plaintiff a right to bring his claim, so far as it is disallowed, before a Court of appeal without requiring him to hasten [508] the execution of the claim so far as it had been awarded. In many cases when plaintiffs appeal in respect of a portion of a claim not awarded, the other side puts in objections at the hearing of the appeal, under section 561, in regard to the claim awarded. So that by virtue of the appeal, the whole claim is brought before the appellate Court. Similarly where there is a common ground or interest amongst the plaintiffs or the defendants, an appeal by one is virtually an appeal by all under section 544 though they may not be parties to the record. Bearing the operations of these sections in mind, it appears to me that, except in the case where the nominally single decree awards separate reliefs against separate defendants, the words of the clause must be construed in their natural sense, as permitting an extension of limitation, where an appeal has been preferred, and is not withdrawn. In the present case the cause of action was single and joint as against all the defendants, being based on the mortgage-bond of the whole property. And though the appeal was necessarily confined to the portion disallowed, it did not follow that the plaintiff was bound to take out execution against the defendant not a party to the appeal, without waiting to see if he could not sell the whole property mortgaged. The case of *Sakhalchand* v. *Velchand*, I. L. R., 18 Bom., 203, is a clear authority on this point, and this High Court has generally interpreted the section as it stands without any conditions. The distinction sought to be made between money amounts and shares in landed property is more or less fanciful, as what plaintiffs sought here was to recover the money by the sale of the property. We, therefore, confirm the order of the lower Court and reject the appeal with costs.

*Order confirmed.*

**NOTES.**

[In the Limitation Act 1908, Art. 182, clause 2, the starting point, where there has been an appeal, is defined to be the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, the latter part giving effect to (1907) 30 Mad., 1 F.B., overruling (1908) P.R., 54. Even partial appeal is within this clause:—(1899) 23 Mad., 60; (1902) 26 Mad., 91; (1902) 5 O.C., 217; (1911) 21 M.L.J., 1020. See also (1914) 22 I.C., 685 (Cal.); (1911) 21 M.L.J., 546.]

## [509] APPELLATE CIVIL.

*The 5th October, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Bai Diwali............(Original Applicant) Appellant

*versus*

Moti Karson............(Original Opponent) Respondent.*

*Hindu law—Marriage—Marriage of a minor in disobedience of Court's order—Doctrine of* factum valet *—Presumption—Presumption as to completion of marriage ceremonies—Guardian and Wards Act (VIII of 1890), Sec. 24—Court's power to make order as to marriage of minor.*

If there is sufficient evidence to prove the performance of some of the ceremonies usually observed on the occasion of a marriage, a presumption is always to be drawn that they were duly completed until the contrary is shown.

A Hindu widow, who was appointed-guardian of the person of her minor daughter eight or nine years old, married the minor in disobedience of the order of a civil Court directing her to make over the minor to her paternal uncle for the purpose of getting her married.

*Held*, that the principle of *factum valet* applied. Neither the disobedience of the Court's order, nor the disregard of the preferable claims of the male relations, would invalidate the marriage.

*Quære*—Whether the marriage of a minor eight or nine years old can be regarded as falling within the scope of section 24 of Act VIII of 1890, especially when the marriage of a minor female terminates the power of the guardian of the person.

APPEAL from the order of G. McCorkell, District Judge of Ahmedabad.

This was an application under Act IX of 1861 (the Minors Act) for the custody of Rakhi, a girl aged eight or nine years.

The girl was living with her mother Bai Diwali, who had been appointed guardian of her person under Act VIII of 1890.

The applicant was Rakhi's paternal uncle, and he sought to take her from her mother for the purpose of getting her married

On the 2nd January 1896, the District Judge of Ahmedabad passed an order declaring the right of the paternal uncle to dispose of the girl in marriage in preference to the mother, and directing Bai Diwali to give her up to him four days before the date fixed for the marriage

On the 9th January 1896, Bai Diwali married Rakhi to one Govind in defiance of the order of the District Judge.

[510] On the 17th January 1896, the paternal uncle made the present application, alleging that he had already betrothed the girl to a suitable husband, and praying that she should be handed over to him for the purpose of completing the marriage.

Bai Diwali replied that she had already given Rakhi away in marriage.

The District Judge found on the evidence that the alleged marriage was not proved. He, therefore, passed an order, directing Bai Diwali to make over the girl to the custody of her paternal uncle for the purpose of marriage.

Against this order Bai Diwali appealed to the High Court.

* Appeal, No. 65 of 1896.

*C. H. Setalvad*, for the Appellant:—The marriage of the girl is proved. That being so, the uncle has no right to the custody of the girl, who is living with her mother, her lawful guardian.

*G. M. Tripati*, for Respondent:—The mother has contracted a *Natra* marriage. She has gone into a different family. She has ceased to act as Rakhi's guardian. The alleged marriage is found by the lower Court to be a fiction, got up for the purpose of preventing the paternal uncle from completing the marriage of the girl, whom he had already betrothed to a suitable husband. The witnesses who speak to the marriage speak as the true witnesses. There is no evidence that the *saptapadi*, which is the essential part of the marriage ceremony, was performed. The marriage is, therefore, not proved.

But assuming that it is proved, it is invalid. The mother was not competent to give away the girl in marriage. Under the Hindu law the paternal uncle is her legal guardian for the purpose of marriage. He has a preferential right to dispose of the girl in marriage—*Shridhar* v. *Hiralal*, I. L. R., 12 Bom., 480. His right was declared by the District Court in this case, and the mother was ordered to give the minor to him for the purpose of marriage. In defiance of this order, the mother pretends she has given her away in marriage. The alleged marriage is, therefore, invalid.

*Setalvad* in reply:—The doctrine of *factum valet* applies in this case Neither disobedience of the Court's order, nor dis-**[511]** regard of the paternal uncle's rights, would invalidate a marriage duly solemnised—*Baee Rulyat* v. *Jeychund Kewul*, Bellasis Rep. (1840—48), 43; *Khushalchand* v. *Bai Mani*, I. L. R., 11 Bom., 247; *Namasevayam Pillay* v. *Annammai Ummal*, 4 Mad. H. C. R., 339. It is contended that the essential ceremonies which constitute a valid marriage were not performed. But the evidence of the officiating priest shows that the usual ceremonies were performed, and the presumption is that the marriage ceremony was duly completed—*Brindabun Chundra* v. *Chundra Kurmokar*, I. L. R., 12 Cal., 140. Section 24 of the Guardians and Wards Act (VIII of 1896) does not authorize the Court to pass any order relating to the marriage of a minor.

**Ranade, J.**:—It is admitted in this case that the appellant Bai Diwali is not only the natural mother of the minor, but was also appointed guardian of the minor's person, and this appointment continues still to be in force, though Bai Diwali has contracted *Natra* marriage with a second husband. The respondent, who is uncle of the minor child, claiming to have a preferable right as against Bai Diwali to dispose of the minor in marriage, applied to the District Court and obtained from that Court an order on 2nd January 1896, directing Bai Diwali to make over the minor into respondent's charge four days previous to the date fixed for marriage,—20th January 1896. Bai Diwali did not obey this order, and, therefore, respondent applied to the District Judge on 17th January 1896, for a fresh order directing Bai Diwali to make over the minor into his charge at once. Bai Diwali in her answer to this fresh application replied that she had given away the minor in marriage to Govind, and that the minor was in the charge of her husband. The District Judge thereupon made Govind a party to the proceeding, and held, on the evidence adduced before him, that the alleged marriage did not take place, and Bai Diwali was again ordered to hand over the minor to the custody of the respondent.

In the appeal before us exception is taken to the correctness of the District Judge's finding on the question of fact, namely, that the alleged marriage had not taken place. The District Judge **[512]** appears to have taken no notice of Govind's sworn statement, that his marriage with the minor took place on 9th January 1896. Of the other four witnesses examined, one is a Patidar,

another is a Brahmin priest, the third is a carpenter, which is the caste of the parties, and the fourth is a Bania vendor of opium. They are all residents of the place where the marriage is alleged to have been celebrated. None of them are related to the parties. The District Judge disbelieved the evidence of Somaram Pitambar, though that witness admittedly gave clear evidence about the marriage, chiefly because he stated in cross-examination that no male person was present with Bai Diwali to give away the girl. There was obviously some mistake here, because the witness had stated that Bai Diwali's son gave away the girl, his sister, in marriage. The Brahmin priest was disbelieved, because he professed not to recognize the bride or know her name. It is quite possible that this ignorance was feigned. It at least rebuts the suggestion that the witnesses were tutored to give their evidence. While the husband and four independent witnesses gave evidence on Bai Diwali's behalf, there was no rebutting evidence on the other side, although the names of several persons were mentioned as being present on the occasion.

On the whole, we feel satisfied that the marriage of the minor did take place as stated by these witnesses. If the evidence was sufficient to prove the performance of some ceremonies usually observed on such occasions, a presumption is always to be drawn that they were duly completed, until the contrary was shown—*Brindabun Chandra* v. *Chundra Kurmokar*, I L. R., 12 Cal., p. 140, and *Inderun* v. *Ramasawmy*, 13 M. I. A., p. 141. Bai Diwali was, no doubt, guilty of disobeying the order of the District Judge; but neither that circumstance by itself, nor the disregard of the preferable claim of the male relations would invalidate the marriage. Even where the dispute was between husband and wife, the doctrine of *factum valet* was allowed to prevail—*Baee Rulyat* v. *Jeychund Kewul*, Bellasis Rep., p. 43; *Modhoosoodun* v. *Jadub Chunder*, 3 Cal. W. R., p. 194; *Khushalchand* v. *Bai Mani*, I. L. R., 11 Bom., 247; *Namasevayam Pillay* v. *Annammai Ummal*, 4 Mad.·H. C. Rep., 339.

**[513]** In the view we have taken of the facts it is unnecessary to consider the question how far the District Judge's order in this case fell within the scope of the provisions of the Guardians and Wards Act, VIII of 1890. Mr. Goverdhanram referred to section 43 as authorizing the orders of the District Judge but that section, which provides for orders regulating the conduct or proceedings of a guardian, must necessarily be read along with and in relation to the sections in which are laid down the duties of a guardian of the person of a minor—sections 24 to 26. These provide only for the support, health and education and advancement of a minor. It is true that, besides the specific objects above named there is a general reference to "all such matters as the law to which the minor is subject requires." Whether the marriage of a minor child at or before nine years can be regarded as falling within the scope of these general words, especially when the marriage of a minor female terminates the powers of the guardian of the person (section 41), is, we think, doubtful. It is, however, unnecessary to consider further this view of the question. For the reasons stated above, we reverse the order of the District Judge, and dismiss the application. Respondent to bear all costs.

*Order reversed.*

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**NOTES.**

[As regards the guardian's power to have the minor married, see also (1913) 35 All., 265; (1911) 35 Mad., 728; (1897) 22 Bom., 812; (1914) 20 C.L.J., 91.

As regards the presumption of the necessary ceremonies having been performed, see also (1911) 38 Cal., 700; (1914) 23 I.C., 828 (Mad.); (1903) P.R., 49.]

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[22 Bom 513]

## APPELLATE CIVIL.

*The 6th October, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

Shankar............Plaintiff

*versus*

Mukta............Defendant.*

*Account stated or adjusted* (ruzakhata)—*Cause of action—Such account only evidence of the existing debt, not itself a fresh contract on which a suit may be brought—Interest*—Damdupat—*Practice—Procedure.*

In June 1883, the plaintiff's father advanced a loan to the defendant at compound interest. The account of this debt with interest was adjusted and signed from time to time. In June 1893, it was adjusted and signed, the amount found due being Rs. 28-8-0. In February 1896, the plaintiff sued to recover this amount.

*Held*, that the account (*ruzukhata*) was merely an acknowledgment of the debt and of the correctness of the calculation of interest upon it.

[514] *Held*, also, that the plaintiff was not entitled to treat the amount so found due as principal and to claim interest upon it. The debt to be sued on was the amount originally advanced, and the interest recoverable was limited by that amount according to the rule of *damdupat*.

By English law an account stated could be sued on as implying a promise to pay. Formerly this was the rule also in Bombay (as shown by the earlier cases) where the account was signed. If, however, it was not signed, it could not be sued on as a new contract. The Indian Limitation Act required an acknowledgment or admission of a debt to be signed; and an admission not made in the manner prescribed by law (*i.e.* signed) for the purpose of preventing a debt from becoming barred does not imply a promise to pay it if it should become barred.

According, however, to the later authorities an account stated or adjusted (*rusukhata*) cannot be sued on as a fresh contract. The suit must be brought in respect of the original transaction, and the subsequent stated or adjusted accounts (*rusukhata*) are only evidence of the debt arising from them, and serve to prevent the operation of the Act of Limitation.

REFERENCE by Rao Saheb Damodar Govind Gharpure, Subordinate Judge of Malegaon in the Nasik District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

Suit on an account stated. The defendant was the widow of one Sankra, who in June 1883, had borrowed certain juari from the plaintiff's father. The account (*ruzukhata*) of this loan with compound interest was made up from time to time. The last account stated (*ruzukhata*), was dated the 13th March 1893, and showed a balance of Rs. 28-8-0 due to the plaintiff. On the 15th February 1896, the plaintiff demanded payment, but the defendant refused to pay. The plaintiff, therefore, brought this suit, claiming Rs. 29 due upon the account.

The account was duly signed by Sankra, and the material part of it was as follows:—

"The 10th of Falgun Vadya—own handwriting.

* Civil Reference No. 7 of 1896.

"28½ on making an account of the last *khata* the amount found due for principal together with interest is Rs. 28½. in letters twenty-eight and a half. The interest payable on this is Re. 1 per cent. per month.

"I admit this to be correct. The handwriting of Damodhar Narayan Mamvadkar, inhabitant of Yedalgav.

"Signature across a receipt stamp of Sankra valad Bhawani Patil—my own handwriting."

**[515]** As the suit was a small cause suit in which there was no appeal, the Subordinate Judge through the District Judge of Nasik referred the following questions to the High Court:—

(1) Is the *ruzukhata* sufficient evidence of the promise alleged by plaintiff?

(2) Can a suit lie on such promise?

(3) Is plaintiff entitled to treat Rs. 28-8 as principal for the rule of *damdupat*?

*Mahadev B. Chaubal* (*amicus curiæ*), for the Plaintiff:—We contend that a suit lies upon this stated account. It is duly signed and admits the amount with interest to be payable, and implies a promise to pay.

[FARRAN, C. J.:—The question is whether a mere signed statement of account sets aside the rule of *damdupat* and becomes itself a sufficient basis of suit. It is not merely an acknowledgment which, being signed, keeps alive the original debt under section 19 of the Limitation Act (XV of 1877)?]

We submit that it contains a stipulation to pay interest on the amount found due, and that implies a promise to pay the whole amount of the *khata* as principal—*Tribhovan* v. *Amina*, I.L.R., 9 Bom., 516; *Vishnav* v. *Dalpat*, P. J., 1890, p. 9; *Jodharaj* v. *Raghavgir*, P. J., 1893 p. 48. It is, therefore, not a mere acknowledgment, but a new contract upon which a suit lies.

*Vasudev G. Bhandarkar* (*amicus curiæ*), for the Defendant:—The *ruzukhata* in question is merely an account stated, upon which no suit can be brought. It is merely an acknowledgment of a debt already existing. It keeps alive that debt and enables the plaintiff to sue for it, but he cannot sue upon the account stated as on a fresh contract. The promise to pay interest, if there is one, is a promise without consideration. Where there are cross demands in the account, the setting off of the items against each other constitutes a consideration; but where, as here, there is only one item, there is no consideration—*Damodar* v. *Devji*, P.J., 1890, p. 314; *Umedchand* v. *Bulakidas*, 5 Bom. H. C. Rep., 16 (O. C. J.); *Mulchand* **[516]** v *Girdhar*, 8 Bom. H. C. Rep., 6 (A. C. J.); *Hargopal* v. *Abdul*, 9 Bom. H. C. Rep, 429; *Amritlal* v. *Maniklal*, 10 Bom. H. C. Rep., 375; *Nahanibai* v. *Nathu*, I. L. R., 7 Bom, 414.

**Farran, C. J.:**—We have been much assisted in this case by the learned pleaders, who, as *amici curiæ*, argued the reference. After referring to the numerous decisions which bear upon the question which has been submitted to us, we cannot say that we feel no doubt as to the answer which we should give to the question, though we think that the Subordinate Judge would have been safe in following the latest authorities in this Court.

Under English law, an account stated, even though it amount to nothing more than the totalling up of the items of an account and adding interest and acknowledging their correctness (which a simple *ruzukhata* usually consists in) could have been directly sued on. "The claim upon an account stated lies where there is an absolute acknowledgment made by the defendant to the plaintiff of a debt due from him to the plaintiff and payable at the time of action brought." See Bullen and Leake's Pleadings, Vol. I, p 33, 4th Ed. (1882), where numerous authorities are cited in support of that view including *Buck* v. *Hurst*, L. R., 1 C. P., 297. "An account stated alone is not conclusive

between the parties, but the debts respecting which it was stated may be examined" (Bullen and Leake, Vol. I, p. 34), and it may be shown that the debt in respect of which the account is stated is not due. These are, however, in the nature of defences to the action. If no defence is established, on mere proof of the defendant's handwriting on the acknowledgment, the plaintiff would be entitled to recover—*Buck* v. *Hurst*, L. R., 1 C. P., 297.

This law was adopted on the Original Side of the High Court in *Umedchand* v. *Bulakidas*, 5 Bom. H. C. Rep., 16 (O. C. J.), and it was assumed in *Dhondu* v. *Narayan*, 1 *ibid.*, p. 47. Where, however, such an acknowledgment was oral or unsigned, the provisions of the Limitation Act rendered it inoperative as an exception to the plea of limitation; and when that Act intervened, such an acknowledgment could not be directly sued upon as a new contract. "An admission of a [617] debt doubtless" (says MELVILL, J.) "implies in law a promise to pay it; but an admission not made in the manner which the law prescribes for the purpose of preventing a debt from becoming barred by time, does not at all imply a promise to pay such debt if it should become barred by time"—*Mulchand* v. *Girdhar*, 8 Bom. H. C. Rep., 6 (A. C. J.). Accordingly in a long series of decisions—*Hargopal* v. *Abdul*, 9 Bom. H. C. Rep., 429; *Amritlal* v. *Maniklal*, 10 *ibid.*, p. 375; *Hanmantmal* v. *Rambabai*, I. L. R., 3 Bom., 198; *Ramji* v. *Dharma*, I. L. R., 6 Bom., 683; *Nahanibai* v. *Nathu Bhau*, I. L. R, 7 Bom., 414; *Chowksi Himutlal* v. *Chowksi Achrutlal*, I. L. R., 8 Bom., 194,—it was held that an unsigned acknowledgment could not form the basis of a suit when the statute intervened, nor could a signed acknowledgment be sued upon if made in respect of a time-barred debt, unless it contained an express promise to pay. Throughout this series, the judgments for the most part still recognize the principle that from an acknowledgment of a debt the law implies a promise to pay it. The principle is stated with great terseness and lucidity by MELVILL, J., in *Amritlal* v. *Maniklal*, 10 *ibid.*, p. 375: "The entry is nothing more than an acknowledgment of an existing debt from which the law implies a contract or promise. The consideration for the contract is expressed in writing, but not the contract itself. The entry is not a contract in writing, but a writing from which an unwritten contract may be inferred."

If the authorities stopped there, we should have no difficulty in applying the English law and holding that *ruzukhata* or adjustment of an account could be sued on as "an account stated" where the Limitation Act did not impose a bar to that being done.

In *Mathur* v. *Krishnashet*, P. J. for 1883, p. 297, the Court intimated an opinion that "the *khata*" (which in that case seems to have been in the nature of a *ruzukhata*) "might serve as evidence of the existence of that debt" (the debt sued for) "although not as the basis of it." In *Tribhovan* v. *Amina*, I. L. R., 9 Bom., 516, there does not appear to have been any question of limitation. The Subordinate Judge referred the [618] question whether the suit could be brought on a *ruzukhata*, being of opinion that it could not, as it was not "an account stated" within the narrower and more accurate definition of that expression. The Court expressed its opinion that the Subordinate Judge was right in treating the *khata* in question as a mere acknowledgment, from which it would appear that they thought the Subordinate Judge was also right in holding that the suit could not be based upon it. The Judges, however, pass that point over. In *Govind* v. *Devchand*, P. J. for 1888, p. 129, it was held by the Court (SARGENT, C. J., and NANABHAI HARIDAS, J.), in second appeal that the acknowledgment in the *khata* put in evidence in that case could not be made the basis of a suit, though it could serve as evidence of the existence of a debt. The same view was expressed by BIRDWOOD and PARSONS, JJ., in

*Nasarvanji* v. *Gangadas*, P. J. for 1891, p. 102, following the above decision and following also *Vishnav* v. *Dalpat*, P. J. for 1890, p. 9, to the same effect. In *Damodar* v. *Devji*, P. J. for 1890, p. 314, the learned Judges (SARGENT, C. J., and CANDY, J.) also express themselves to the effect that the mere existence of a *ruzukhata* is not, unsupported by evidence of a contemporaneous oral contract founded on consideration, sufficient to form the basis of a fresh contract. The case of *Jodharaj* v. *Raghavgir*, P. J. for 1893, p. 48, is not perhaps altogether consistent with the above, but the circumstances of the case were peculiar, and the Court did not consider that the above authorities applied to it. There is thus, we consider, a strong current of later authorities to the effect that a *ruzukhata* cannot form the basis of suit, but that, the original transactions forming the basis of the suit, the subsequent *ruzukhatas* are only evidence of the debt due serving to prevent the operation of the statute of limitation. No reasons are assigned by the Courts for the view which they have adopted in opposition to the view that a *ruzukhata* is an unequivocal admission of a debt, from which the law implies a promise to pay, and thus (except for limitation purposes) contains in itself all the requisites of a valid contract which can form the immediate basis of a suit. The decisions are possibly based on the provisions of section 50 of the Civil Procedure Code, which apparently contemplates that the plaintiff should [519] state his original cause of action and treat acknowledgments of it as exceptions taking the case out of the range of the limitation law. However that may be, we think that the authorities are so numerous and uniform as to prevent us from following the technical English law upon this subject. It is also, we think, clear that, having regard to the relations between capitalists and borrowers in the mofussil, the rule laid down by these decisions is more likely to result in doing justice between the parties than would be the opposite rule.

Turning to the *ruzukhata* in this case it is, as translated by our Court Interpreter, as follows :—

"Creditor Shankar Ramkrishna Shet Wani, a minor, by his guardian his mother Bhagirthibai kom Ramkrishna Shet Malegaokar.

"The *khata* of Sankra valad Bhawani Patil, inhabitant of mouja Chandanpuri at present at Malegav. The 10th of Falgun Vadya Shak 1814. The 13th of March 1893.

| Cr. | Rs. | | Dr. | Rs. |
|---|---|---|---|---|
| "7 | The 2nd of Jeshta Shudh Shak 1815. | | The 10th of Falgun Vadya—own handwriting. | |
| | | 28½ | On making an account of the last *khata* the amount found due for principal together with interest is Rs. 28½, in letters twenty-eight and a half. The interest payable on this is Re 1 per cent. per month. I admit this to be correct. The handwriting of Damodhar Narayan Mamvadkar, inhabitant of Yedalgav | |
| | | | Signature across a receipt stamp of Sankra valad Bhawani Patil—my own handwriting." | |

We think that the admission or agreement that the statement is correct refers to the whole entry and is not an agreement as to the interest alone and a promise to pay it at ¾ per cent. In this view the *ruzukhata* in this case presents no peculiar feature and is an acknowledgment of the correctness of the calculation and of the rate of interest and nothing more.

[520] The transaction, therefore, amounts to this. There was an original debt advanced on (as the *ruzukhatas* show) compound interest, and the sum

now due at the foot of the account is Rs. 28½. How much of this due for principal and how much for interest is a matter of calculation, but the interest recoverable by suit is limited by the amount of principal originally advanced. This decision is in accord with that in *Motilal* v. *Shivram* (Second Appeal No. 43 of 1894) not reported.

The first and second questions should be answered in the negative, the third also in the negative, the amount of interest recoverable by the plaintiff being limited by the principal amount due on the original transactions.

*Order accordingly.*

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**NOTES.**

[ This was followed in (1901) 23 All., 502 ; see also (1902) 26 Mad., 186 ; (1909) 32 Mad., 284 ; (1900) 24 Bom., 394 ; (1901) 25 Bom., 387 ; (1904) P.R., 68 ; 84 ; (1901) 14 C.P.L.R., 151 ; (1914) 19 C.L.J., 263.]

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[ 22 Bom. 520 ]

## APPELLATE CIVIL.

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*The 13th October, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE HOSKING.

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Balkrishna Indrabhan............(Original Defendant) Applicant

*versus*

Mahadeo Babaji Kulkarni............(Original Plaintiff) Opponent.*

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*Dekkhan Agriculturists' Relief Act (XVII of 1879), Secs. 12, 13, 53 and 54—Mortgage—Profits in lieu of interest—Loan not secured—Provision that mortgage not to be redeemed until unsecured loan paid off—Mortgage paid off out of profits—Balance of profits applied to interest on loan—Special Judge, power of, to vary decree—Review.*

*A* lent *B* Rs. 150 for which *B* gave him a bond, dated 6th July 1872. Of this loan Rs. 100 were advanced on the mortgage of certain land, and the bond contained the terms of the mortgage, one of which was that the profits of the land were to be taken by the mortgagee in lieu of interest on the Rs. 100. The remaining Rs. 50 of the loan unsecured by the bond were made repayable with compound interest at Re. 1-8-0 per cent. per mensem. The bond further provided that the mortgage should not be redeemed until the latter sum of Rs. 50 with interest should be paid off. *B* sued for redemption of the mortgage. The first Court found that the mortgage had been paid off, and ordered redemption on the plaintiff paying Rs. 50. with interest, which under the rule of *damdupat* increased the amount to Rs. 100. The plaintiff applied to the Special Judge for review on the ground that he had already paid the Rs. 50. The Special Judge [521] did not review the case on that ground, but acting under the power given him by sections 53 and 54 of the Dekkhan Agriculturists' Relief Act varied the decree by ordering redemption on payment of Rs. 50 only, holding that as the mortgage had been long since paid out of profits, the balance of such profits should be applied to payment of the interest due on the Rs. 50. On appeal to the High Court,

*Held*, that the Special Judge had jurisdiction *proprio motu* under the provisions of section 53 to vary the decree of the lower Court while not reviewing the case on the ground applied or by the plaintiff.

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* Application, No 174 of 1896, under Extraordinary Jurisdiction.

*Held*, also, that the Courts while inquiring into the merits of a case under section 12 of the Dekkhan Agriculturists' Relief Act had authority under section 13 to treat the original advance of Rs. 100 and Rs. 50 as a single transaction and to set aside the agreement of the parties to treat part of the loan as a mortgage loan and part as an unsecured loan, and to deal with the whole case (as in substance it was) as an advance on a mortgage.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Khan Bahadur Nowroji Dorabji, Acting Special Judge under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879).

Suit for redemption of a mortgage dated 6th July 1872.

The bond which contained the mortgage, was given to secure a loan of Rs. 150, and it provided that only Rs. 100 of that sum should be deemed to be advanced on the security of the land thereby mortgaged, and that in lieu of interest on that sum of Rs. 100 the mortgagee should take the profits of the said land. The remaining Rs. 50 of the loan were, by the bond, made repayable with compound interest at Re. 1-8-0 per cent. per mensem, and it was provided that the mortgage should not be redeemed until this sum of Rs. 50 and interest should be paid off.

The Subordinate Judge found that the mortgage-debt had been already paid off out of the profits of the land; and he ordered redemption on payment of Rs. 50 with interest, which under the rule of *damdupat* made a total sum of Rs. 100 to be paid by the plaintiff.

The plaintiff applied to the Special Judge for review on the ground that he had repaid the Rs. 50. The Special Judge did not review the case, but varied the decree by directing redemption on payment by the plaintiff of Rs. 50 only, holding that as [522] the mortgage-debt had long since been repaid out of the profits of the land, the balance of such profits ought to be applied in reduction of the interest which had accrued due on the Rs. 50.

The defendant applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling on the plaintiff to show cause why the decision of the Special Judge should not be set aside on the grounds that the decision was against the provisions of the Dekkhan Agriculturists' Relief Act as interpreted by the decisions of the High Court, that the Special Judge was wrong in applying the profits enjoyed by the defendant as mortgagee to the payment of interest on the unsecured amount, and that the effect of the decision was to compel the mortgagee to refund profits enjoyed by him under the terms of the bond, which was passed long before the Dekkhan Agriculturists' Relief Act came into force.

*Mahadev B. Chaubal* appeared for the Applicant (Defendant) in support of the rule:—The Judge was wrong in appropriating the profits enjoyed by us to the payment of interest on the unsecured debt. There were two debts due to us: one secured by a mortgage, the other not secured. The two debts are quite distinct though there is only one bond. And the terms of the bond relating to the mortgage do not apply to the other debt. Under the bond the mortgagee is entitled to the profits of the land until redemption, but the Special Judge has applied part of the profits towards the payment of the unsecured debt. The effect of that is, that the mortgagee has to refund profits to which he is entitled under the terms of the mortgage executed long before the Dekkhan Agriculturists' Act came into force. The ruling in *Janoji* v. *Janoji*, I. L. R., 7 Bom., 185, is an authority that such a thing cannot be done. If there had been only the mortgage-debt, then in taking an account of the profits the Court could not have ordered any refund. The plaintiff did not contend that the debts should be considered as one. In his application for revision before the Special Judge,

the plaintiff sought to get himself absolved from liability on grounds other than those given by the Judge. The Judge was wrong in making out a new case for the plaintiff—*Gorakh Babaji* v. *Vithal*, I. L. R., 11 Bom., 435.

[523] *Sadashiv R. Bakhale*, for Balaji *A. Bhagavat*, for the Opponent (Plaintiff) showed cause:—The Judge was right under sections 12 and 13 of the Agriculturists' Relief Act (XVII of 1879). Courts are at liberty to inquire into the history of the transaction. The Judge did so, and he found that in fact the sum of Rs. 150 was one debt, and not two separate debts, as would appear from the bond. Regarding the debt as a single debt and the transactions as a single transaction, the Judge was right in dealing with the accounts as he did.

As to the objection that the Special Judge should have decided only the points raised in the plaintiff's application for review and should not have gone into other questions, we submit that the powers of the Special Judge under the Dekkhan Agriculturists' Relief Act are wider than those of other Courts.

He is a Court of revision, and in that capacity he can vary the decree *proprio motu* under the provisions of section 53 of the Act. His jurisdiction is not limited to the points taken before him.

**Farran, C. J.**:—We are of opinion that we ought not in this case, in the exercise of our extraordinary jurisdiction, to interfere with the order of the Revisional Judge.

The plaintiff sued to redeem a mortgage dated the 6th of July 1872. The bond which contained the mortgage was given to secure an advance of Rs. 150. It provided that of that sum Rs. 100 should be deemed to be advanced on the security of the mortgaged land, the profits of which were to be taken by the mortgagee in lieu of interest on that sum. The residue (Rs. 50) was made repayable with compound interest at Re. 1-8 per cent. per mensem, and it was provided that the mortgage should not be redeemed until the Rs. 50 with interest should be paid off.

The Subordinate Judge, First Class, found that the mortgage debt had been paid off out of the profits of the land, and decreed redemption on the plaintiff repaying by instalments the Rs 50 with interest, which, the rule of *damdupat* being applied, amounted to Rs. 50 more, or Rs. 100 in all.

The plaintiff applied to the Special Judge to review the case on the ground that he had repaid the Rs. 50. The Special Judge [524] did not review the case on the ground applied for by the plaintiff, but acting, we presume, under the power conferred upon him by sections 53 and 54 of the Dekkhan Agriculturists' Relief Act, varied the decree by directing that the plaintiff should be at liberty to redeem on payment of Rs. 50 only, deeming that, as the mortgagee had been long since repaid the Rs. 100 out of profits, the balance of such profits should be applied to payment of the interest due on the Rs. 50. This he considered to be an equitable order.

Mr. Chaubal contends that this is, in effect, an order directing the defendant to refund the profits which he has received in accordance with the terms of his mortgage and so is contrary to the ruling in *Janoji* v. *Janoji*, I. L. R., 7 Bom., 185. He also contended that the Special Judge had no jurisdiction under the circumstances to make a new case for the plaintiff different from that which he set forth in his application for review, citing *Gorakh Babaji* v. *Vithal*, I. L. R., 11 Bom., 435.

As to the latter objection we think that the Special Judge had jurisdiction *proprio motu* to vary the decree under the provisions of section 53, and the authority quoted does not, therefore, apply to the present case.

As to the former, we think that the Courts while under section 12 inquiring into the merits of the case had authority under section 13 to treat the original

advance of Rs. 100 and Rs. 50 as a single transaction and to set aside the agreement of the parties to treat part of the loan as a mortgage loan and part as an unsecured loan and to deal with the whole sum (as in substance it was) as an advance on mortgage. The arrangement to deal with the Rs. 50 as an unsecured debt, but to make the mortgage irredeemable until it was paid, in effect, though not in law, made the property a security for the Rs. 50—*Yashwant Shenvi* v. *Vithoba Sheti*, I. L. R., 12 Bom., 231; *Sundar Malhar* v. *Bapuji Shridhar*, I. L. R., 18 Bom., 755. If such a device were allowed to prevail, it would be adopted in many cases, and the provisions of the Dekkhan Agriculturists' Relief Act would be defeated. The mortgagee has himself interlaced the two loans and cannot complain of their being treated substantially as one. Though the Special [526] Judge has not dealt with the case exactly on the footing upon which we have considered it, we think that we ought not on that ground to exercise our extraordinary powers. Rule discharged with costs.

*Rule discharged.*

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[ 22 Bom. 526 ]

## CRIMINAL REVISION.

*The 31st October, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE

Imperatrix
*versus*
Vanmali and others.*

*Easement—Entry on land in order to repair—Dominant and Servient owners, rights and liabilities of—Indian Easement Act (V of 1882), Sec. 24, Ill. (a)—Right of entry—Indian Railway Act (IX of 1890), Sec. 122.*

The Rajnagar Spinning, Weaving and Manufacturing Company had a mill on one side of the B. B. & C. I. Railway line and a ginning factory on the other. To bring water from the mill to the factory a pipe had been laid beneath the railway line, and brick reservoirs built at each side to preserve the proper level of the water. Servants of the company having entered on the railway premises to repair the pipe and reservoirs without having first obtained the permission of the Railway Company, were convicted by a Magistrate under section 122 of the Indian Railway Act (IX of 1890) of an unlawful entry upon a Railway. It was proved that the repairs were necessary.

*Held*, reversing the convictions and sentences that, as the pipes and reservoirs belonged to the Spinning and Weaving Company and were kept in repair by them, they, as owners of the dominant tenement, had a right to enter on the premises of the Railway Company, the owners of the servient tenement, to effect any necessary repairs, and that the entry in question, being in the exercise of that right, could not be called unlawful.

APPLICATION under the Revisional Jurisdiction of the High Court under section 435 of the Code of Criminal Procedure (Act X of 1882).

* Criminal Application for Revision, No. 210 of 1896.

The Rajnagar Spinning, Weaving and Manufacturing Company, Limited, at Ahmedabad had a spinning and weaving mill on one side of the B. B. & C. I. Railway and a ginning factory on the other, the railway line passing between the two.

The plots on which the mill, the factory and the railway line were situate formed originally one piece of gronnd owned by one [526] individual; but when the Railway Company acquired the intervening piece of land for their line, an arrangement was made with the Railway Company that the water should be conveyed from the mill to the factory by means of a pipe laid under the Railway line; and two tanks were erected, one on either side of the permanent way, within the Railway limits, to keep the water on the same level. One of the tanks having got out of order the servants of the mill entered the land belonging to the Railway Company and repaired the tank, but without first having asked permission from the Railway authorities to do so. Thereupon the Railway authorities prosecuted the servants of the mill under section 447 of the Indian Penal Code (Act XLV of 1860) and section 122 of the Indian Railway Act (IX of 1890) before the First Class Magistrate of Ahmedbad.

The Magistrate refused to frame any charge under the Penal Code, but convicted the accused under section 122 of the Railway Act (IX 1890) and sentenced them to a fine of annas 4 each.

Against these convictions the accused applied to the High Court.

*Chimanlal Harilal Setalvad*, for the Accused.—The tanks which are in the land belonging to the Railway Company, and to repair which the petitioners entered the land, are admittedly the property of the mill whose servants the petitioners are. The owners of the tanks have the right to repair them which they have always exercised without obstruction, but they cannot do so without going upon the land. The Railway Company is the owner of a servient tenement and cannot complain of the lawful exercise of the rights possessed by the holders of the dominant tenement, *viz.*, the mill authorities. The position of the tanks precluded any possibility of danger or accident to the working of the railway line, and the Railway Act, therefore, has no application in this case. The petitioners were there in the exercise of their right of easement, and cannot be convicted as trespassers—Indian Easement Act (V of 1882) section 24 and Illustration (*a*); *Colebeck* v. *Girdlers Company*, 1 Q. B. D., 234.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown:—The accused had no right to enter the railway limits [527] and commence any work without first having obtained permission from the railway authorities. The railway authorities would have granted such permission had they been properly approached. The act of the accused was dangerous and might have resulted in loss of life and property. The Easement Act has no application to this case.

**Parsons, J.**:—The Magistrate finds that the company whose servants the accused are, have a mill on one side of the railway line and a ginning factory on the other, and that to bring water from one to the other there is a pipe laid beneath the railway line and brick reservoirs at each side to preserve the proper level of the water. He has convicted the accused under section 122 of the Indian Railway Act, 1890, because they entered on the railway premises to do some repairs to the pipe and reservoirs without having first obtained the permission of the Railway Company to their entry. But it appears to us that as the pipe and reservoirs belong to the company, and are kept in repair by them, they, as the dominant owners, would have a right to enter on the premises of the Railway Company, the servient owners, to effect any repairs that might be necessary. See the Indian Easement Act, Section 24, and

Illustration (a) and *Colebeck* v. *Girdlers Company*, 1 Q. B. D., 234. The evidence shows there was such necessity at this time, the flow of the water through the pipe being stopped. An entry in exercise of a right, cannot be called unlawful. We, therefore, reverse the convictions and sentences.

*Convictions and sentences reversed.*

**NOTES.**

[ This was followed in (1905) 30 Bom., 348; (1911) 9 I. C, 1011 (Punjab)-right to exclude from platform persons wishing to see friends off.]

## [528] PRIVY COUNCIL.

*The 19th November, 1897.*

PRESENT:

THE LORD CHANCELLOR, LORD HOBHOUSE, LORD DAVEY AND SIR R. COUCH.

Bal Gangadhar Tilak.... .......Petitioner

*versus*

The Queen-Empress.

(On petition from the High Court at Bombay.)

*Privy Council—Leave to appeal—Refusal of leave to appeal from a conviction and sentence—Alleged misdirection to a jury—Indian Penal Code (Act XLV of 1860), Sec. 124A.*

The petitioner applied to the Privy Council for leave to appeal from a verdict finding him guilty on a charge under section 124A of the Indian Penal Code (Act XLV of 1860).

*Held* that, consistently with the rules hitherto guiding the Judicial Committee in recommending the grant of leave to appeal from convictions in criminal cases, the petitioner's case was not one in which leave should be granted.

PETITION for leave to appeal from a conviction and sentence (14th September 1897) of the High Court in its original criminal jurisdiction.

Under an order, dated 26th July 1897, of His Excellency the Governor in Council, in accordance with section 196 of the Criminal Procedure Code (Act X of 1882), the Official Translator laid an information against Bal Gangadhar Tilak, editor and proprietor of the *Kesari*, a weekly journal published by him, in the vernacular, at Poona and at other places, in respect of articles in that newspaper alleged to offend against section 124A of the Indian Penal Code*. Tilak was committed for trial at the next sessions in Bombay, [529] and was held to

* Section 124 A, Indian Penal Code, is as follows:—"Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life, or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine."

"*Explanation*:—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause." (Act XXVII of 1870, S. 5).

bail. He was tried before STRACHEY, J., and a special jury on the 8th September 1897 and the five following days, and was found guilty of having, on the 15th June 1897, attempted to excite feelings of disaffection to the Government by publishing in the *Kesari* the articles specified. That was the verdict of the majority of the jurors (six against three), and it was accepted by the Judge, who sentenced him to eighteen months' rigorous imprisonment.

The *Kesari* of the 15th June 1897 contained a report of the proceedings at the Shivaji festival, then recently held at Poona. An historical lecture about the killing of Afzul Khan by Shivaji, was followed by speeches, of which one was delivered by Bal Gangadhar Tilak, who defended that act as justifiable, and alluded to other circumstances. The charge was based on the report, and also on a collection of Marathi verses, published in the same issue of the *Kesari* describing an imaginary awakening of the Maharaja from the sleep of centuries, and representing him as lamenting, in figurative language, over the decadence of Maharashtra, as well as discoursing upon other matters in a strain of discontent.

The petition stated the above facts, and mentioned that the petitioner had been elected by the native community on the 23rd May 1897 to represent them in the Legislative Council of the Governor of Bombay; and that his election had been accepted on the 24th June 1897, by the Government.

The principal grounds on which the petition sought for leave to appeal from the verdict and sentence were:

(1) That the order, or authority, purporting to be under section 196 of the Criminal Procedure Code (X of 1882) in not stating, either expressly or by reference, the words on which the charge was to be based, was insufficient; and that this defect was not rendered immaterial by section 532 of the Criminal Procedure Code (X of 1882).

(2) That the Judge had misdirected the jury as to the meaning of section 124A on a material point affecting the merits of the case and their finding, both as to the meaning of disaffection and in directing them to consider, in regard to the intention of the accused, a state of excitement among his readers, no such [530] feeling having in fact been proved to exist by evidence given at the trial.

(3) That the Judge had not, as he should have done, drawn the attention of the jury to editorial notes in the *Kesari* of the 18th May, showing that the cause of excitement, arising in regard to the sanitary operations had, in consequence of the request on the part of the native community, been removed before the publication of the *Kesari* of the 15th June.

The petition set forth the Judge's charge: see *supra* pp. 133 to 144.

*Asquith*, Q. C., (with whom were *J. D. Mayne*, *Womesh Chandra Banerji*, and *G. A. Blair*), for the Petitioner, argued that the Judge had misdirected the jury as to the meaning and application of section 124A. The ruling in *Reg.* v. *Bertrand*, (1867) L. R., I. P. C., 520, would support this petition, which sought to raise a question of "great and general importance" as affecting the right of political discussion. The principal argument was that too wide a meaning had been given to the words of the section; and that, in fact, it would appear doubtful whether the petitioner had exceeded the bounds within which a writer might express opinions. The Judge had directed the jury that "disaffection" meant ill-will in any form to the Government, "disloyalty" being, perhaps, the best term, and had said that he agreed with the definition given in *Queen-Empress* v. *Jogendra Chunder Bose*, (1891) I. L. R., 19 Cal., 35, where the Chief Justice of Bengal had stated the word to mean the absence of affection. It was obvious that this might vary in degree from indifference to extreme hostility, and that the

term was vague. The word "sedition" used in English law, explained as "disloyalty in action," was more clear. The question should not be tied to the one word, and it was submitted that the learned Judge's direction came to this, *viz.*, that if the evidence showed that the intention of the accused was to excite hatred of the Government in the minds of his readers, that alone would be sufficient to bring him within the scope of the section. The "explanation," in that section, had been treated by the Judge as if it formed by negation an exhaustive description of all that was not to fall within it. It was [531] submitted that this was not its true construction. The word "measures" used in the "explanation" was not the governing word; and comments upon measures should be understood as comprehending comments upon the whole course of Government without their being limited, as the Judge had limited them. The protection afforded to comments had been unduly restricted by the Judge's construction; and the protection should have been extended to comments such as had been made in this case, where the feelings, attempted to be excited, were such as to be "compatible with the disposition to render obedience to the lawful authority of the Government, and to support that authority against unlawful attempts to subvert it." The protection was applicable in a more general sense than that to which the Judge has limited it. The criticism of a Government generally took the form of criticizing some, or one, of its measures. The learned Judge should have told the jury to keep in mind the question—was the spirit, which the words were alleged to have been designed to engender, compatible or incompatible with the disposition to obey lawful authority? The contention now was that the articles, and the rhetorical verses, were merely intended as comments upon the course of Government, and upon the change in social habits and institutions which had been brought about since the days of Maratha rule; and that there was nothing to be found in the words used which necessarily tended to excite a disposition not to render obedience to lawful authority. The dividing line would have been passed if it had been shown that the feeling sought to be excited was incompatible with the disposition to render such obedience. Thus it appeared that the learned Judge had not suggested that construction of the section which was the true one. Further, he had, at various stages, referred to a state of disquiet or unrest as existing in the minds of those to whom the words of excitement were addressed, without evidence having been put before the jury of the existence of that state of agitation. This had been spoken of as requiring, if found to exist, a more severe construction of the language used than the latter might have called for at another time, or in another place. Thus a case of misdirection had, it was submitted, been made out. It had been said that a mere ordinary misdirec-[532] tion to a jury would not be sufficient ground for such an application as this, should no grave injustice be shown. Misdirection, leading to results of serious importance, might, on a consideration of circumstances and consequences, be the occasion of their Lordships' recommending the grant of special leave to appeal. Here, if no such leave were granted, this case, as it stood, must form a precedent guiding other Courts in future; and its importance would appear for this reason. Reference was made to *Reg.* v. *Bertrand*, (1867) L. R, 1 P. C., 520, where the opinions in *Re Ames*, (1841) 3 Moore, P. C. Ca, 409, in *The Queen* v. *Joykishen Mookerjee*, (1862) 1 Moore, P. C. Ca. (N. S.) 272, and in *The Falkland Islands Company* v. *The Queen*, (1863) 1 Moore, P. C. Ca. (N. S.), 299, were cited.

*Cohen*, Q. C., with whom was *J. H. A. Branson*, only mentioned *Ex parte Carew*, (1897) Ap. Ca., 719, at p. 721, in which the rule laid down in *Re Dillet*, (1887) 12 Ap. Ca., 459, at p. 467, was stated as follows:—"Her Majesty will not review, or interfere with, the course of criminal proceedings unless it

is shown that by a disregard of the forms of legal process. or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

Their Lordships' **judgment** was delivered by the Lord CHANCELLOR.

**Lord Halsbury**:—Their Lordships are of opinion, taking a view of the whole of the summing-up, which is of very great length, that there is nothing in that summing-up which calls upon them to indicate any dissent from it or necessity to correct what is therein contained, looking at the summing-up as a whole, and looking at each part of what was said by the light of what else was said. Speaking generally of the argument which has been presented to their Lordships, they are of opinion that no case has been made out consistently with the rules by which their advice to Her Majesty has been hitherto guided in giving leave to appeal in criminal cases; and, therefore, they will humbly advise Her Majesty that this is not a case in which leave should be granted.

Solicitors for the Petitioner:—Messrs. *Payne and Lattey.*

Solicitor for the Objector:—*The Solicitor, India Office.*

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## [533] ORIGINAL CIVIL.

*The 20th and 21st December, 1897.*

PRESENT:

MR. JUSTICE B. TYABJI.

Khimji Jairam Narronji............Plaintiff

*versus*

Morarji Jairam Narronji and others............Defendants.

*Will—Construction—Gift to a class—Members of class not in existence at testator's death—Void gift—Intention of testator—Gift to widows of sons is a gift to a class.*

A testator gave his property to his executors and trustees, who were to apply the income as directed He further directed that after the death of the last survivor of his five sons the property should be divided as directed among the sons of his sons and daughters of his sons, and provision was made, in certain events, for the widows of his deceased sons. He left him surviving his five sons, three grandsons and three grand-daughters. After his death two more grand-daughters were born.

*Held*, that the gifts to the sons, daughters and widows of deceased sons were void. They were gifts to a class of which some members were not in existence at the time of the testator's death.

The principle deducible from the authorities is that it is the primary duty of the Court so to construe the will as to carry out, as far as possible, the intentions of the testator, and that if the Court comes to the conclusion that the testator had the primary intention of benefiting all the members of a class and if such intention fails by reason of its being void,

yet if the Court can deduce a secondary intention that at least such members of the class should take as were in existence at the time of the testator's death, then effect should be given to such secondary intention, but not otherwise. For the purpose of ascertaining these primary and secondary intentions it is, of course, necessary to take all the material facts as to the testator's family into consideration and to read the various provisions of his will as a whole.

A gift in a will to widows of sons is, in the case of Hindus, a gift to a class, as Hindus by their law are permitted to have more than one wife at the same time.

*Ram Lal* v. *Kanai Lal*, I. L. R., 12 Cal., 663, *Krishnanath* v. *Atmaram*, I. L. R., 15 Bom., 543, *Mangalddas* v. *Tribhovandas*, I. L. R., 15 Bom., 652, *Tribhovandas* v. *Gangadas*, I. L. R., 18 Bom., 7, and *Krishnarao* v. *Benabai*, I. L. R., 20 Bom., 571, referred to.

SUIT by an executor for the construction of a will.

One Jairam Narronji died at Bombay on the 19th April 1890, leaving a considerable amount of property. Probate of his will, dated 1st January 1890, was granted to his son, the plaintiff, on the 15th December 1893.

[534] The testator left a widow, five sons, *viz.*, Liladhur, Khimji (plaintiff), Morarji, Callianji and Meghji; three grandsons, one of them being a son of the plaintiff and the other two being the sons of Liladhur, and three grand-daughters, of whom one was the daughter of the plaintiff and two the daughters of Liladhur. The testator had a sixth son (Karsondas), who, however, predeceased him and left a widow (defendant No. 15).

Liladhur died in 1892, leaving a widow (defendant No. 16) and also the two above-mentioned sons.

Subsequently to the testator's death two daughters were born to the plaintiff (defendants Nos. 7 and 8).

The testator's widow and mother and the Advocate General of Bombay were defendants in the suit.

By his will the testator directed that a lakh and a half of his property should be "set apart in trust" and held by his executors as trustees, and he directed that out of the income arising therefrom monthly allowances should be made to his mother and widow and daughter-in-law, and that the residue should be applied to the support of a certain sadavarat and to the maintenance and education of his family, all of whom were to reside together.

He further directed that, if any son should live separate, the trustees, after paying the above allowances, were out of the surplus of such income to give to the son so living apart his equal share.

On the death of the last of his sons the trust was to come to an end, and the trust property to be divided among the sons of his sons. Such sons were to take their deceased father's share, and if any of his sons had no son but had daughters, such daughters were to get half their father's share, the other half going to the sons of the other sons.

The above directions are contained in the following clauses of the will:—

"7. If until (the expiration of) the period appertaining to this trust and before the distribution of the trust property according as mentioned below my sons cannot live together, and if any one of them should live separate, then after making the outlays and paying the sums mentioned in the above written clauses (Ka) to (Dna) as to the surplus which may remain out of the income [535] of the trust property, out of the same my trustees shall give to the son so living apart his equal share. And for the purpose of fixing the amount of the share appertaining to each of the sons in this manner an equal share shall be given to my worshipful and respectful mother Jivibai and my wife Shamavahu (*i.e.*) to each of them during their lifetime for their boarding expenses. And after the decease of such son the amount of the income coming to his share shall be given to his sons. And if he should have no sons, and (but) if he should have a widow and daughters,

the trustees shall give them out such sums for their boarding and maintenance expenses as may be reasonable and just.

"8. When the decease of the last of my sons shall take place, the time in respect of this trust shall expire. And my trustees shall divide and distribute this trust property among the *sons of my sons*. And the sons of each of (my) deceased sons shall be given their deceased father's equal share. And if there should be no sons born of the loins of any one of my sons, but if there should be daughters, a moiety of the share of such deceased son shall be given to his daughters. And the remaining moiety shall be divided and distributed amongst the sons of my other sons, who may get the remaining property. The same shall be given in such a way that the sons of each of (my) sons shall get one equal share, that is to say, the distribution shall take place on the principle of what in English is called stirpes (per stirpes). And if such deceased son should have no children whatever, the whole share of such deceased son shall be given to the sons of his other deceased brothers agreeably to what is written above."

Besides the trust property the testator had other property out of which he made certain bequests and finally gave the following directions as to the residue of his estate :—

"18. After setting apart the trust property and legacies or (and) after making the outlays appertaining to ornaments and marriages and the outlays appertaining to the *uttar kriya* (ceremonies) mentioned above, as regards whatever property of mine may remain over the whole of such property shall be divided into as many equal shares as there may be my sons and one for me. And if accounts should not have been opened after making a division in my lifetime in the name of each of my sons in respect of his such share, the several accounts should be opened. And whatever sum may come to the share of each of (my) sons should be considered as given in gift to him by me. And out of the amount of my share outlays shall be made according to what is mentioned below; that is to say, a sanitarium should be built for the use of Bhatias or a '*suvavad khana*' (lying-in hospital), or chawls for poor Bhatias to live therein on payment of cheap rents.........should be built and therein some accommodation should be provided for my friends to put up at. After this shall have been done, all of my sons together and jointly with each other and in peace and harmony shall carry on the business which I at present carry on, or any other business. **[536]** And whatever profit or loss may arise therein, the same shall respectively be credited or debited to the account of each son in equal shares. If any of my sons should not be of age,—that is to say, should not have completed the age of eighteen years,—the executors shall credit his share and income in his name. And I recommend my executors and my sons as follows :—They should live unanimously as far as practicable and by doing so they will always be benefited. But if any of my sons should not be in peace and harmony (with others) the amount which may be due to the account of such son should be paid in full (to him) and he should be separated from the partnership. And as long as the other sons can live together, and carry on the business, they shall live together and conduct themselves agreeably to what is mentioned above. And when they shall separate in business, or should desire to do so, (those) remaining sons shall divide and receive in equal shares my remaining property and the income thereof whatever the same may be. And if the decease of any one of (my) sons should have taken place before that time, his sons, if he has any, shall be entitled to his share: and if he has no sons (his said share) shall be apportioned in such a way as may have been directed in the will if such deceased son should have made one. And if he should not have made a will, and *if the widow only of such deceased son should have been left*, she shall get the income of (such share) as long as she may be alive. And on the decease of the said Bai, my other sons shall become entitled to the said property in equal shares. But if he should have daughters (a sum of) Rs. 5,000, namely five thousand, shall be paid to each of such daughters. Out of the remaining property coming to the share of such deceased son, outlays relating to the marriage of such daughters shall be made agreeably to my respectability. And after making such outlays as regards whatever may remain over, (my) other sons shall divide and receive the same in equal shares."

The plaint set forth the various questions of construction to be decided by the Court. The main point, however, raised at the hearing and the only one material to this report was whether under the gifts made in the will to "sons of sons," "daughters of sons" and "widows of sons" the members of those classes could take who were living at the death of the testator, excluding those who afterwards came into existence, or whether the gifts to those classes were wholly void.

*Lang* (Advocate General) and *Inverarity* appeared for the Plaintiff.

*Anderson*, *Lowndes* and *Jamietram Nanabhoy* appeared for the Defendants.

The following authorities were cited:—*Krishnanath* v. *Atmaram*, I. L. R., 15 Bom., 543; *Mangaldas* v. *Tribhovandas*, I. L. R., 15 Bom. 652; *Krishnarao* v. *Benabai*, I. L. R., 20 Bom., 571; **[537]** *Ramlal Sett* v. *Kanailal Sett*, I. L. R., 12 Cal., 663; Succession Act (X of 1865), section 104; *Rai Bishen Chand* v. *Mussumat Asmaida Koer*, L. R., 11 Ind. Ap., 164 at p. 178.

**Tyabji, J.**:—This suit is filed by the plaintiff as the surviving executor of his father Jairam Narronji for the purpose of getting the will of the testator construed and the rights of the parties interested under the will to be ascertained by the Court. The facts of the case are simple and undisputed. It appears that the testator Jairam Narronji, a Hindu inhabitant of Bombay, died on the 19th April 1890, having made his will in the Gujarati language dated 1st January 1890. Probate of the will was granted to the plaintiff as the sole surviving executor on 15th December 1893. The testator at the time of his death was possessed of considerable property, all of which was self-acquired.

The testator left him surviving five sons, namely, the plaintiff Khimji and his brothers Morarji (first defendant), Callianji (third defendant), Meghji (fourth defendant) and Liladhur, who died afterwards on the 18th June 1892. Liladhur had two sons, namely, the ninth and tenth defendants, and two daughters, namely, the eleventh and twelfth defendants, all of whom were born before the death of the testator. Liladhur also left a widow, the sixteenth defendant. The testator also left him surviving his mother Jivibai (fourteenth defendant), his widow Shamavahu (thirteenth defendant), his daughter-in-law Monghivahu (fifteenth defendant), who is the widow of his predeceased son Karsandas. The plaintiff's son Vallabhdas (fifth defendant) and his daughter Manekbai (sixth defendant) were also born before the death of the testator. The plaintiff's daughter Monghibai (seventh defendant) and Manibai (eighth defendant) were born after the testator's death. The first, third and fourth defendants have no issue.

Under these circumstances various questions have arisen as to the true construction of the will, and it will be convenient to deal with them seriatim in their order.

The main question, however, on which the construction of the different clauses of the will turns is whether the terms "sons of sons," "daughters of sons," "widows of sons," which occur **[538]** throughout the will, denote a class, so that the gift to all of them would be wholly void, as only a very few members of the class were in existence at the time of the testator's death, or whether the gift to any of the members of the class who were in existence at the time of the testator's death takes effect. Before expressing my conclusion upon this point I may at once say that the case has been argued before me on behalf of the various parties in an extremely friendly spirit with a desire so to construe the will, if that be possible, as not to prejudice any members of the class who were intended to be benefited by the testator. Indeed, I may say that the efforts of Counsel were directed to prevent the hardships that would arise if such a construction were to be put upon the various clauses of the will

as to benefit only some members of the testator's family to the exclusion of others standing in precisely the same position. The question, therefore, before me is how far I can give effect to the desire of the parties by putting upon the clauses of the will the construction which is most equitable and which they all seem to desire.

It is, of course, beyond doubt that the expressions "sons of sons" and "daughters of sons" must necessarily be treated as denoting a "class" as defined in *Leake* v. *Robinson*, 2 Mer., 363, and Jarman on Wills (4th Ed.), p. 268. The term "widows of sons" raises more difficulty; but as Hindus are, by their law, permitted to marry and to have more than one wife at the same time, I must hold that they also form a "class." It follows, therefore, that a gift to any of these three classes would be bad under the *Tagore* case, 9 Beng. L. R., 377, as some of the members of each of these classes were not in existence at the time of the testator's death.

The question, however, is whether, under the provisions of this will, I must or ought to hold the gift to be good in favour of such members of these three classes as were in existence at the time of the testator's death to the exclusion of all the others as decided in *Ram Lal* v. *Kanai Lal*, I. L. R., 12 Cal., 663; *Krishnanath* v. *Atmaram*, I.L.R., 15 Bom., 543; *Mangaldas* v. *Tribhovandas*, I. L. R., 15 Bom., 652; *Tribhovandas* v. *Gangadas*, I. L. R., 18 Bom., 7, and *Krishnarao* v. [539] *Benabai*, I. L. R., 20 Bom., 571. The principle I deduce from these authorities is that it is the primary duty of the Court so to construe the will as to carry out, as far as possible, the intentions of the testator, and that if the Court comes to the conclusion that the testator had the primary intention of benefiting all the members of a class, and if such intention fails by reason of its being void, yet if the Court can deduce a secondary intention that at least such members of the class should take as were in existence at the time of the testator's death, then effect should be given to such secondary intention. For the purpose of ascertaining these primary and secondary intentions it is, of course, necessary to take all the material facts as to the testator's family into consideration and to read the various provisions of his will as a whole. Adopting this test, I have come to the conclusion that in this case the testator intended to benefit all the members of the three classes as a whole and that he had no intention of benefiting any particular member of any of the classes in the event of the gift to the classes as a whole failing by reason of the non-existence of some of the members at the time of the testator's death. In other words, I can discover no indication whatsoever of the intention of the testator to benefit his three grandsons (fifth, ninth and tenth defendants) to the exclusion of his other grandsons by the same or other sons. Similarly I can discover no such indication in favour of his grand-daughters (sixth, eleventh and twelfth defendants) to the exclusion of his other grand-daughters born afterwards. Nor can I see any direct intention to favour the sixteenth defendant to the exclusion of any other widows that Liladhur might have left. No member of any of these three classes is named, or specifically designated in the will, or referred to in any manner whatsoever as to show that the testator had him specially in mind. This observation, of course, does not apply to the fifteenth defendant for whom special provision has been made in the will and whose husband had died before the testator's death. Reading the will as a whole I have come to the conclusion that the testator intended to benefit no members of the class unless he could equally benefit all of them whether born before or after his death.

[540] Having made these general observations I will now proceed to construe the various clauses in their order. (His Lordship then decided the issues raised on the clauses of the will and continued :—)

The construction I have put upon the various clauses of the will makes some of its provisions absolutely void and that causes intestacy, but under the peculiar circumstances of the testator's family it is clear to my mind that the intestacy will indirectly bring about practically the same results that the testator had in view. Under the intestacy the testator's five sons will inherit the property which must necessarily enure to the benefit of the testator's grandsons and grand-daughters and the widows of the testator's sons and grandsons, that is, for the benefit of the very persons whom the testator had intended to benefit. If, on the other hand, I had held the provisions to be good and valid in favour of the few members of the three classes who were in existence at the time of the testator's death, it is obvious that they would have absolutely taken the whole benefit of the estate and would have excluded many of those for whom the testator intended to provide.

I record my findings upon the issues in accordance with the above conclusions and I direct that the costs of all parties should come out of the estate as between attorney and client.

Attorneys for the Plaintiff :—Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for the Defendants :—Messrs. *Little and Co.*

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**NOTES.**

[Gifts to a class are valid as regards those who can take notwithstanding their failure as regards some members of the class :—(1911) 15 C. W. N., 393 P.C.; see likewise (1901) 26 Bom., 449; (1905) 32 Cal., 598.

The Hindu Disposition of Property Act, 1916, is to the same effect.]

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[ 22 Bom. 540 ]

## ORIGINAL CIVIL.

*The 11th January, 1898.*

PRESENT :

MR. JUSTICE FULTON.

W. B. Stokes............Plaintiff

*versus*

Soondernath D. Khote and another............Defendants.*

*Broker—Brokerage—Suit for brokerage—Contract effected by broker not carried out by purchaser*—Quantum meruit.

The plaintiff was employed by the defendants as broker to sell certain property. The defendants' letter dated 3rd January 1895, engaging him as [541] broker stated as follows :—"It is understood that the brokerage will be paid on receipt by us of the money, and that this transaction is to be completed within a fortnight from date." The plaintiff negotiated with one Pestonji Patel and his brother, who eventually agreed to become purchasers, but stipulated for four or five months within which to pay the purchase-money. On the 1st February 1895, the defendants, through the plaintiff, finally closed the contract with the purchasers, one of the terms of which provided that Rs. 10,000 should be paid immediately, as earnest, and the balance (Rs. 27,000) of the purchase-money should be paid within four months. The purchasers were, however, unable to pay the Rs. 10,000 earnest-money and they handed to the defendants three Bank of Bombay shares as security for the performance of the contract. One of the purchasers shortly afterwards died. The defend-

* Suit No. 455 of 1897.

ants apparently abandoned the idea of enforcing the contract, and at the end of the year they returned to the purchasers' family two of the Bank of Bombay shares, having (as they alleged) sold the third to defray the expenses which they had incurred in connection with the transaction. The plaintiff sued to recover Rs. 1,500 as brokerage from the defendants.

*Held*, that under the circumstances the plaintiff was not entitled to recover the Rs. 1,500, but only to a *quantum meruit*, there being no previous agreement as to the time when the brokerage was to be paid; and that he was only entitled to a percentage (5 per cent.) on the value of the shares which had been actually received by the defendants. Part of the business for which the plaintiff was employed was to find a solvent purchaser.

SUIT for brokerage. The plaintiff alleged that by a writing dated the 3rd January 1895, he was employed by the defendants to procure a purchaser of their shares in the agency commission of the New Dholera Cotton Pressing and Ginning Company, Limited, and that for doing so he was to receive a brokerage of Rs. 1,500; that he had procured a purchaser and concluded a contract between him and the defendants, and he was, therefore, entitled to be paid his brokerage. He also claimed the said sum for work and labour under the ordinary money counts.

The defendants pleaded that they were not bound to pay any brokerage or commission to the plaintiff, as the purchase which he had negotiated had never been completed and the purchase-money had never been paid.

The writing of the 3rd January 1895, mentioned in the plaint, was a letter addressed by the defendants to the plaintiff and was as follows:—

"With reference to our talk *re* the sale of our shares in the agency commission of the New Dholera Cotton Press and Spinning Company, Limited, [542] we agree to let you have, as bonus or brokerage, the sum of Rs. 1,500 only, if you succeed in selling a twelve-annas' share in the commission for shares of the value of Rs. 42,000 of the said company at par value. If not, you may sell a six-annas' share in the said commission for shares of the said company of the value of Rs. 22,000 (sic) at par value, for which we shall be glad to let you have Rs. 750 for your trouble. *It is understood that the brokerage will be paid on receipt by us of the money*, and that this transaction is to be completed within a fortnight from date."

It appeared that subsequently to the receipt of that letter the plaintiff negotiated with one Pestonji Patel and his brother Jamsetji, who eventually agreed to become purchasers.

They, however, stipulated for four or five months within which to pay the purchase-money. On the 30th January 1895, the defendants wrote to the plaintiff to inquire who the proposed purchasers were, and having obtained the information from the plaintiff they wrote the following letter next day to the plaintiff:—

"*31st January*, 1895.

"To Messrs. STOKES & Co.
Bombay

"Dear Sirs,—With reference to your letters to us dated 21st and 30th instant, informing us that Messrs. Pestonji and Jamsetji Dadabhoy Patel are willing to purchase from us a portion of our share in the agency commission and its emoluments of the New Dholera Cotton Pressing and Ginning Company, Limited, on certain conditions, we beg to inform you that we shall be glad to meet them on the following conditions" (then followed the conditions, of which the following are material):—

"(1) That they are to get a ten-annas' share in the agency commission of the company on their taking up 74 shares of the said company of Rs. 500 each at par value, their Mr. Ratilal retaining the remaining six-annas' share.

"(2) That a sum of Rs. 10,000 should be paid immediately down in cash as earnest-money; the balance of the purchase-money, namely, Rs. 27,000, to be paid within four

months from date whereon interest is to run in the meantime at Rs. 6 per cent., but at the same time that it should open to Messrs. Patel to pay it up within that period."

On the following day the plaintiff wrote as follows to the defendants :—

"Dear Sirs,—We duly received yours of the 31st January and have submitted the contents to Messrs. Patel Brothers. The following items are their replies to yours" (the items are then set forth, but only the following is material) :—

[543] "2. That Messrs. Patel Brothers are ready to pay cash money on the completion of the agreement and pukka transfer of the shares.

* * * * * * *

"Awaiting the favour of your confirmation."

On the same day the defendants wrote as follows to the plaintiff accepting the terms of purchase :—

"1st February 1895.

"To Messrs. STOKES & Co.,
Brokers, Bombay.

"Dear Sirs,—We beg to acknowledge your letter of date and to inform you that we confirm the terms mentioned therein, with the variation contained in the para. in the postscript.

"2. As arranged personally with you, we shall request our solicitors, Messrs. Chitnis, Motilal and Malvi, to draw up the regular deed of agreement."

The Patels, however, were unable to pay the Rs. 10,000 earnest-money and they handed over to the defendants three Bank of Bombay shares as security for the performance of the contract. In May 1895, Pestonji Patel died.

No brokerage was paid to the plaintiff, although (as he alleged) he repeatedly applied for it. On the 2nd August 1895, he wrote the following letter to the defendants :—

"I think it is now time you paid me my brokerage, seeing that the late Mr. Pestonji Patel (the purchaser) paid you five (sic) Bank of Bombay shares as a deposit.

"You must know that as soon as the contract is finished, and deposit paid, I am entitled to my brokerage."

The defendants apparently abandoned the idea of enforcing the contract and at the end of the year they returned to the Patel family two of the Bank of Bombay shares. The third they sold for Rs. 1,300, in order (as they stated) to reimbu se themselves for expenses which they had incurred in the transaction. Before they had returned the share, however, the plaintiff had written the following letter to the defendant :—

"7th December 1895.

"Dear Mr. Khote.—I met Mr. Patel's uncle yesterday. He wants you to hasten to return the shares. I informed him that whatever was done, my commission would be deducted first.

[544] "Therefore I must ask you not to part with the shares until my commission is paid. I performed my part and I think you should square up now. I do not see why you should delay when you have the value in hand. Awaiting your reply."

The plaintiff now sued to recover Rs. 1,500 as brokerage.

*Russell*, for Defendants :—The plaintiff is not entitled to any brokerage. The letter of 3rd January employing him clearly states that the brokerage is to be paid on receipt of the purchase-money. The defendants' object in making that arrangement was to secure a solvent purchaser. The purchaser procured by the plaintiff was not solvent and the purchase-money was never paid. The receipt of the purchase-money by the defendants was a condition precedent to the plaintiff's right to demand his brokerage.

*Kirkpatrick*, for the Plaintiff :—A broker does not ordinarily guarantee the completion of the contract which he makes for his principal. His work is done

when the contract is made. The plaintiff did what he agreed to do, and the defendants accepted the purchaser he found. He could not enforce the contract. The defendants could have enforced it, but apparently they did not try. They have lost their money by their own default. The plaintiff ought not to suffer. In any case the plaintiff was entitled to be paid his brokerage out of the shares deposited by the purchasers. The defendants instead of insisting on the purchase-money consented to receive them in place of it, *i.e.* as security for it. He cited *Fisher* v. *Drewett*, 48 L. J. (Ex.), 32; *Pricket* v. *Badger*, 1 C. B. (N. S.), 296; *Green* v. *Lucas*, 33 L. T. (N. S.), 584; *Rimmer* v. *Knowles*, 30 L. T. (N. S.), 496; *Municipal Corporation of Bombay* v. *Cuverji Hirji*, I. L. R., 20 Bom., 124.

**Fulton, J.**:—The plaintiff sues to recover brokerage on the sale of a certain agency commission belonging to the defendants. It appears that on 29th December 1894, the defendants wrote to Mr. Stokes, asking him to find a purchaser, and said as follows:—" As regards your bonus or brokerage it would be much better if you made your demand, which, if deemed reasonable, I shall accept." Some reply is stated to have been written, but the defendants' papers are missing and plaintiff has no copy, and it is [545] evident from the terms of the next letter that the amount of the brokerage was proposed in conversation. On the 3rd January the defendants sent a letter to the plaintiff, in which they wrote as follows:—

" With reference to our talk *re* the sale of our shares in the agency commission of the New Dholera Cotton Press and Spinning Company, Limited, we agree to let you have, as bonus or brokerage, the sum of Rs. 1,500 only if you succeed in selling a twelve-annas' share in the commission for shares of the value of Rs. 42,000 of the said company at par value. If not, you may sell a six-annas' share in the said commission for shares of the said company of the value of Rs. 22,000 at par value, for which we shall be glad to let you have Rs. 750 for your trouble. *It is understood that the brokerage will be paid on receipt by us of the money*, and that this transaction is to be completed within a fortnight from date."

Subsequently terms were arranged with one Pestonji Patel, who stipulated for four or five months for payment in his letter of the 18th January. On the 21st January, Pestonji signed a " bought note " for 74 shares for which payment was to be made on or before four or five months at his option. A " sold note " in similar terms was presented to the defendants, but was not signed owing to the necessity of consulting certain directors. On 30th January the defendants wrote to ask who Pestonji D. Patel and others were; and on the same day the plaintiff wrote to say that the " others " were Pestonji's brother Jamsetji.

On 31st defendants wrote agreeing to sell on the following conditions to Messrs. Pestonji and Jamsetji:—

" 1. That they are to get a ten-annas' share in the agency commission of the company on their taking up 74 shares of the aforesaid company of Rs. 500 each at par value, their Mr. Ratilal retaining the remaining six-annas' share.

" 2. That a sum of Rs. 10,000 should be paid immediately down in cash as earnest-money, the balance of the purchase-money, namely, Rs. 27,000, to be paid within four months from date whereon interest is to run in the meanwhile at Rs. 6 per cent., but at the same time that it should be open to Messrs. Patel to pay it up within that period."

There were also certain other conditions which for the purposes of this case it is not necessary to recapitulate.

On the 1st February the plaintiff wrote to the defendants that Messrs. Pestonji and Jamsetji Patel agreed to take twelve annas in eighty shares, and were ready " to pay cash money on the com-[546]pletion of the agreement and

pukka transfer of the shares. On the same day this proposal was accepted by the defendants.

After this, difficulties arose. The Patels were unable to pay the deposit of Rs. 10,000, and Pestonji, through his solicitors, gave three Bank of Bombay shares as security for his performance of the contract. About May Pestonji died. Then the defendants, apparently under some pressure, returned two of the Bank shares to Pestonji's grandmother, who claimed them and sold one for Rs. 1,300, out of which they re-imbursed themselves the expenses to which they had been put. The shares, it may be explained, stood in the grandmother's name, but were received by the defendants with blank transfer papers signed by her.

What the arrangements were about the payment of brokerage to Mr. Stokes it is difficult to say. The letter of the 3rd January 1895, was clear. If that arrangement had held good, his brokerage was made conditional on the payment of the money by the purchaser. But it was argued, reasonably enough on his behalf, that the extension of time given for payment for the purchase-money necessarily implied some modification of this provision. Mr. Stokes says that Mr. Khote had verbally promised to pay the brokerage when the deposit of Rs. 10,000 was received, but apparently he thought himself entitled to the amount as soon as the agreement with the Patels was negotiated. On the other hand, Mr. Khote says he only promised to pay a proportionate part of the brokerage on Rs. 10,000 being received, and he considered that as the Patels never carried out their agreement, the plaintiff was not entitled to anything. It is very difficult to say, for certain, that any agreement on the subject was come to, or that the matter was ever discussed with any precision. No reference to such discussion is mentioned in letters K or L in which plaintiff claimed payment. In the circumstances I think the plaintiff can only recover a *quantum meruit*, there being no precise agreement as to the time when his brokerage was to be paid. Whether the condition about payment was inserted in the defendants' letter of 3rd January in special reference to Patel as stated by the defendants, or without such special reference as contended on behalf of the plaintiff, is not very material. That condition, I think, [547] clearly showed that the defendants only intended to pay brokerage in case a solvent purchaser was procured.

Mr. Kirkpatrick relied on the cases of *Pricket* v. *Badger*, 1 C. B. (N. S.), 296; *Rimmer* v. *Knowles*, 30 L. T. (N. S.), 496; *Green* v. *Lucas*, 33 L. T. (N. S.), 584; *Fisher* v. *Drewett*, 48 L. J., (Ex.), 32, to show that, in the words of Lord Justice BRAMWELL in *Fisher* v. *Drewett*, "the current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their part of the bargain, irrespective of what may take place subsequently between the parties." But, after all, neither this case nor the others referred to above—any more than the case of the *Municipal Corporation of Bombay* v. *Cuverji*, I. L. R., 20 Bom., 124,—is really in point. If the bargain is merely that the broker is to introduce the purchaser, and effect an agreement between him and the seller, it is clear that he is entitled to be paid when his part of the transaction is performed. But in each case I think the nature of the contract must be carefully considered, and if part of the business for which the broker is employed is to find a solvent purchaser, he will not, I think, be entitled to his brokerage till he has done so.

Now in the present case it seems that the stipulation in the letter of the 3rd January, that the brokerage was only to be paid when the money had been received, governed the whole of the subsequent dealings betweeen the parties,

and showed that the broker to the extent of his brokerage was to be answerable for the solvency of the purchaser. And I think that even when the terms of the sale were modified, and payment was deferred, Mr. Stokes, if he wished to get rid of this liability, ought to have got the matter clearly settled. Instead of this it is evident that nothing was definitely settled, and it was left in doubt whether he was to be paid in full or proportionately when the deposit of Rs. 10,000 was made. Doubtless if the contract with the Patels had fallen through, as in *Pricket* v. *Badger* and *Green* v. *Lucas* and *Fisher* v. *Drewett*, through the default of the defendants, the plaintiff would have had a strong case for the recovery of the whole of his commission; but here this was not the case. It is clear that the de-[548] fendants were anxious and willing to sell, and their failure to do so was due not to their own but to the default of the purchaser introduced by the plaintiff. It was said they ought to have sued Pestonji or his legal representatives, but the defendant Khote says that he knew it was useless to do so, and there is no evidence to contradict him. Whatever the agreement between the defendants and Stokes was, it cannot be suggested that it in any way required them to involve themselves in litigation, possibly of a hopeless nature.

Then it was urged that at any rate they ought not to have surrendered the two bank shares deposited with them. There is, I think, force in this contention. The Patels had deposited them as security for the fulfilment of their contract, and the circumstances under which they were surrendered to the grandmother have not been shown. The legal necessity for this surrender was not apparently sufficient to prevent the defendants insisting on retaining one share for their own expenses: and if they were entitled to do so I cannot see why they were not equally entitled to keep the other two. The Patels had handed them over to them as security for the performance of their contract with the grandmother's authority to transfer signed in blank, and it is doubtful whether she was legally entitled to have them back. In the absence of all evidence as to how Pestonji got the shares from her, I think the presumption is that the defendants were, at law, entitled to retain them, having obtained possession *bonâ fide*, and to the extent of the value of these shares the purchasers were solvent. (*Vide* Contract Act, section 108.) To that extent, then, the plaintiff seems entitled to his remuneration of 5 per cent., not on the whole bargain, but on the portion of it which the defendants could have enforced against the purchasers. The value of these three shares may be set down at Rs. 3,900, as one of them was sold for Rs. 1,300. There will be a decree for plaintiff for Rs. 195. Both parties being equally responsible for the vagueness of the contract, and neither party being, in my opinion, wholly right about it I make no order as to costs.

*Decree for plaintiff.*

Attorney for the Plaintiff :—Mr. *M. N. Sakhlatvala.*

Attorneys for the Defendants :—Messrs. *Bicknell, Merwanji and Motilal.*

## [549] CRIMINAL REVISION.

*The 23rd July, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Imperatrix

*versus*

Sadashiv Narayan Joshi.*

*Criminal Procedure Code (Act X of 1882), Secs. 528, 497—Transfer of case—Notice to accused—Bail—Order admitting to bail not revisable by District Magistrate—Practice.*

An order under section 528 of the Criminal Procedure Code (Act X of 1882) transferring a case for inquiry or trial from one Magistrate to another ought not to be made without notice to the accused.

An order admitting an accused person to bail made by a Magistrate is not revisable by a District Magistrate. If the latter considers the order wrong, he can refer it to the High Court.

APPLICATION for revision under section 435 of the Code of Criminal Procedure (Act X of 1882).

The petitioner was charged with theft of property in a dwelling-house, and was sent up by the police to the First Class Magistrate at Poona. An application was made to the Magistrate to release him on bail on the grounds (*inter alia*) that he was a " man of a respectable family, and a man of riches, and it was not possible that he would commit theft," and also that the evidence would clearly exonerate him from the charge. The Magistrate under section 497 of the Criminal Procedure Code (Act X of 1882) made an order admitting him to bail.

This order being brought to the notice of the District Magistrate, he, without giving any notice to the accused, transferred the case from the Court of the First Class Magistrate to that of the City Magistrate, recording the following order :—

" The District Magistrate is of opinion that the reasons given in the Magistrate First Class's order, dated 18th June 1896, under section 497, Criminal Procedure Code, do not justify the release of the accused on bail, and that the Magistrate's action shows a tendency to treat the accused with undue leniency."

The petitioner applied to the High Court to set aside this order.

*Daji Abaji Khare* and *Vinayak Vishnu Ranade*, for the Petitioner:—They referred to *In the matter of Ratanji Premji*, Cr. Ruling 32 of 1889; *Imperatrix* v. *Mulubhai Bavaji*, Cr. Ruling 21 of 1893.

[550] Rao Saheb *Vasudev J. Kirtikar* (Government Pleader), for the Crown :—The District Magistrate had authority to transfer the case at any stage under section 528 of the Code of Criminal Procedure (Act X of 1882). If the order is bad for want of notice to the accused, the District Magistrate should be directed to rehear the matter after giving notice, as was done in the case of *Re Petition of Mahadu Sadashiv*, Cr. Ruling 4 of 1892.

**Parsons, J.** :—The District Magistrate transferred this case under section 528 of the Code of Criminal Procedure (Act X of 1882) from the Magistrate, First Class, to the Court of the City Magistrate for the following recorded reasons :—" The District Magistrate is of opinion that the reasons given in the

* Application for Revision, No. 127 of 1896.

Magistrate First Class's order, dated 18th June 1896, under section 497, Criminal Procedure Code, do not justify the release of the accused on bail, and that the Magistrate's action shows a tendency to treat the accused with undue leniency." We reverse the order of transfer because

1. It was passed apparently *ex proprio motu*, and certainly without any notice being given to the accused, and it is, therefore, illegal: see *In the matter of Ratanji Premji*, Cr. Ruling 32 of 1889; *Imperatrix* v. *Mulubhai Bavaji*, Cr. Ruling 21 of 1893; *In the matter of Teacotta Shekdar*, I. L. R., 8 Cal., 393.

2. The discretionary power vested in a Magistrate by section 497 of the Code was not revisable by the District Magistrate. If the District Magistrate considered the order wrong, he could have referred it to this Court. He ought not to have made a transfer the mode of giving effect to his opinion that the order was wrong.

It is a ground of transfer that a fair and impartial trial cannot be had in a Court, but no authority has been shown to us to the effect that a transfer is justified on the part of the Crown because the Magistrate's action in exercising a jurisdiction vested in him by law, *viz.*, releasing an accused person on bail, shows a tendency to treat the accused with undue leniency.

We may express a hope that Magistrates will be always lenient to accused persons, at any rate until they are convicted.

*Order reversed.*

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**NOTES.**

[ See also (1904) 6 Bom. L. R., 856.]

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## [551] FULL BENCH.

## APPELLATE CIVIL.

*The 18th November, 1896.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE RANADE, MR. JUSTICE FULTON AND MR. JUSTICE HOSKING.

Vasudeo Vishnu Manohar............(Original Defendant) Appellant

*versus*

Ramchandra Vinayak Modak............(Original Plaintiff) Respondent.*

*Hindu law—Adoption—Adoption by widow of a predeceased son of owner after the estate had vested in the daughters of the deceased owner—Assent of a minor daughter in whom the estate had vested to the adoption—Ratification by the minor on attaining years of discretion—Adoption invalid—Acquiescence not equivalent to consent.*

On the death of one Vishnu his estate vested in his two daughters, one of whom was a minor. Six months after Vishnu's death his daughter-in-law Savitri (widow of his predeceased son) adopted the plaintiff. It was alleged that the daughters consented to the adoption.

* Appeal No. 37 of 1896 under the Letters Patent.

*Held*, that the adoption was invalid, as the minor daughter could not give such a consent to it as would operate to divest her of her estate.

*Per* FULTON and HOSKING, JJ.:—Subsequent assent to an adoption cannot give it validity if it was invalid when made.

*Per* RANADE, J.:—The adoption of the plaintiff was invalid for the double reason that Savitri had no power to adopt, as she was not the widow of the last male holder, and the nearest heirs, the daughters of the deceased Vishnu, were not proved to have given their consent to the divesting of the estate which had come to them by inheritance, in favour of Savitri or the plaintiff.

Mere presence at the ceremony and the absence of any objection might imply an acquiescence, but mere acquiescence is not equivalent to consent.

APPEAL under section 15 of the Amended Letters Patent against the decision of the Division Bench confirming the decree of T. Walker, Assistant Judge of Ratnagiri.

The plaintiff claimed to recover certain property which originally belonged to one Vishnu Modak, who died in 1874. He alleged that he had been validly adopted by Savitri, the widow of Vishnu's predeceased son, and in virtue of that adoption he claimed the property.

[552] The facts appear from the following table:—

Vishnu, died 1874.

| | | |
|---|---|---|
| Vinayak, died 1873 —Savitri adopted plaintiff after Vishnu's death. | Dwarki. | Godi. |

Vishnu at his death in 1874 left only two daughters, Dwarki and Godi (a minor), and a daughter-in-law, Savitri, the widow of his predeceased son Vinayak. The plaintiff was adopted by Savitri after Vishnu's death.

The defendant pleaded that the adoption was invalid, having been made by an untonsured widow without the consent of the other members of the family, and that the right to the property in suit had passed to, and was vested in, other persons prior to the plaintiff's adoption.

The Subordinate Judge rejected the claim.

On appeal by the plaintiff, the Assistant Judge of Ratnagiri found that the plaintiff was Vinayak's adopted son and succeeded both to his property and to Vishnu's. He, therefore, reversed the decree and allowed the claim.

The defendant having preferred a second appeal, the High Court after hearing arguments send down the following issue for a finding:—

"Is plaintiff the adopted son of Vinayak and entitled, as such, to inherit the property of Vishnu?"

The Judge (M P. Khareghat) found that the plaintiff was the adopted son of Vinayak and that he was entitled to inherit the property of Vishnu. He further held that the adoption took place with the consent of Dwarki and Godi, the latter of whom ratified her act after she attained majority.

The above finding having been certified, the case came on for argument before the Division Bench consisting of PARSONS and CANDY, JJ.

*Daji A. Khare*, appeared for the Appellant (Defendant).

*Ganesh K. Deshmukh*, appeared for the Respondent (Plaintiff).

[553] **Parsons, J.**:—I accept the finding of the lower Court that Dwarki and Godi consented to the adoption. It is one of fact, and no illegality has been shown to justify interference.

As the widow had not attained puberty, tonsure would not be required.

The only other objection raised to the validity of the adoption rests on the proposition that Savitri, as the widow of Vinayak, the predeceased son of Vishnu, had no power to adopt after the death of Vishnu and the vesting of the estate in Dwarki and Godi. As, however, Dwarki and Godi consented to the adoption and to the divesting of their inheritance, I consider that objection unsound. It is directly contrary to our recent decision in *Babu Anaji* v. *Ratnoji*, I. L. R., 21 Bom., 319. As my colleague differs, the decree appealed from is confirmed under section 575 of the Code with costs.

**Candy, J.**:—The question is whether plaintiff's adoption was valid. In my opinion it was not.

At Vishnu's death the estate had vested *by inheritance* in Dwarki and Godi. Vinayak was not the last male holder. The adoption was not made by the widow of any previous holder. Vinayak was not a holder at all. "Under no other circumstances will an adoption made to one person devest the estate of any one who has taken that estate as heir of another person"—Mayne's Hindu Law, section 179, page 210 (5th Ed.). This is the principle on which the decision of this Court was given in *Krishnarav* v. *Shankarrav*, I. L. R., 17 Bom., 164, and in *Shri Dharnidhar* v. *Chinto*, I. L. R., 20 Bom., 250. In *Babu Anaji* v. *Ratnoji*, I. L. R., 21 Bom., 319, a contrary decision would appear to have been given. In that case the learned Judges ruled that "for the purposes of inheritance the adoption may be considered as relating back to the death of the adoptive father, *divesting all estates which have during the intermediate period become vested as it were conditionally in another*. See *Raje Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. Rep., A. C. J., 191; Mayne's Hindu Law, S. 171." I cannot find the words underlined in the case quoted. Mr. Mayne's remarks in section 171 must be read with those in the subsequent paragraphs.

**[554]** With regard to "the assent of those capable of giving the validating assent" it must be remembered that the need of the kinsmen's sanction does not arise from their right in the property, but from their family relations to the widow (see the authorities collected at p. 128 of I. L. R., 15 Bom.). Here the assent of the two girls Dwarki and Godi would not confer validity on an adoption which was otherwise invalid. From the moment that Vishnu died, and his estate was vested in his daughters, the right of his daughter-in-law, Savitri, to adopt for the purposes of inheritance was *at an end*. See judgment of West, J., in *Keshav* v. *Govind*, I. L. R., 9 Bom., 94, and *Shri Dharnidhar* v. *Chinto* quoted above. What would have been the position of the parties had Savitri adopted plaintiff before Vishnu's death and with his assent as head of the family, it is unnecessary to enquire. I cannot hold the adoption of the plaintiff to be valid without going contrary to the decisions in *Krishnarav* v. *Shankarrav*, I. L. R., 17 Bom., 164, and *Shri Dharnidhar* v. *Chinto*, I. L. R., 20 Bom., 250, and the numerous authorities quoted in those two cases. As my learned colleague holds that the adoption was valid, and would accordingly confirm the decree of the Lower Appellate Court, that decree will stand.

The Judges having thus differed, and the decree of the Assistant Judge having been confirmed under section 575 of the Civil Procedure Code (Act XIV of 1882), the defendant appealed under section 15 of the Amended Letters Patent.

*Daji A. Khare*, for the Appellant (Defendant):—The adoption was invalid *ab initio*, because the authority of Vinayak's widow to adopt came to an end after Vishnu's death, and the daughters could not by their consent give authority to adopt. After Vishnu's death the estate vested in his daughters, and when the estate vests in another person, the power of a widow to adopt comes to an end.

*Ganesh K. Deshmukh* for the Respondent (Plaintiff):—The finding of the Judge as to the consent of Dwarki and Godi to our adoption is a finding of fact. Godi was at the time of the adoption a minor, but she never disputed the adoption after attaining majority. Estoppel applies to minors. An estate [555] although vested can be divested in three ways. See Mayne's Hindu Law, para. 179.

The cases referred to in the following judgments were cited and discussed during the argument.

**Farran, C. J.**:—I am of opinion that the adoption of the plaintiff by Savitri in this case was invalid upon the ground that Godi, in whom jointly with Dwarki the estate was vested, was a minor at its date and could not for that reason give such a consent to it as would operate to divest her of her estate or as a waiver of it in favour of the boy adopted by Savitri. Such a consent, whatever view of the law upon this subject may be taken, was, I think, clearly necessary to validate the adoption. The Acting District Judge was of opinion that though Godi could not by reason of her minority validly consent to the adoption, yet she subsequently ratified it by her conduct; but the adoption must, in my opinion, have been either valid or invalid at the time when it took place, and its validity cannot depend upon the subsequent action of Godi:—see West and Bühler, page 1099.

In this view it becomes unnecessary for me to express an opinion in this appeal between the conflicting views, which the learned Judges in the Division Court expressed, upon the effect which the consent of the person, in whom the estate is vested in the case of a divided family, has in validating what would otherwise be an invalid adoption, or as to whether the case of *Babu Anaji* v. *Ratnoji*, I. L. R., 21 Bom., 319, following *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., 114, A. C. J., was rightly decided. When that decision was arrived at, the case of *Annammah* v. *Mabbu*, 8 Mad. H. C. Rep., 108, was not brought to our notice, nor was I aware of the *dictum* of the Court in *Shri Dharnidhar* v. *Chinto*, I. L R., 20 Bom., 250. I shall, therefore, feel at liberty to consider the principle of that decision when it again arises and calls for determination. I cannot, however, as at present advised, bring myself to consider that the question involved in it has been impliedly decided by the Privy Council, or that the decision in *Babu Anaji* v. *Ratnoji* (*supra*) is at variance with any judgment of their Lordships. So far as I am aware, their [556] Lordships have not considered or expressed an opinion upon the question: see *Kally Prosonno* v. *Gocool Chunder*, I. L. R., 2 Cal., 295 at p. 307. The result, however, is that in my opinion the appeal in this case should be allowed, the decree of the Lower Appellate Court reversed, and the plaintiff's suit dismissed with costs throughout on the plaintiff.

**Ranade, J.**:—I agree with Mr. Justice CANDY in holding that the adoption of the respondent plaintiff is invalid for the double reason that Savitri had no power to adopt, as she was not the widow of the last male holder, and the nearest heirs, the daughters of the deceased Vishnu, are not proved to have given their consent to the divesting of the estate which had come to them by inheritance in favour of Savitri or the respondent. Savitri, as the widow of a predeceased son of Vishnu, had no right to the property of Vishnu, which devolved on Vishnu's daughters as his only heirs. At the time when the adoption took place six months after Vishnu's death, his property had become vested in his daughters as his sole heirs, and Savitri had only a right to maintenance. Her adoption of the respondent-plaintiff could not, therefore, confer on the plaintiff any right to the property of the last male holder. The principle of this decision was laid down by their Lordships of the Privy Council in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore*, 10 M. I. A., 279, and

has been affirmed by their Lordships in *Padmakumari Debi* v. *Court of Wards*, I. L. R., 8 Cal., 302, and *Thayammal* v. *Venkatarama*, I. L. R., 10 Mad., 205. The Madras High Court followed this same principle in *Annammah* v. *Mabbu*, 8 Mad. H. C. Rep., 108. In our own Presidency, this same view has been given effect to by a series of rulings commencing with *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., 114, A. C. J; *Ramji* v. *Ghamau*, I. L. R., 6 Bom., 498; *Keshav* v. *Govind*, I. L. R, 9 Bom., 94; *Chandra* v. *Gojarabai*, I. L. R., 14 Bom., 463; *Krishnarav* v. *Shankarrav*, I. L. R., 17 Bom., 164.

The facts of the case reported in *Gayabai* v. *Shridharacharya*, P. J. for 1881, p. 145, are exactly in point, for there, as here, it was held that if the [557] last male holder was separated from his brothers, his daughters would succeed as heirs, and the widow of a predeceased son of the last male holder could not make a valid adoption without the consent of the daughters

This brings us to the consideration of the second question, whether the daughters Dwarki and Godi gave their consent in the present case. One of the daughters was only twelve years old, and the other twenty-five, and they were present on the occasion of the adoption. The Court of First Instance held that such presence would not amount to consent. The lower Court of appeal at first refused to go into this question, as the original defendants were strangers, and did not claim under any of the alleged heirs. On remand from this Court, it inquired into this issue, and found that though their consent was never personally taken at any time, yet as they did not object at any time, and are shown to have taken part in the ceremony, this was proof of their substantial consent to the adoption. The District Judge has relied chiefly on the authority of the ruling in *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., 114, A. C. J., where consent was held to be proved. The party giving her consent was a major, and had herself taken part in celebrating and proclaiming the adoption. This can hardly be asserted of the two daughters in the present case, one of whom was admittedly a child twelve years old. Mere presence at the ceremony, and the absence of any objection, might imply an acquiescence, but it has been ruled that mere acquiescence is not equivalent to consent—*Ramamani Ammal* v. *Kulanthai Natchear*, 14 M. I. A., 346, and *Rungama* v. *Atchama*, 4 M. I. A., 1.

Under these circumstances the finding of the lower Court of appeal, that the daughters must be held to have consented, cannot be accepted as a binding adjudication of fact. On the whole, I feel satisfied that the adoption in this case was void for want of legal power in the adoptive mother Savitri to make a valid adoption, and that this defect was not cured by the consent of the real heirs.

**Fulton, J.**:—As Godi was only twelve at the time of the adoption she was, I think, incompetent to give an assent thereto such [558] as to satisfy the requirements of justice alluded to in Mr. Justice MELVILL'S judgment in *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., at p. 119, A. C. J. The adoption, therefore, cannot be upheld having regard to the decision in *Gayabai* v. *Shridharacharya*, P. J. for 1881, p. 145, for there seems no authority for holding that subsequent assent can give validity to an adoption which was not valid when made. It is unnecessary, then, to discuss the question whether, after the estate has passed by inheritance to a daughter or other heir of the last male holder, the widow of a predeceased co-parcener can adopt to her husband with the assent of the heir in whom the estate has vested.

I think, therefore, the decrees of the Assistant Judge and the Division Bench must be reversed and the claim rejected with costs on plaintiff throughout.

**Hosking, J.**:—I agree in holding the adoption invalid on the grounds that Godi being at the time only twelve years of age was unable to give such an assent as would bind her, and that the adoption being *ab initio* invalid could not be made valid by any subsequent ratification by Godi on attaining years of discretion.

Accordingly I concur in reversing the decree of the Division Bench.

*Decree reversed.*

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NOTES.

[ The power to adopt, however derived, is at an end once for all, (and is not subsequently revived) by the estate having vested in a different heir than the adopting widow; (1908) 33 Mad., 228; see also (1905) 29 Bom., 410; (1905) 29 Bom., 400; (1914) 38 Bom., 724, as regards the effect of consent in such cases.]

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[ 22 Bom. 558 ,

FULL BENCH.

APPELLATE CIVIL.

*The 24th November, 1896.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS, MR. JUSTICE RANADE, MR. JUSTICE FULTON AND MR. JUSTICE HOSKING.

Ramchandra Bhagavan............(Original Defendant) Appellant

*versus*

Mulji Nanabhai............(Original Plaintiff) Respondent. *

*Hindu law—Widow—Adoption—Motive—Inquiry as to motives in making adoption irrelevant.*

*Held* by a Full Bench (HOSKING, J., dissenting) that in the Bombay Presidency, a widow having the power to adopt, and a religious benefit being caused to her [559] deceased husband by the adoption, any discussion of her motives in making the adoption is irrelevant.

SECOND APPEAL from the decision of Gilmour McCorkell, District Judge of Ahmedabad, confirming the decree of Khan Saheb Nowroji Byramji, Subordinate Judge of Umreth.

Suit by a reversioner to set aside an adoption alleged to be made by a widow from improper motives, and to recover possession of property.

The plaintiff was the nearest reversionary heir of one Bhagavanbhai Naranji who died in the year 1836. Bhagavanbhai left a widow Bai Harkore and a minor son Motilal, the latter of whom died in 1839 while still a minor. Shortly after Motilal's death the widow Bai Harkore quarrelled with the plaintiff and gave the management of her affairs to her own relatives. Litigation took place between her and the plaintiff in which the plaintiff was successful. In March 1888, she adopted the defendant and on the 12th July 1888, she died.

In March 1894, the plaintiff filed this suit against the defendant to set aside his adoption and to recover the property to which he had succeeded on Bai Harkore's death. The ground on which the plaintiff sought to invalidate the adoption was that "it was made maliciously, wrongfully and in anger with

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* Second Appeal, No. 273 of 1896.

the intent to injure the rights of the plaintiff and to deprive him of his lawful inheritance."

The Subordinate Judge allowed the claim, holding that the adoption had been made from improper motives.

On appeal by the defendant the Judge confirmed the decree.

The defendant having preferred a second appeal to the High Court, it came on for hearing before a Division Bench consisting of FARRAN, C. J., and PARSONS, J., who referred the matter to a Full Bench. The following is the referring judgment:—

**Farran, C. J.**:—The plaintiff, as the next reversionary heir of Bhagvanbhai and of his infant son Motilal after the death of Bai Harkore, widow of Bhagvanbhai, sued to recover possession of a house and room at Umreth from the defendant Ramchandra, [560] the adopted son of Bai Harkore, and to have the adoption of the latter declared invalid and set aside.

Bai Harkore died on the 12th July 1888. The suit was brought on the 3rd March 1894. The adopted son had thus been nearly six years in possession of the property after the death of Bai Harkore and during that time had been recognised by the caste as the son of Bhagvanbhai.

There was no ground for disputing the *factum* of the adoption, or that the requisite ceremonies to give it full efficacy had been performed, and both the lower Courts have so found. The ground on which the plaintiff sought to invalidate the adoption was that "it was made maliciously, wrongfully, and in anger with the intent to injure the rights of the plaintiff and to deprive him of his lawful inheritance." It has to be determined, in second appeal, whether the plaintiff is entitled to set aside the adoption and to recover the property.

The Subordinate Judge found the following facts which the District Judge has adopted as the basis of his judgment. Bhagvanbhai died in the year 1836, leaving his widow Bai Harkore and a minor son Motilal, who died still a minor about three years after his father. Soon after Motilal's death Bai Harkore became on unfriendly terms with the plaintiff, her husband's cousin and the next heir Pranshankar. Bai Harkore's affairs were thenceforth managed by her relations Surajram Sanmukh and Ganpat Sanmukh, the defendant's natural father and uncle respectively, both of whom resided with her. On the 24th of October 1873, Bai Harkore executed a mortgage in favour of Sanmukh, and on the 24th August 1875, she made a will in favour of Surajram and Ganpat. The plaintiff and Pranshankar filed a suit in 1876 to have the mortgage and will declared invalid and not binding on the reversionary heirs of Bhagavanbhai. The plaintiff obtained a decree in that suit in their favour. It was confirmed, in second appeal, on the 31st January 1881.

On the 5th March 1888, Bai Harkore adopted the defendant Ramchandra, the son of Surajram. A distant relative of Bhagavanbhai and Revashankar, the son of Pranshankar, were present at the adoption, and the latter signed the deed of adoption. The [561] Subordinate Judge thinks that he could not have understood the full significance of his action. There were sons of other cousins of Bhagavanbhai from amongst whom Bai Harkore could have adopted a son. Bai Harkore died about four months after the adoption. She was a very old woman and infirm, but mentally capable of adopting a son. From these facts the Subordinate Judge drew the conclusion which he states in the following words:—

"It is, therefore, proved beyond a shadow of a doubt that Bai Harkore had owed an unquenchable grudge against the plaintiff since 1839 until she died, that she was all this time under the influence of her own relatives, who were impecunious, who attended upon her and nursed her, and who were maintained by her, and her sole aim in the latter part of her

old age was to reward and benefit her own relatives, and that on her previous attempts towards that having failed, she took a boy of their own family in adoption only four months before she died in furtherance of her original motive. * * * The plaintiff must be, therefore, held to have succeeded on clear evidence in discharging the heavy burden which lay on him in proving that the adoption in question was made with the sole object of benefiting her own relatives and defeating the interest of the plaintiff, and that she was not inspired in the performance of the act by the sense of the paramount religious duty of benefiting her husband's soul."

On the issues he found that the defendant's adoption was invalidated by reason of its having been made maliciously and in anger. The District Judge in appeal laid down only one issue—"Is it proved that the adoption of the defendant was made capriciously and maliciously"—which he found in the affirmative. It considerably detracts from the value of his finding that he has assumed as the basis of it that there was no religious necessity for Bai Harkore's adopting a son. He says: "Bai Harkore's husband died in A. D. 1836. He left a minor son, who was competent to perform all the religious ceremonies connected with the obsequies of his deceased father. No religious necessity can be shown why Bai Harkore should at any time after her husband's death adopt a son to him." This undoubtedly would have been so if the son had reached majority and acquired full ceremonial competency, but as he did not acquire this competency the religious duty of Bai Harkore to adopt a son still we think continued. This is indeed one of the principal grounds upon which the widow of a husband who has left a son who dies [562] subsequently without heirs in the lifetime of the widow is allowed to adopt to her husband—*Gavdappa* v. *Girimallappa*, I. L. R., 19 Bom., p. 331 at p. 337. The finding, however, remains, and the important question which it raises calls for determination.

We agree with the view taken in *Mahableshvar* v. *Durgabai*, *ante* p. 199, that notwithstanding that this Court has in several cases assumed that the Courts are at liberty to consider the motives of a widow in making an adoption, there has been no decision upon the point and the question is still open. We ourselves incline to the opinion that it ought to be held that the presumption that a widow has acted from a due sense of her religious duty where such exists ought to be deemed an irrebuttable presumption. It appears to us to be most dangerous to allow the right to property to depend upon the view which Civil Courts may take of the motives which operate upon the mind of a Hindu lady making an adoption. From the same facts different Courts may and often do draw the most opposite inferences. In the present case the facts which we have set out might lead rather to the inference that the adopting mother selected the boy to be adopted on account of her affection towards the family from which she chose him than to the conclusion that she adopted him out of a feeling of ill-will towards the plaintiff, the evidence of which is drawn from a written statement affirmed by her about seven years before the adoption, which rather shows that she considered the plaintiff to be unfriendly to her than that she was at enmity with him. That the lady had not her religious duty in view there can be no positive proof.

The question is so important having regard to the frequency with which it has of late arisen, and the contrary view to that to which our opinion inclines has been so frequently assumed in the judgments of this Court, that we consider that the matter ought to be considered by a Full Bench.

We, therefore, refer to a Full Bench the following questions:—

1. Whether (in this Presidency) in the case of a widow having the power to adopt and a religious benefit being caused to her [563] deceased husband by

the adoption, any discussion of the adopting widow's motives in making the adoption is not irrelevant?

2. Whether if such an adoption can be referred to proper religious motives, the Courts ought not to presume that the widow performed the ceremony of adoption from such motives?

The reference was argued before a Full Bench consisting of FARRAN, C. J., and PARSONS, RANADE, FULTON and HOSKING, JJ.

*Gokuldas K. Parekh*, for the Appellant (Defendant):—The Court cannot inquire into the motives of a widow in making an adoption. In all cases of adoption, the husband receives the spiritual benefit of the adoption and, therefore, the question of motive is immaterial. The text books have nowhere laid down that an adoption should be held illegal, because the motive of the widow in making the adoption was improper. Unless a widow is specially prohibited from making an adoption, she has the right to adopt in this Presidency. By adoption as by marriage a person not born in the family is brought into it. A marriage cannot be set aside, or held invalid, because of the motives of the parents of the bride or bridegroom. So neither can an adoption. It would be impossible to ascertain the motives of an adopting widow. It would be dangerous to make the validity of an adoption depend upon such considerations—*Mahableshvar* v. *Durgabai*, *ante* p. 199; *Bhimawa* v. *Sangawa*, *ante* p. 206; *Patel Vandravan* v. *Patel Manilal*, I. L. R., 15 Bom., 565.

*Govardhanram M. Tripathi*, for the Respondent (Plaintiff):—The question raised in this case has never been considered by the Courts. It was incidentally raised in *The Collector of Madura* v. *Moottoo Ramlinga*, 12 M. I. App., 397. No doubt where kinsmen consent to an adoption, the motives of the widow in adopting need not be considered. But a widow may not act from mere caprice or from other improper motive. For instance she should not adopt a mere stranger if a boy in the husband's family is available for adoption. A widow can adopt a stranger only when there is no kinsman available—West and Bühler, pp. 974, 975, 1018 to 1022; Mandlik's Hindu Law, p. 57; *Bhagubai* v. *Kalo* [564] *Venkaji*, P. J., 1875, p. 45; *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. Rep., A. C. J., 181; *Narayan Babaji* v. *Nana Manohar*, 7 Bom. H. C. Rep., 153 at p. 172; *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., A. C. J., 114; *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. Rep., 241 at p 257; *Mahableshvar Fondba* v. *Durgabai*, *ante* p. 199; *Ramji* v. *Ghamau*, I. L. R., 6 Bom., 498; *Vithoba* v. *Bapu*, I. L. R., 15 Bom., 110; *Patel Vandravan* v. *Patel Manilal*, I. L. R., 15 Bom., p. 578.

**Farran, C. J.**:—I have had an opportunity of reading the several judgments which my learned colleagues are about to deliver, and I agree with the majority of them that the first question referred for our opinion should be answered in the affirmative. I adhere to the view expressed in *Mahableshvar* v. *Durgabai*, *ante* p. 199, that the Judicial Committee of the Privy Council has left the question open in *Rajah Vellanki Venkata* v. *Venkata Rama*, L. R., 4 I. A., 1 at p. 14, and consider that it is incumbent upon us now to solve it for this Presidency. After the best consideration which I have been able to give to the question, and it has occasioned me much thought, I have come to the conclusion above expressed.

The doubt which I have mainly felt is whether in so deciding we are not running counter to an assumption so long and consistently made in the judgments of this Court as to have become an integral part of the law which we are called upon to administer. That doubt is, however, considerably lessened, if not entirely removed, by a consideration of the circumstance referred to in the judgment of my learned colleague Mr. Justice FULTON that in no case (for I do

not consider *Bhagubai* v. *Kalo Venkaji*, P.J., 1875, p. 45, to be an exception) has an adoption made by a widow been successfully impeached in this Court on the ground of its having been made capriciously and from a corrupt motive. The Court has, it appears to me, felt that the ascertainment of the exact motives which actuate a Hindu lady in making an adoption is beyond its ken, and being, therefore, unable to find in the affirmative on the issue as to caprice, has always been compelled to affirm the validity of adoptions assailed on that ground. When we turn to the case of *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. Rep., A. C. J., 181, the judg-[565]ment in which forms the basis upon which the above assumption is founded, we see that neither in the texts nor in the answers of the Shastris nor in the judicial precedents upon which that judgment rests is it suggested that it is the duty of the Court to inquire into the motives which actuate a Hindu lady when she adopts a son to continue the line of her husband in a divided family. The assumption made in the judgment, that such a duty devolves upon the Courts, rests entirely upon the oft-quoted passage in the judgment of the Privy Council in the *Ramnad* case which their Lordships have commented on and explained in *Rajah Vellanki* v. *Venkata Rama*, and, but for the passage, presumably would not have found its way into it. Under these circumstances I feel that we ought not to treat that assumption as law binding upon the Court. For the rest I concur in the judgments which my colleagues who agree with me are about to deliver and generally for the reasons given by them, to which I feel that I cannot usefully add anything. To hold otherwise would, I think, in effect be to substitute in this Presidency the approval of the Court of an adoption, for the assent of kinsmen required in the Madras Presidency to its validity, for which, I think, no warrant exists.

**Parsons, J.** :—I answer the first question in the affirmative. In the case of *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R., 3 I. A., 154 at p. 193, their Lordships of the Privy Council say: "It is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession...the rights of parties in actual possession—dependent on the caprice of a woman subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power (of adopting) strictly within the limits which the law has assigned to it." We have, therefore, to see how far the law has limited the power of a widow in a divided family to adopt. The case of a widow who has the express permission of her husband to adopt presents no difficulty. The case above [566] cited is an authority showing that she can adopt whomsoever she pleases from among those capable by Hindu law of being adopted. In cases where there is no express permission given to adopt, but no actual prohibition or restriction of the exercise of the right placed on it by the husband, the law as laid down by the Courts on this side of India (differing no doubt from that in force elsewhere) is that she may adopt whomsoever she chooses and that she does not need to obtain the assent of her husband's kinsmen to her adoption; but the Judges have added a proviso that the act of adoption must be done by her in the proper and *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive. It is the use of these last words which has caused the present reference. Granting the truth of the saying as a precept of morality, the point is, Are the Courts to be the judges of her motives? I think not, and I can find no authority for the proposition that a Court can ever question the motives of a person who does an act that he has an absolute right to do. The power of a widow to adopt at all must be ascribed to the fact that her husband

has either expressly or impliedly allowed her to adopt. If he has not exercised his right either of prohibition or restriction, then it seems to me to follow necessarily that she is left free and unfettered to exercise her own choice in the matter. I can make no difference between permisson by express terms and permission by implication; in either case there is permission and the result is the same. Whenever the widow has this power to adopt, any enquiry into her motives must be irrelevant, for her action is that of a person who does what she has the right to do. Where, however, she has not this full power, but is obliged to obtain the consent of other persons to her action, the case seems to me to be very different. Even in such a case, however, I conceive, motives would be quite irrelevant if the consent of all the persons whose consent was requisite had been obtained. The point only arises where the consent of some has been obtained, and the question is whether that consent is binding on the others. In such a case the Privy Council say: "There should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty and [567] neither capriciously nor from a corrupt motive," and again "there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this and that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband" —*Rajah Vellanki* v. *Venkata Rama*, L R., 4 I. A., at p. 14. These rulings can only apply to the case of an adoption by a widow who is obliged to obtain the assent of her husband's kinsmen, but who has obtained the assent of some one or more and not of all of them. In such a case the motives of the assenting kinsman or kinsmen would be relevant and, if fraudulent, would invalidate the adoption. See *Karunabdhi Ganesa* v. *Gopala Ratnamaiyar*, L. R., 7 I. A., 173. They cannot be applicable to the case where no consent of kinsmen is required, and where no family council need be called or consulted. I think, therefore, that the learned Judges of this Court wrongly applied the language of the Privy Council in the *Ramnad* case to the case of a widow who had in herself full and free power to adopt. I think in the latter case her motives in adopting are wholly irrelevant, as irrelevant, in fact, as they would be if the Courts were enquiring into a will disposing of her property made by her under a right vested in her.

**Ranade, J.**:—My reply to both the questions is in the affirmative. The widow of a separated householder, who adopts a son to continue the line of her husband, performs this act under an express or implied authority from her husband, and presumably her exercise of this right, independently of the wishes of reversionary heirs, must be as free as if the husband himself effected the adoption. It was, however, contended by Mr. Goverdhanram that this analogy did not hold good, inasmuch as the widow's power of alienation by will or by gift *inter vivos* is subjected to restrictions, which find no place in respect of the powers of disposal enjoyed by her husband. This circumstance, however, is due to the limited nature of her interest as a Hindu widow for purposes of enjoyment. When she disposes of the [568] estate to satisfy her husband's debts or other necessary purposes, her power of alienation is admittedly not subject to similar restrictions, and it is this last analogy which must regulate the freedom of her choice when she adopts a son to her husband.

This freedom of choice, moreover, follows as a necessary consequence from the fact that, in Western India, the necessity of express authority from the husband, or of the assent of kindred is not recognized as essential.

The principal case—*Collector of Madura* v. *Moottoo Ramalinga*, 12 M. I. A., 397,—in which their Lordships of the Privy Council laid down that the widow's choice must not be influenced by capricious or corrupt motives, came from the province of Madras, where the restrictions on the widow's choice are more strictly enforced. The remarks of their Lordships in the *Ramnad* case no doubt suggested the observations to the same effect first made in *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. Rep., 181, and subsequently alluded to in *Bhagubai* v. *Kalo Venkaji*, P. J. for 1875, p. 45; *Ramji* v *Ghamau*, I. L. R., 6 Bom., 498; *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., 114, A. C. J.; *Keshav* v. *Govind*, I. L. R., 9 Bom., 94. Following, however, the observations made by their Lordships in more recent judgments --*Sri Raghunada* v. *Sri Brozo Kishoro*, L. R., 3 I. A., 154, and *Rajah Vellanki* v. *Venkata Rama*, L. R., 4 I. A., 1,—in which they have stated that their remarks in the *Ramnad* case were not intended to justify an inquiry into the widow's motives to see if she was moved by caprice in making her choice, this Court has in *Patel Vandravan* v. *Patel Manilal*, I. L. R., 15 Bom., 565, ruled that when the motives were mixed, the presumption was very strong in favour of the widow having acted from a sense of religious duty and this view has been further given effect to in *Bhimawa* v. *Sangawa*, *ante* p. 206, and *Mahableshvar* v. *Durgabai*, *ante* p. 199, where improper motives were sought to be established by proof of alleged ill-will or personal advantage. These decisions virtually leave but little scope for an investigation into the motives which may possibly influence the widow to effect an adoption.

**[569]** It may be, moreover, observed that the person who suffers most by an adoption is the widow herself, for she becomes thenceforward only a member of the family entitled to receive maintenance from the adopted son. It is not likely that she would wantonly or capriciously run such a risk to spite her reversioners. Caprice in the matter of adoption can have reference only to the choice of strangers, and the time when this choice may be made. It has, however, been frequently ruled that the adoption of an *asogotra* stranger in preference to nearer *sagotra* relations is not prohibited by the Hindu law, and this rule has been laid down both for Brahmins and Sudras—*Dharma* v. *Ramkrishna*, I. L. R., 10 Bom., 80; *Raje Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. Rep., 191, A.C.J.; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. Rep., 364. Their Lordships of the Privy Council have also ruled that the injunction to adopt the nearest kinsman has only a moral obligation, being directory and not mandatory—*Srimati Uma Deyi* v. *Gokoolanund Das*, L. R., 5 I. A., 40; *Bhyah Ram Singh* v. *Bhyah Ugur Singh*, 13 M. I. A. 373.

As regards the delay in making the choice, the postponement of the adoption for twenty-five or thirty years was held not to be an index of a capricious choice—*Giriowa* v. *Bhimaji*, I. L R., 9 Bom., 58.

On the whole, therefore, both on grounds of analogy and principle, it seems to me that, in Western India, in the case of a widow of a separated Hindu, adopting a son to continue the line of her husband, any discussion of the adopting widow's motives, is irrelevant, and that, if the act can be referred to proper religious motives, the Courts ought to presume that she was influenced by these motives and not by caprice.

**Fulton, J.** —The question "whether in this Presidency in the case of a widow having the power to adopt and a religious benefit being caused to her deceased husband by the adoption any discussion of her motives in making the adoption is not irrelevant" is one which involves considerations of some difficulty.

In the *Ramnad* case, 12 M. I. A. 397, their Lordships of the Privy Council in dealing with an adoption governed by the law of Southern [870] India, after pointing out that in an undivided family the assent of the father-in-law or, in default of him, of all the brothers would be required to supply the want of positive authority from the deceased for an adoption by his widow, continued as follows :—

"Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband there is a greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty as understood by Hindus. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, whom the law points as the natural guardian and venerable protector of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend on the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

In *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. Rep., at p. 191, A. C. J., in which the judgment of this Court was delivered by Sir R. COUCH very soon after the decision of the *Ramnad* case, his Lordship remarked as follows :—" Upon the review which we have made of the authorities applicable in this part of India we are of opinion that, in the Maratha country wherein the property in question in this suit is situate, a Hindu widow may without the permission of her husband and without the consent of his kindred adopt a son to him if the act is done by her in the proper and *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

[871] In *Narayan Babaji* v. *Nana Manohar*, 7 Bom. H. C. Rep., at p. 172, Chief Justice WESTROPP referred to this passage in *Rakhmabai* v. *Radhabai*, but added, " How this may be, it is unnecessary for us now to express any opinion."

In *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., at pp. 119-120, Mr. Justice MELVILL in referring to the same case said : " The decision in *Rakhmabai* v. *Radhabai* and the authorities on which it is based may be accepted without hesitation as showing that in the Maratha country a widow in whom the estate is vested may show by other evidence than the assent of a responsible kinsman that (to use the words adopted by the learned Judges from the decision of the Privy Council above referred to) the act of adoption was done by her in the proper and *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

In *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. Rep., at p. 257, Chief Justice WESTROPP said : " It has even been held here that the consent of the kinsmen of the husband is not essential to adoption by a widow if the act be done in the *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

The next case in order of time which it is necessary to notice is *Bhagubai* v. *Kalo Venkaji*, P. J., 1875, p. 45, which is of importance as it is the only case

to which we have been referred in which apparently an adoption was successfully attacked in this Court on the ground under consideration. But this case is not a satisfactory precedent to rely on, for the reasons on which the Court acted are not very clearly stated and, though their Lordships held that the validity of the adoption set up was not proved in that proceeding, they intimated that it was not to be understood that they pronounced definitely against it if it should come into question in a regular suit.

In *Ramji* v. *Ghamau*, I. L R., 6 Bom., at p. 500, Chief Justice WESTROPP again referred to the passage from *Rakhmabai* v. *Radhabai*, but merely for the purpose of showing it to be inapplicable to the case under consideration.

[572] In Mr. Justice CANDY'S decision in *Vithoba* v. *Bapu*, I. L. R., 15 Bom., 110, will be found an exhaustive discussion of the authorities on adoption by widows. It was held that in a united family an adoption made by a widow with the assent of her father-in-law, being the head of the family, was valid irrespective of her motives.

In *Patel Vandravan* v. *Patel Manilal*, I. L. R., 15 Bom., at pp. 577-578, SARGENT, C.J., after referring to the remarks in *Rakhmabai* v. *Radhabai* and to the views of the Privy Council expressed in the *Ramnad* case and in *Rajah Vellanki* v. *Venkata Rama*, L. R., 4 I. A., 1, said: "This would seem to imply, as Mr. Mayne appears to have understood the remark of their Lordships (see p. 113), that where the assent of sapindas has been obtained it must be presumed that the widow acted from proper motives and it was so held in *Vithoba* v. *Bapu*. Where, however, the assent of sapindas is not required, as in this Presidency, where the family is divided, then there will only be the ordinary presumption that the widow has performed a duty from proper motives, and the *onus* lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive."

Excepting the case of *Bhagubai* v. *Kalo Venkaji* all the above cited cases have been referred to in the judgment delivered by FARRAN, C.J., in *Mahableshvar Fondba* v. *Durgabai*, *ante* p. 199, but I have thought it necessary once more to recapitulate them in order to show clearly the difference between the view expressed in *Patel Vandravan* v. *Patel Manilal* and the *dictum* in *Rakhmabai* v. *Radhabai* as explained in *Rupchand* v. *Rakhmabai*. In the latter case it appears to have been assumed that it was for the widow to show by some evidence that the adoption was performed as a religious duty, while in *Patel Vandravan* v. *Patel Manilal* the burden of proof was thrown heavily on the party impugning the adoption.

Now it must be remarked that if we except the case of *Bhagubai* v. *Kalo Venkaji*, which is of doubtful authority, no case has been referred to in which this Court has ever set aside an adoption by a widow having express or implied authority from her [573] husband to adopt on the ground that she was acting under the influence of improper motives. It is true that the Court has frequently expressed the opinion that the widow when adopting must be actuated by proper motives, but it has never determined how those motives are to be ascertained.

In Southern India we know, on the authority of the *Ramnad* case, that the assent of kinsmen is held sufficiently to evidence the correctness of the widow's motives. Here, however, no such settled rule prevails. Mr. Govardhanram endeavoured to show that although in this Presidency assent of kinsmen was not essential, there should be some evidence of good motive such as might be furnished by the selection of the nearest sapinda, or the approval of the caste, or the Government, or the relatives. But he was unable to refer to any clear authority on the subject, and the very vagueness of the suggestions shows

that they could not form a rule for the guidance of the community. The fact is that Hindu law as applied in this Presidency does not appear to lay down any rule by which the *bona fides* of the widow can be ascertained, and under these circumstances the Court, I think, cannot supplement the law by making such a rule. A definite rule such as prevails in Southern India may be desirable. Adoptions can safely be made with reference to it, and the check which it imposes on the caprice of widows may be beneficial. But here there is no rule of the kind, and I do not think the Court can by way of substitute attempt to dive into the secrets of the widow's mind in order to ascertain what her real motives were. In some cases the facts may be such as to justify the Court in presuming that bad motives had influence in the widow's mind, but who can ever say that she was not also influenced by good motives? Worldly desires often creep in and suggest the performance of religious duties, but it would usually be very rash in any given case to say that they were the only cause of action. For years a widow may have neglected her duty to her husband and at last she may have adopted one of her own relatives in preference to his; but no one in this world can say for certain that religion and a desire to benefit his soul, accompanied possibly by a feeling of compunction for her past neglect, may not have had some influence in leading her to adopt, although the more apparent cause [874] may be the desire to benefit her own family and prevent the estate from going into the possession of the sapindas whom she dislikes. In the case now under consideration the widow who made the adoption has been dead some years, and we are asked to uphold the finding that she was acting solely from motives other than religious. But it seems to me manifest that such a finding cannot be come to with any certainty, as the widow alone knew what her motives were, and inferences on the subject are very apt to be erroneous.

An enquiry of this sort certainly incurs the danger adverted to in *Rajah Vellanki* v. *Venkata Rama*, L. R., 4 I. A., at p. 14, of introducing "into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow." As, however, the Hindu law of this Presidency has not prescribed any criterion of these motives, I do not think the Courts are justified in introducing one which must from the very nature of the case work almost as capriciously as the widow's mind. If the general sentiment of the Hindu community had required that the widows in divided families should be controlled in matters of adoption, the feeling would ere now have been crystallized in some definite rule as in Southern India. But the fact that no such rule exists shows that the law as here administered leaves the propriety of the adoption to the widow's discretion and, though it expects her to act discreetly, it does not prescribe any means of limiting her exercise of the powers conferred on her.

The matter seems summed up in the answer quoted in *Rakhmabai* v. *Radhabai*, 5 Bom. H. C Rep., at p. 188, A. C. J, of eight Poona Shastris to the question, "Can a woman adopt a son after her husband's death without his order for the purpose, given on his death-bed?" The reply was, "It may be done, and it is the best way, by the consent of the father and other relations within the seventh degree, and of the caste. It is also done without any order or consent at all."

Under the circumstances I think that the first question must be answered in the affirmative and that the second question, therefore, does not arise.

**[875] Hosking, J.**:—Upon the two questions referred by the Division Bench I find as follows:—

1. In this Presidency in the case of a widow having the power to adopt, and a religious benefit being caused to her deceased husband by the adoption,

discussion of the adopting widow's motives in making the adoption is not irrelevant.

2. If such an adoption can be referred to proper religious motives, there is nevertheless no irrebuttable presumption that the widow performed the ceremony of adoption from such motives.

I come to these conclusions with much reluctance, but it appears to me that to decide otherwise would be to alter what has been for many years the recognized law in this Presidency.

In 1868 a Full Bench consisting of COUCH, C. J., and NEWTON and WARDEN, JJ., after very full consideration of the authorities said: "Upon the review which we have made of the authorities applicable to this part of India, we are of opinion that in the Maratha country, wherein the property in question in this suit is situate, a Hindu widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive"—*Rakhmabai* v. *Radhabai*, 5 Bom. H. C. Rep., at p. 191, A. C. J. The condition qualifying the power of adoption is expressed in the words used by the Judicial Committee of the Privy Council in the case of *The Collector of Madura* v. *Moottoo Ramalinga*, 12 M. I. A., 397, known as the *Ramnad* case, but the Judges remark that the judgment in that case does not determine what is the law in this part of India, and they base their ruling on the law applicable to the Maratha country. This statement of the law as to the limitations upon a widow's power to adopt in this Presidency has since been frequently referred to in judgments of this Court as authorities—*Rupchand* v. *Rakhmabai*, 8 Bom. H. C. Rep., at p. 119, A. C. J; *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. Rep., at p 257; *Bhagubai* v. *Kalo Venkaji*, P. J., 1875, p. 45; *Ramji* v. *Ghamau*, I. L. R., 6 Bom., at p. 500; *Giriowa* [876] v. *Bhimaji*, I. L. R., 9 Bom., 58; *Patel Vandravan* v. *Patel Manilal*, I. L. R., 15 Bom., 565. See also Mayne's Hindu Law, 5th Ed., section 118.

In *Narayan Babaji* v. *Nana Manohar*, 7 Bom. H. C. Rep., 172, A. C. J., and in *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. Rep., at p. 257, Sir MICHAEL WESTROPP refers to the ruling in *Rakhmabai* v. *Radhabai* with some doubt, but the nature of the doubt is shown by the same learned Chief Justice's judgment in *Ramji* v. *Ghamau*. There Sir MICHAEL WESTROPP giving the judgment of a Full Bench, held that in the Maratha country "the widow of a Hindu, dying with male issue, may, *if her husband were separated from his family in estate*, adopt without any express authority from him (if he have not prohibited her from so doing or otherwise implied his intention that she should not adopt): and without the consent of his relatives," and his Lordship expressed concurrence with the remarks of MELVILL, J, in *Rupchand* v. *Rakhmabai*. Mr. Justice MELVILL there says: "The decision in *Rakhmabai* v. *Radhabai*, and the authorities on which it is based, may be accepted without hesitation as showing that in the Maratha country a widow in whom the estate is vested may show by other evidence than the assent of a responsible kinsman that (to use the words adopted by the learned Judges from the decision of the Privy Council above referred to) the act of adoption was done by her in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

In 1876 the Judicial Committee in *Rajah Vellanki* v. *Venkata Rama*, L. R., 4 I. A., 1, explained what their Lordships had said in the *Ramnad* case as to a widow adopting in the proper and *bonâ fide* performance of a religious duty. "Their Lordships think it would be very dangerous to introduce into the

consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all what this Committee in the former case intended to lay down was that there should be such proof of assent on the part of the *sapindas* as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that *sapinda*, but [577] upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. If that be so, there seems to be every reason to suppose that in the present case there was such a consideration, both on the part of the widow and on the part of the *sapindas*; and their Lordships think that in such a case it must be presumed that she acted from the proper motives which ought to actuate a Hindu female, and that, at all events, such presumption should be made until the contrary is shown."

Commenting upon this decision Mr. Mayne in his work on Hindu Law, 5th Ed., paragraph 116, says: "It does not seem quite clear, even now, whether their Lordships are of opinion that the motive which operates upon the mind of a widow in making an adoption can be material upon the question of its validity, where she has obtained the necessary amount of assent: that is, whether evidence would be admissible which went to show that the widow was indifferent to the religious benefits supposed to flow from an adoption to her husband, or even disbelieved in the efficacy of such an adoption; and that her real and only object in making an adoption was to enhance her own importance and position, and to prevent the property of her late husband from passing away to distant relations." Mr. Mayne is of opinion that the Judicial Committee did not intend to lay down that such evidence would be material or admissible. I am unable to agree in the view taken by Mr. Mayne. If the Judicial Committee had held that there was an irrebuttable presumption that a widow, who had obtained the assent of other members of the family upon a fair consideration of the expediency of substituting an heir by adoption to the deceased husband, had acted from the proper motives which ought to actuate a Hindu female, their Lordships would not, I think, have said that, at all events, such presumption should be made until the contrary is shown. And if where the assent of *sapindas* is necessary, the presumption in favour of the widow acting from proper motives is not irrebuttable, still less can there be such a presumption where the widow requires no assent.

If it be proved that the main motive of a widow in this Presidency in making an adoption was mere caprice or was corrupt, [578] then, though the adoption might in part be attributed to a religious motive, the adoption would, I think, be invalid. The following remarks of the Judicial Committee in *Sri Ragunadha* v. *Sri Brozo Kishoro*, L. R., 3 I. A., 154, although made with reference to the need of the assent of kindred, are, I think, important in considering the present questions. Their Lordships say: "It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property . . . dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women, possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

In this Presidency the law as it has been interpreted for many years has declared that a widow in making an adoption must neither act capriciously nor

corruptly. The judgment of the Privy Council in the *Ramnad* case was at first understood to throw upon the widow the *onus* of proving the absence of capricious or corrupt motives.

In *Patel Vandravan* v. *Patel Manilal* Sir CHARLES SARGENT and Mr. Justice CANDY after considering the judgments of the Privy Council in the *Ramnad* case and in *Rajah Vellanki* v. *Venkata Rama* say: "Where, however, the assent of *sapindas* is not required, as in this Presidency, where the family is divided, then there will be only the ordinary presumption that the widow has performed a duty from proper motives, and the *onus* lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive." The learned Judges also held that in this matter, apart from local or caste custom, there is no reason for drawing any distinction between Gujarat and the Maratha Country properly so called.

In my opinion the learned Judges gave the fullest effect which ought to be given to the late judgment of the Judicial Committee.

**[879]** Doubtless the decision of my learned colleagues simplifies the administration of the law on a different matter, but I am unable to see with them the main point at issue before us as an open question.

Upon the answer of the Full Bench, the Division Bench reversed the decrees of the Courts below and dismissed the suit.

*Decree reversed.*

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**NOTES.**

[The motive in adoption is entirely irrelevant :— (1899) 23 Bom., 789; (1908) 31 Mad., 446.

As regards the effect of consent, see also (1914) 38 Bom., 724.]

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[22 Bom. 879]

## APPELLATE CIVIL.

*The 18th November, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE

Abaji Parashram............(Original Plaintiff) Appellant

*versus*

The Secretary of State for India in Council............(Original Defendant).*

*Jurisdiction—The Bombay Revenue Jurisdiction Act (X of 1876), Sec. 11—Suit against Government—Practice—Procedure—Appeal from an order of a revenue officer—Presentation of such appeal.*

All that section 11 of the Bombay Revenue Jurisdiction Act (X of 1876) requires is that the appeal referred to therein shall be *presented*. When, therefore, the only appeal allowed by law against a certain order of the Collector lay to the Commissioner, and such appeal was presented,

*Held*, that the plaintiff was not bound to wait for a reply before filing his suit against Government.

APPEAL from the decision of F. C. O. Beaman, District Judge of Thana.

* Appeal, No. 158 of 1895.

The facts as alleged by the plaintiff were as follows:—

Plaintiff was the vatandar khot* of the village of Ambdosi in the Thana District.

Before the passing of Bombay Act I of 1865, the khots of the village used to receive from the tenants *ardhal* (half the crop) of rice lands and *tirdhal* (one-third of the crop) of varkas lands.

[580] After that Act came into force the Revenue authorities altered the amount payable to the khot and required him (the plaintiff) to pass a kabulayat in accordance with the new arrangement.

The plaintiff, however, refused to pass a kabulayat for 1892-93 in the prescribed terms, and insisted on recovering his dues according to the usual custom.

On the 31st October 1892, the plaintiff made an application in this matter to the Collector of Thana, but the Collector rejected this application and ordered plaintiff's village to be attached if he failed to pass the kabulayat in the prescribed form.

Plaintiff thereupon passed the required kabulayat under protest.

On the 16th November 1892, plaintiff presented an appeal from the Collector's order to the Revenue Commissioner.

As no reply was received from the Commissioner, plaintiff petitioned Government on 2nd July 1893, but the petition was returned for want of a copy of the Commissioner's decision.

Hence the present suit, which was filed on the 28th November 1893. The plaintiff prayed (1) for a declaration that the kabulayat obtained from him by the Revenue authorities for 1892-93 was null and void; (2) for a declaration that he was not liable to pass similar kabulayats in future years; and (3) for a perpetual injunction restraining defendant-plaintiff from attaching the plaintiff's village in case of his refusal to pass such a kabulayat.

Section 11 of the Bombay Revenue Jurisdiction Act (X of 1876) is as follows:—

"11. No Civil Court shall entertain any suit against Government on account of any act or omission of any Revenue officer unless the plaintiff first proves that previously to bringing his suit he has presented all such appeals allowed by the law for the time being in force as within the period of limitation allowed for bringing such suit it was possible to present."

The District Judge raised the following preliminary issue:—

"Has plaintiff shown that he has presented all such appeals allowed by the law in force (*viz.*, sections 203 and 204, Bombay Land Revenue Code, 1879), as it was possible for him to present within the time allowed by law for the suit?"

[581] On this issue the District Judge recorded the following finding and dismissed the suit:—

"After taking time to consider the matter, I am reluctantly compelled to find this issue against the plaintiff. I say reluctantly, because it is, I suppose, nothing more than a preliminary which will put the litigation one stage back, and prevent very important issues from coming to a clear settlement at once. But suppose that the Commissioner's reply, which the plaintiff received long after the filing of the suit, had been in his favour, could it be then denied that his suit was premature? Would he have had any cause of action at all? And surely the object of these restrictive measures is to ensure that the Revenue authorities shall have a full opportunity of deliberating and pronouncing finally upon the need for any particular measure before Government is dragged into the Court to defend it. In this view, and taking the facts and dates as given by the plaintiff, I must hold that he had not exhausted his remedies before bringing the suit, and it is, therefore, premature and must be dismissed."

Against this decision plaintiff appealed to the High Court.

*Daji A. Khare*, for Appellant.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

**Parsons, J.**:—It appears that there was a dispute between the Collector of Thana and the plaintiff as to the terms of the kabulayat that the latter was bound to pass for the management of his village, which culminated in the latter's making the application to the Collector (Exhibit 12) dated 31st October 1892. The Collector passed an order thereon dated November 4th, 1892, refusing the plaintiff's application and requiring him to pass a kabulayat in the form prescribed by him. Against this order the plaintiff, on the 16th November 1892, appealed to the Commissioner.

Having obtained no reply to this appeal he, on the 2nd July 1893, petitioned Government, but his petition was returned on the 17th July 1893, for the reason that a copy of the decision of the Commissioner was not attached to the petition. The plaintiff then gave the statutory notice to Government and filed this suit on the 28th November 1893. The District Judge dismissed the suit on the ground that "the plaintiff had not exhausted his remedies before bringing the suit, and it is, therefore, premature."

[582] Section 11 of the Bombay Revenue Jurisdiction Act, 1876, is as follows:—"No Civil Court shall entertain any suit against Government on account of any act or omission of any Revenue officer unless the plaintiff first proves that, previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present." The only appeal allowed by law in the present case against the order of the Collector lay to the Commissioner (see section 203 of the Bombay Land Revenue Code, 1879). There would be no appeal to Government (see section 204). The plaintiff presented an appeal to the Commissioner. It is true he filed this suit before he got a reply, but he was not bound to wait for a reply. All that the Act requires is that the appeal shall be presented. There is no provision that the time occupied in the appeal shall be excluded from the period allowed by the law of limitation, so that a suit might easily become time-barred before a reply was received. As a matter of fact in the present case the appeal was not decided by the Commissioner until the 8th November 1894. In so far, therefore, as this suit brings into question the legality of the order of the Collector of the 4th November 1892, it is not barred by section 11 of the Bombay Revenue Jurisdiction Act. The other acts complained of by the plaintiff need not, in our opinion, have been separately appealed from. They are merely the outcome of the order of the Collector: acts done in the carrying out of the order and the legality of which depends entirely upon the legality of the order itself. We reverse the decree and remand the suit for trial on the merits. We make costs costs in the cause.

*Decree reversed and case remanded.*

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**NOTES.**

[See also (1897) 22 Bom., 583 at 589.]

## [683] APPELLATE CIVIL.

*The 15th October, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Ranchod Haribhai and another............(Original Plaintiffs) Appellants

*versus*

The Secretary of State for India............(Original Defendants) Respondents.*

*Revenue Jurisdiction Act (Act X of 1876), Sec. 11†—Meaning of the words " appeal allowed by law "—Construction.*

**The words "an appeal allowed by law" used in section 11 of the Revenue Jurisdiction Act (Act X of 1876) do not mean "an appeal within the time allowed by law." They refer to the appeals which the law prescribes, and have no reference to the limitation in point of time, which the law may impose upon the bringing of such appeals.**

APPEAL from the decision of C. Fawcett, Assistant Judge of Broach. The plaintiffs sued to recover certain land which they alleged to belong to them and for Rs. 150 damages. They complained that in 1891 the Collector of Broach issued a notice under section 202 of the Land Revenue Code (Bombay Act V of 1879) requiring them to vacate, and that in February 1892, the Mamlatdar of Amod had taken the land into his possession and had pulled down a house which stood on part of it.

The defendant pleaded (*inter alia*) that the suit was not maintainable, the plaintiffs not having exhausted all rights of appeal in the Revenue Courts.

On this point the Judge dismissed the suit, although, on the merits, finding in favour of part of the plaintiffs' claim. The following is the material part of his judgment:—

"I take up issue 7 first, as it is really a preliminary issue which should have been decided before the suit was entertained on its merits. The notice (Exhibit 32) was issued by the Assistant Collector to Haribhai Khushal on the 17th January 1891, but no action was taken upon it until the 19th February 1892, when the building erected upon a portion of the land in dispute was pulled down, and the plaintiff's possession over the remainder of the ground disturbed. This is the cause of action alleged, and it is to be seen whether the plaintiffs [684] have proved under section 11 of Act X of 1876 that, previously to bringing their suit, they had presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present. Now in this case the acts complained of were done at the orders of the Assistant Collector in revenue charge of the taluka of Amod purporting to act under sections 61 and 202 of the Land Revenue Code read with section 10 of the same Act. Under section 203 of the Code an appeal lay from the Assistant Collector's order to the Collector and, as the final words of the section show, from the Collector's decision in appeal to the Commissioner, N. D. Under section 204, no appeal lay to the Governor in Council, as the Commissioner's decision would be passed by him on appeal

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* Appeal, No. 50 of 1897.

† Revenue Jurisdiction Act (Act X of 1876), section 11:—

11. No Civil Court shall entertain any suit against Government on account of any act or omission of any Revenue officer, unless the plaintiff first proves that previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present.

from a decision itself recorded in appeal by an officer subordinate to him. Such being the law, what are the facts? From Exhibits 88 and 98 it appears that on the 23rd February 1892, the deceased plaintiff Ranchod Haribhai through a vakil Mr. Ambashankar Harprasad sent by post an application to the Assistant Collector protesting against the pulling down of the building on the 19th February 1892, and re-asserting the plaintiff's ownership over the land in dispute, but owing to the application being insufficiently postage-stamped, it was received back through the Dead Letter Office and reforwarded on the 31st March 1892. To this the Assistant Collector replied on the 26th April 1892, that he did not think proper to interfere in the matter by doing otherwise than what had been done (Exhibit 98). This may be considered the Assistant Collector's final decision in the matter, and it is to be seen whether plaintiffs presented the requisite appeals 'allowed by the law for the time being in force' therefrom. Before the Assistant Collector had given the above reply, Ranchod Haribhai had already on the 2nd March 1892, presented through Mr. Ambashankar Harprasad an appeal to the Collector (Exhibit 102). This was returned on the 4th March 1892, for attaching a copy of the Assistant Collector's order as required by section 208 of the Land Revenue Code. It was again sent to the Collector, with a copy of the order of the Assistant Collector, on the 6th June 1892. On this date, therefore, the proper appeal was presented to the Collector, and it was accordingly presented within the prescribed period of sixty days from the decision of the Assistant Collector on 26th April 1892 (section 205, Land Revenue Code). The Collector replied on the 18th June, and his answer, though it appears based on a misapprehension of the real facts as to the notice under section 202 having already been executed, must be taken as one confirming the decision of the Assistant Collector. From this decision an appeal lay, as already mentioned, to the Commissioner, N. D., and the law prescribes (section 205) that such appeal shall not be brought after the expiration of ninety days, exclusive of the time required to prepare a copy of the decision or order appealed against. The appeal was not, however, as a matter of fact, preferred until six months afterwards, *viz.*, on the 8th December 1892 (Exhibit 103). This appeal was, after the institution of the present suit, rejected by the Commissioner as time-barred. (See reply of the Collector to the appli ant, dated 27th April 1893, Exhibit 99).

[586] "The question, therefore, arises whether this appeal to the Commissioner, being presented after the prescribed period of limitation, is an appeal "allowed by the law for the time being in force" within the meaning of section 11 of the Bombay Revenue Jurisdiction Act, 1876. I am of opinion that the question must be answered in the negative. A person cannot, I think, be properly said to have presented an appeal '*allowed by law*,' when it is presented under circumstances in which the law distinctly *disallows* its being made. The language of section 205 is positive 'no appeal shall be brought after the expiration of,' &c., and the only qualification to this express provision is contained in section 206 under which an appeal may be admitted after the period of limitation 'when the appellant satisfies the officer......to whom he appeals that he had sufficient cause for not presenting the appeal within such period.' In this particular case it is to be presumed, from the Commissioner rejecting the appeal as time-barred, that he was not satisfied by the appellant on the point; although in his appeal appellant Ranchod Haribhai put forward excuses for the late presentation of the appeal. It is not, I think, open to this Court to consider in this suit whether as a matter of fact Ranchod Haribhai had sufficient cause for not presenting the appeal within time, the decision on this point being under section 206 of the Code left to the officer appealed to;

but supposing that it was open to the Court to do so, plaintiffs have certainly failed to make out any such 'sufficient cause.' * * Section 206 of the Land Revenue Code will not, therefore, help the plaintiffs, and a time-barred appeal not being an appeal 'allowed by law,' any more than an appeal to a wrong officer or an appeal which violates rules 108 and 109 of those under section 214 (b) of the Land Revenue Code, the plaintiffs have failed to prove what is required under section 11 of Act X of 1876. This interpretation of the meaning of the words of that section is, I think, in accordance with common sense, because otherwise the object of the provision embodied therein could always be successfully evaded by the mere expedient of going through the form of presenting an appeal, which the appellant knows will be rejected as time-barred and which he presents for that purpose. By this means he would prevent the appeal being enquired into on its merits and so deprive the higher Revenue authorities of the opportunity which section 11 of the Revenue Jurisdiction Act is intended to provide of rectifying an illegality or admitting a claim in respect of which the person aggrieved hopes to obtain better redress, pecuniarily or otherwise, in a Court of Law. If it be said that thereby a person may be innocently and unjustly deprived of his eventual right of recourse to a civil suit, through his failing to present an appeal in time to the proper Revenue authorities, the answer is that, if he fails to do so for any sufficient cause, section 206 of the Land Revenue Code provides sufficient remedy, and that if it be without any sufficient cause, then he has only himself to blame and is not entitled to any special favour, in order to relieve him of the consequences of his own negligence or wilful delay. * * The appeal to the Commissioner was actually made on the day after the notice of intention to file a suit against Government (Exhibit 86) was given by the plaintiffs to the Collector, and they had been threatening to bring a civil suit in regard to the matter ever since the 19th February 1892, when the house was pulled down [586] (see Exhibit 96). Under these circumstances I can only conclude either that the failure to appeal to the Commissioner within the prescribed period was deliberate on their part, or that it was due to the most extraordinary negligence; and in neither case are they entitled to any sympathy from the Court.

"I know, however, of no previous ruling on the point, and as it may, therefore, be considered a doubtful point of law, especially in view of the rule that statutes which encroach upon the rights of the subject, whether as regards person or property, must be construed strictly and their words not put into operation unless they accurately fit the case in point (cf. as to Limitation Acts, cases reported at I. L. R., 1 Bom., 19; I. L. R., 9 Bom., 403; I. L. R., 6 Bom., 724, and I. L. R., 14 Bom., 272), and as the suit has been tried and argued on its merits, I will also record my findings on the other issues, so that in the event of the appellate Court disagreeing with me on this point of law, it may not be necessary to remand the suit to this Court for further hearing.

* * * * *

"But for my finding on issue 7, I would, therefore, pass a decree in their (plaintiffs') favour for the recovery of possession of so much of the *gabhan* in dispute as will give the plaintiffs' *gabhan* a clear breadth of 8 feet along its whole length, *i. e.*, along the west side of the ground in dispute, adjoining the land at present in possession of the plaintiffs, land measuring 3 feet 6 inches in breadth for a length of 21 feet and 2 inches at the northern end and land measuring 5 feet and 3 inches in breadth for a length of 34 feet 10 inches at the southern end. I would also allow the plaintiffs Rs. 10 as compensation for damage caused to them by the wrongful removal of part of the building standing on 81 square feet out of the *gabhan* in dispute, and would dismiss the rest of the plaintiffs' claim."

Plaintiffs appealed.

*Gokuldas K. Parekh*, for the Appellants (Plaintiffs).

Rao Bahadur *Vasudev J. Kirtikar* (Govenment Pleader), for the Respondent (Defendant).

**Farran, C. J.**:—Upon the merits of this case we do not feel that we can do otherwise than confirm the findings of the Assistant Judge upon the first five issues. (His Lordship after commenting upon the evidence continued :) I pass to consider whether the plaintiff has lost his right to the limited relief to which the Assistant Judge considers (with us) that he was entitled to. The technical defence to the plaintiff's suit is based upon the provisions of section 11 of the Bombay Revenue Jurisdiction Act (X of 1876), which enacts that "no Civil Court shall entertain any suit against Government on account of any act or omission of any revenue officer unless the plaintiff first proves that previously to bringing his suit he has presented all such [587] appeals allowed by the law for the time being in force as within the period of limitation allowed for bringing such suit it was possible to present"

Now, as shown by the Assistant Judge, the appeals *allowed by law* in this case were (1) an appeal from the order of the Assistant Collector to the Collector; (2) an appeal from the order of the Collector to the Commissioner. No further appeal to Government was *allowed by law*. The Assistant Judge has treated the expression "an appeal allowed by law" as equivalent to "an appeal within the time allowed by law," but I think that it rather refers to the appeals which the law prescribes, and has no reference to the limitation in point of time which the law may impose upon the bringing of such appeals. The plaintiff in this case appealed to the Collector. No objection has been taken to that appeal. He also appealed to the. Commissioner, but his appeal was rejected on the ground that it was not within time. He has, therefore, preferred all the appeals which the law allows, unless it can be predicated of his last appeal that it was not an appeal because it was not presented in time. The term "allowed by law" cannot, I think, do double duty and be held to be both descriptive of the nature and number of the appeals which a claimant must present and also be employed to impose a limit of time within which he must bring such appeals. These words do not, I think, assist in determining whether the plaintiff has brought all the requisite appeals. The question rather I think is: "Is an appeal which is rejected as time-barred, an appeal within the meaning of the Act?" Such an appeal clearly satisfies, I think, the words of the statute. The bringing of such an appeal is a literal compliance with its terms. There is not, in my opinion, any reason for construing the term "appeal" in the Act before us in other than its literal meaning. The section in question is not, in my opinion, a complex statute of limitation for the protection of Government. Its object is to prevent Government from being exposed to law suits arising out of the orders of its subordinate officers before its superior officers have been afforded the opportunity of considering, and it may be, of disallowing the executive orders of its subordinate officials.

Now although section 205 of the Land Revenue Code imposes [588] a limit upon the time within which an appeal may be brought, section 206 gives power to the officer appealed to, to admit the appeal after the expiration of such limit if he is satisfied that the appellant had sufficient cause for not presenting it within time; and section 211 gives power to a superior officer to call for and examine the proceedings of an inferior officer at any time and to modify, annul or reverse the order. No period of time is fixed for the exercise by the superior officer of this power, and there is nothing to prevent him from exercising it upon facts brought to his notice by a time-barred appeal. If I

have rightly apprehended the object of the section in question, there is no reason to suppose that its object will be defeated by a ruling which ascribes a natural meaning to the direction to present an appeal. Statutes imposing restrictions upon the subject's right of suit should be construed strictly, and such restrictions should not be extended beyond what the words used actually cover.

In the present case it has been contended by the appellant that his appeal to the Commissioner was in fact in time. His allegation is that though the Collector's order was passed on the 8th June, he did not receive notice of it until October. It certainly did not reach the officers of the plaintiff's village until the 25th July. There is no evidence other than the statement of the plaintiff in his petition to the Commissioner as to when the order was communicated to the plaintiff. If an appeal to the Commissioner must, in order to satisfy the requirements of section 11 of the Revenue Jurisdiction Act, be brought within ninety days, the plaintiff certainly has not proved that his appeal was brought in time, but it is difficult to suppose that the Legislature intended that a man's claims to property valuable it may be should depend upon the solution of the question whether he has appealed to the Commissioner in time or whether he had sufficient cause for not doing so. I cannot suppose that a subject can be deprived of his rights because a Commissioner in his discretion does not accept as sufficient the excuses which the subject brings forward to justify his delay. The question is doubtless a difficult one, but the above is, I think, its correct solution. I would, therefore, allow the appeal and pass the decree which upon the merits the Assistant Judge, considers that the plaintiff is entitled to.

**[589] Candy, J.**:—On the merits of the case I have nothing to add. On the technical question whether the plaintiff's right to the relief, to which he would be otherwise entitled, is barred by section 11 of Act X of 1876, I have felt considerable difficulty. After careful consideration I am of opinion that the conclusion arrived at by the learned Chief Justice should prevail.

The intention of the Legislature in enacting section 11 of Act X of 1876 was doubtless to enable Government or superior executive officers to correct the errors or omissions of subordinate revenue officers, and thus avoid litigation in Civil Courts. In the present case the plaintiff's appeal to the Commissioner was, *after* the institution of the suit, rejected by the Commissioner as time-barred. Plaintiff was not bound to wait for the Commissioner's reply to his appeal—*Abaji* v. *The Secretary of State for India in Council*, *ante*, p. 579. Plaintiff may have thought that the Commissioner would be satisfied with the alleged cause for delay. Even if not so satisfied, the Commissioner might, on a perusal of the appeal and of the copy of the Collector's decision, have thought it necessary to call for the proceedings and satisfy himself as to the propriety of the Assistant Collector's order (Land Revenue Code, section 211).

It cannot, therefore, be said that the Assistant Judge by entertaining the suit was acting contrary to the spirit or the letter of section 11 of Act X of 1876. The words "all appeals allowed by law" in that section naturally mean cases in which appeals are allowed, *viz.*, where the decision is not final, (*cf* section 212 of the Land Revenue Code). Here an appeal was so allowed: it was presented: the fact that the Commissioner subsequently rejected it as time-barred should not annul the right entertainment of the suit by the Civil Court.

The decision of the Assistant Judge will, therefore, be reversed, and the claim awarded to the extent set out by the Assistant Judge. As the Assistant Judge states that this amounts to about half the claim, plaintiff will obtain

half his costs throughout. The rest of the costs will be borne by the parties, each paying his own costs.

*Appeal allowed.*

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## [590] APPELLATE CIVIL.

*The 23rd November, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

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Lakshmibai and others............(Original Plaintiffs) Appellants

*versus*

Ramchandra..........(Original Defendant) Respondent.*

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*Hindu law—Adoption—Adoption by widow—Untonsured widow—Delegation of authority to adopt—Ceremony of adoption.*

Under the Hindu law the widow only can adopt a son to her husband, and she cannot delegate this authority to any other relation.

Where a widow performs the principal part of the adoption ceremony—namely, the gift and acceptance,—the fact that at her request the religious part of the ceremony is completed by a relation, does not vitiate the adoption.

In the case of a young widow, the fact that she was untonsured at the time of the adoption is not such a disqualification as vitiates the adoption.

APPEAL from the decision of Rao Bahadur Gangadhar V. Limaye, First Class Subordinate Judge of Dharwar.

The plaintiffs sued, as reversionary heirs of one Shankar Malhar, to obtain a declaration that the defendant was not the adopted son of the deceased, and to recover possession of the property in dispute.

The property in suit originally belonged to Malhar Guddo. On Malhar's death it was inherited by his son Shankar, who died in November 1885, leaving a childless widow Nagubai, about fifteen years old. Nagubai adopted the defendant in 1886, and immediately afterwards applied to the Revenue authorities to have her husband's kulkarni vatan entered in the name of her adopted son. The Collector thereupon entered the vatan in the defendant's name, and appointed him to the office of kulkarni.

In 1893 Nagubai died. Thereupon the plaintiffs sued, as the next of kin of the deceased Shankar Malhar, to set aside the defendant's adoption and recover the property from his possession.

The plaintiffs alleged (*inter alia*) that even if the *factum* of the adoption were held proved, it was invalid on the ground that the adoptive mother was an untonsured Hindu widow, and, therefore, incompetent to adopt a son to her deceased husband by reason [591] of her religious impurity, and that as a matter of fact she did not herself take part in the adoption ceremony, but delegated the duty to her relative Krishnarao.

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* Appeal, No. 49 of 1896.

The First Class Subordinate Judge of Dharwar, who decided the case, found that the defendant was taken in adoption by Nagubai; that she herself performed the essential part of the adoption ceremony, namely, the receiving of the boy from his natural father; and that at her request and direction the *Datta Homa* and other ceremonies were performed by her relation Krishnarao.

The Subordinate Judge held that though the adoptive mother was an untonsured Hindu widow, the adoption was not on that account invalid, or contrary to Hindu law or caste custom.

The suit was, therefore, dismissed.

Against this decision the plaintiffs appealed to the High Court.

*Scott* (with *D. A. Khare*), for Appellants:—We contend that the adoption is invalid (first) because the adoptive mother did not take part in the adoption ceremony and (secondly) because she was incompetent to adopt. The evidence shows that Nagubai was untonsured at the time of the alleged adoption. According to the Shastras and usages of the Hindus she was in a state of religious impurity. She could not perform any religious ceremony, and so the *Datta Homa* and the other religious portions of the adoption ceremony were performed at her request by her relative. We submit that she could not delegate this duty to any relative. According to the Hindu law, a widow must herself adopt a son to her deceased husband; she cannot delegate this authority to others—*Bhagvandas* v. *Rajmal*, 10 Bom. H. C. Rep., 241. In the present case the widow got the whole adoption ceremony performed by her relative. The adoption is, therefore, absolutely null and void.

The adoption is further vitiated by the fact that she was untonsured at the time of the adoption. The remarks of FARRAN, J., on this point in *Ravji Vinayak* v. *Lakshmibai*, I. L. R., 11 Bom., 381, are *obiter dicta* as not necessary for the decision of the case. The experts, who were examined in this case—the local Shastris and Pandits—stated [592] that an untonsured widow is incompetent to perform a religious act like that of adoption and they are supported by the Dharmasindhu and other authorities.

*Macpherson* (with him *Manekshah Jehangirshah*), for Respondent.—It is found as a fact by the lower Court, and the evidence conclusively shows, that the essential part of the adoption ceremony—namely, the gift and acceptance—was performed by the adoptive mother herself. It was Nagubai who asked for the boy, and received him in gift from his natural father. That being the case, the mere fact that the religious part of the ceremony was performed at her request by her relative does not invalidate the adoption. The essential requisites of an adoption are gift and acceptance. They are the operative part of the ceremony, being that part of it which transfers the boy from one family to another Nothing else is so essential as gift and acceptance. Even the *Datta Homa* is treated as a mere matter of unessential ceremonial—Mayne's Hindu Law, section 141. That being the case, the fact that the religious part of the ceremony was performed in the present case by a relative at the widow's request, cannot invalidate the adoption.

As to the second objection to the validity of the adoption, there is no text, and no authority in support of the proposition, that an untonsured widow cannot adopt. The case of *Ravji* v. *Lakshmibai*, I. L. R., 11 Bom., 381, is a distinct authority to the contrary. The Dharmasindhu is a work of a very recent date, and cannot be treated as an authority on the subject.

**Ranade, J.**:— The appellants (original plaintiffs), who claim to be the reversionary heirs of Shankar Malhar on the death of Shankar's widow Nagubai, sought in this suit to set aside the adoption of the respondent by Nagubai,

and also to recover possession of the property of deceased Shankar. The *factum* of adoption was not seriously disputed by the appellants' counsel, Mr. Scott, who, however, questioned its validity on the double ground that Nagubai, the adoptive mother, did not perform the ceremony of receiving the respondent in adoption herself, and that she was incompetent to take such a gift by reason of her ceremonial impurity.

[893] As regards the first ground, it was contended that Nagubai took no part in the adoption ceremony, but delegated it, on account of her impurity, to her relation Krishnarao, into whose hands the respondent was made over by his natural father at the time of the adoption ceremony.

There can be no doubt that a widow alone can adopt a son to her husband, and that she cannot delegate this authority to any other relation—*Bhagvandas* v. *Rajmal*, 10 Bom. H. C. Rep., 241. There is, however, no evidence in this case that there was any such delegation of authority on the part of Nagubai in respect of the principal portion of the ceremony, namely, the gift and acceptance. Not only is the deed of adoption, Exhibit 74, explicit on the point, but it was followed up by Nagubai's applications to the Collector, Exhibits 75, 76, of June 1886, and April 1891, in which applications she asked that the vatan might be entered in respondent's name. It was not till 1892, when Nagubai had attained majority, and the Collector made over the estate to her charge, that any objection was raised by Nagubai to the validity of the adoption (Exhibits 80, 81). As regards the oral evidence, the original plaintiffs Nos. 1, 2, had no knowledge on the point. Exhibits 64, 86 and none of the witnesses examined on their behalf gave any evidence in regard to the ceremony. They were all witnesses in regard to the effects of the alleged impurity (Exhibits 114, 115, 116). On the other hand, respondent's witnesses, including his natural father, the priest who officiated at the ceremony, and the relation and stranger who wrote and attested the adoption deed, distinctly swore that the boy, respondent, was made to sit on the lap of Nagubai, who asked him in gift from his natural father (Exhibits 100 and 103).

Nagubai was only a girl of fifteen years at the time, and had just lost her husband, and there is nothing surprising, therefore, in her remaining in the inner room, and asking her elderly relation to complete the *Homa* and the other religious portion of the celebration, which, indeed, as a woman, she could not directly take on herself to perform. The doubtful evidence given by witness Ganesh, Exhibit 95, and the total denial of all knowledge of the adoption by plaintiff No. 3, Exhibit 105, were very properly [894] discredited by the lower Court, as Ganesh had a grudge against the respondent, being dismissed from Nagubai's service, and plaintiff No. 3 had an interest in completely ignoring the fact of adoption. On the whole, therefore, we must hold with the lower Court that Nagubai herself received the respondent in adoption and that her requesting Krishnarao to complete the religious ceremony did not in any way vitiate the act.

The second ground on which the validity of the adoption was questioned has reference to the alleged incompetency created by the fact that Nagubai had not removed the hair on her head, and was thus ceremonially impure. The lower Court has considered this point at great length, though in the appeal before us, Mr. Scott did not seem to lay much stress on it. In *Ravji* v. *Lakshmibai*, I. L. R., 11 Bom., 381, this same question was raised, but it was not found necessary to decide the question, as it was held that the party, who sought to raise it, was estopped by her acts from denying the adoption. Three witnesses were examined on this point in the present case, none of whom appeared to be entitled to any great weight. The Purohit of the family admitted

that the receiving and giving must be done by the principals themselves, and the rest of the ceremony can be performed by a priest appointed for the purpose. As regards the impurity, the same witness was of opinion that the adoption by a widow, who had not removed her hair, required expiation—in other words, her act was not absolutely void, and the defect might be cured by certain payments made to Brahmins. The only authority he cited was the Dharmasindhu, which is a very recent compilation by a Pandharpur Shastri. Nirnayasindhu and Dharmasindhu indeed quote texts said to be found in Skanda Puran to the effect that "if a widow braids her hairs, the braided hair prevents the liberation of the husband, and that, therefore, the widow must remove her hair by shaving them." This is only a Puran text and of doubtful validity. The Smriti texts of Yama, Parashar and Apasthamba, which are superior in authority to such Puran texts, expressly provide that in the case of women who have to perform penance either for cow-slaughter or other equally heinous sins, the "*mundana,*" or shaving of the head, is to be performed [596] by holding up the hair, and cutting off the ends to the extent of one or two fingers. Other texts are cited by the authors of Smriti Ratnakar and similar collections, which direct, on the authority of Apasthamba and Vyas, that "*wapan*" is obligatory on sons and widows and other sorrowing relations of the deceased, but *wapan* must be understood here, and in fact has been described, to be equivalent to *mundana* as defined above, and it must reasonably be interpreted in the same sense both for male and female relations.

There is thus admittedly no authoritative Smriti text on the point, and whatever the efficacy of ceremonial strictness may be, the Courts which administer the law in British India must be guided by what is the received practice and custom of the country or the class to which the parties belong. Plaintiffs' own witness Guracharya admitted that ceremonial strictness, such as the texts advocate in the case of Brahmin widows, is now not observed in the vast majority of cases, and another witness on appellants' behalf stated that no exception was taken to Nagubai's conduct by the head priest of the caste. The adoption deed bears the signatures of many persons, and it is in evidence that a large number of persons dined in Nagubai's house on the day of adoption.

It is well known that among the Deshasta Brahmins in the Deccan, widows are allowed, in most cases, to retain their hair, and among all classes there is no compulsion in the case of young girls before they attain majority. The observations in West and Bühler, pp. 998, 1084, reflect the view of the Pandits and not of the learned authors, and the observation relates to purely religious acts and observances, and not to secular acts such as adoption, &c. On the whole, therefore, we feel satisfied that the alleged impurity of Nagubai was not, in the case of a young girl like her, such a disqualification as vitiated the adoption.

As we find in favour of the adoption, it is unnecessary to discuss the question of limitation incidentally raised in the pleadings before the lower Court. We reject the appeal and confirm the decree with costs on appellants.

*Decree confirmed.*

# [596] APPELLATE CRIMINAL.

*The 14th December, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Imperatrix
*versus*
Jijibhai Govind.*

*Penal Code (Act XLV of 1860), Sec. 211—False complaint to police—Code of Criminal Procedure (Act X of 1882), Sec. 162—Statements of witnesses before police not admissible against accused—Evidence.*

The accused complained to the police that *A* and *B* had robbed him. After inquiry the police reported to the Magistrate that the charge was false. The Magistrate thereupon struck off the case without holding any further inquiry himself. The accused was subsequently charged and convicted under section 211 of the Penal Code of making a false charge. On appeal it was contended that as the accused had not been given an opportunity of substantiating his complaint before a Magistrate, his prosecution was illegal, or, at the most, he ought to have been charged under section 182, and not section 211.

*Held*, that in order to constitute an offence under section 211 it was not necessary that the complaint should be made to a Magistrate. It was enough that it was made to the police authorities and related to a cognizable offence, and that action was thereupon taken by the police.

*Held*, also, that the fact that no opportunity was allowed to the accused by the Magistrate to substantiate his complaint before striking it off, was not a circumstance which invalidated the commitment duly made, and the conviction otherwise good could not be set aside on account of such omission. The trial before the committing Magistrate and in the Sessions Court gave ample opportunity to the accused to substantiate his complaint, and he was not prejudiced by the omission.

The positive prohibition under section 162 of the Criminal Procedure Code (Act X of 1882), *viz*., that statements to the police other than dying declarations shall not be used in evidence against the accused, cannot be set aside by reference to section 157 of the Evidence Act (I of 1872).

APPEAL from the decision of C. Fawcett, Joint Sessions Judge of Broach.

The accused was charged under section 211 of the Indian Penal Code (Act XLV of 1860) with having falsely charged Anop Talsia and two other persons with theft before the District Inspector of Police, Broach, and thereby causing criminal proceedings to be instituted against the said persons. In January 1896, the accused was going from the village of Haldar to Wagusna. On his way he had an altercation with a gang of [597] railway coolies. On his arrival at Wagusna he gave information to the police patel there that he had been robbed by the railway coolies of Rs. 25. The police patel thereupon went with him to the place where the alleged robbery was committed, and the accused identified one Anop Talsia as one of those who robbed him.

The police patel at the request of the accused reported the complaint to the chief constable and the accused himself made a further complaint to the inspector of police, who took it down in writing. The inspector also went with the accused to the place of the robbery and the accused identified a second person (Hussein) as one of the three who had committed the offence.

* Criminal Appeal, No. 326 of 1896.

The person so identified was arrested and a watch was kept upon his house, which was searched. Nothing, however, was found to incriminate him. The inspector of police then transferred the inquiry to the chief constable under a written order in which he expressed an opinion that the complaint was false.

The chief constable after a further inquiry made a report under section 157, Criminal Procedure Code (Act X of 1882) to the First Class Magistrate, in which he stated that his opinion was that the charge was false, and he asked that the complaint should be struck off. The Magistrate concurred, and characterized the complaint as maliciously false.

The accused was then charged under section 211 of the Penal Code.

The Joint Sessions Judge, disagreeing with both the assessors, found the accused guilty, and sentenced him to rigorous imprisonment for a year and a half, and a fine of Rs. 500.

Against this conviction and sentence the accused appealed to the High Court.

*Chimanlal H. Setalvad*, for the Accused:—There has been no magisterial enquiry into the complaint of theft which the accused made and which is alleged to have been "maliciously false." Without such enquiry the prosecution of the accused is illegal, because he was not allowed an opportunity of proving the truth of the complaint made by him—*Government* v. *Karim*-[598] *dad*, I L.R., 6 Cal., 496; *Empress* v. *Grish Chunder*, I.L.R., 7 Cal., 87; *Giridhari Mondul* v. *Uchit Jha*, I. L. R., 8 Cal., 435; *Queen-Empress* v. *Sham Lall*, I. L. R., 14 Cal., 707. Then there were no proceedings instituted—only a complaint to the police. This is not an offence—*Queen-Empress* v. *Bisheshar*, I. L. R., 16 All., 124. The statements of witnesses taken by the police during the investigation have been used as evidence to corroborate the evidence for the prosecution. This is contrary to the provisions of section 162 of the Code of Criminal Procedure.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown:—The accused has had ample opportunity in the Sessions Court to prove the truth of his complaint. He tried to do so and failed. He has, therefore, rightly been convicted.

Accused's complaint was, no doubt, to the police, but action was taken thereupon, and that amounts to an institution of criminal proceedings within the meaning of section 211 of the Penal Code (Act XLV of 1860). See *Karim Buksh* v. *Queen-Empress*, I. L. R., 17 Cal., 574.

As to the admission of the statements of witnesses before police as evidence in this case, no doubt section 162 of the Code of Criminal Procedure prohibits their being used against the accused, but they are not inadmissible in evidence (see section 157 of the Evidence Act I of 1872). Independently of these statements there is other reliable evidence to support the conviction. So the accused is not prejudiced.

**Ranade, J.**:—In this case the Joint Sessions Judge of Broach disagreeing with the assessors convicted the accused of an offence under the first part of section 211, and sentenced him to rigorous imprisonment for 1½ years, and a fine of Rs. 500.

Mr. Chimanlal in arguing the appeal before us, raised two preliminary points of law which must first be disposed of before considering the case on its merits. The first point had reference to the fact that the prosecution in this case was ordered without any proper enquiry before a Magistrate into the truth or falsehood of the charge brought by the accused. The complaint of rob-[599] bery, or, as the Joint Sessions Judge has found it to be, of theft, or misappropriation, brought by the accused against Anop and Hussein was not

preferred before a Magistrate. It was made to the police inspector, and after the police had made enquiries it was reported by the police chief constable to be a false complaint, and, therefore, it was struck off by the orders of the Magistrate. Mr. Chimanlal contended that as no opportunity had been allowed to the accused to substantiate his complaint before the Magistrate directed it to be struck off, the prosecution was not legal in its inception, and that at the most the charge ought to have been brought under section 182.

We are unable to accept this contention. In *Reg.* v. *Arjun*, 1 Bom. H.C. Rep., 87, and *Empress* v. *Arjun*, I. L. R., 7 Bom., 184, it has been held that when one person specially complains that another has committed an offence, and such complaint is shown to have been falsely made with the object of injuring that other person, the offence falls under section 211, and not under section 192. There is also ample authority for holding that to constitute an offence under the first part of section 211, it is not necessary that the complaint should have been made to a Magistrate, but that it is enough if it is made to the police authorities, and relates to a cognizable offence, and action is taken thereupon by the police authorities concerned—*Queen* v. *Subbanna*, 1 Mad. H. C. Rep., 30 ; *Empress* v. *Abul Hasan*, I. L. R., 1 All., 497 ; *Empress*, *Salik*, I. L. R., 1 All., 527 ; *Empress* v. *Parabu*, I. L. R., 5 All., 598; *Queen-Empress* v. *Karim Buksh*, I. L. R., 14 Cal., 633. A person who sets the criminal law in motion by making to the police a false charge in respect of a cognizable offence institutes criminal proceedings under the first part of section 211.

On this point there is no divergence of views between the Calcutta and Allahabad High Courts. That divergence is confined to the question whether the latter part of section 211 applies to such cases of complaints to the police which are disposed of without a formal magisterial inquiry. A Full Bench of the Calcutta High Court has held that the latter part of [600] section 211 would apply to such cases when the charge related to the more serious offences —*Karim Buksh* v. *The Queen-Empress*, I. L. R., 17 Cal, 574, while the Allahabad High Court has dissented from that view, and decided that, unless the matter was enquired into by a Magistrate, the latter part of section 211 would not apply—*Queen-Empress* v. *Bisheshar*, I. L. R., 16 All, 124. There has been no ruling on the point in this Court, and it is not necessary to decide it here, as the Joint Sessions Judge has convicted the accused of an offence under the first part of the section 211 about the applicability of which there is no dispute.

As regards the allegation that no opportunity was allowed to the accused by the Magistrate to substantiate the charge before he ordered the complaint to be struck off, we are of opinion that such a course is no doubt very desirable in the ends of justice, but its omission is not a circumstance which invalidates a commitment duly made, and a conviction otherwise good cannot be set aside on account of such omission—*Queen-Empress* v. *Ganga Ram*, I. L. R., 8 All., 38 ; *Government* v. *Karimdad*, I. L. R., 6 Cal., 496 ; *Reg.* v. *Navalmal*, 3 Bom., H. C. Rep,, Cr. Ca., 16 ; *Ramasami* v. *The Queen-Empress*, I. L. R . 7 Mad., 292. The trial before the Committing Magistrate and in the Sessions Court offered ample opportunity for the accused person to substantiate his complaint, and the omission is not one which has prejudiced the interests of the accused.

We must, therefore, overrule both these contentions. Turning next to the merits (here His Lordship reviewed the evidence and continued). On the whole, therefore, we feel satisfied that the Joint Sessions Judge has correctly appreciated the probabilities of the case, and the conviction must stand.

We note for the information of the Joint Sessions Judge that the procedure followed by him in admitting as corroborative evidence against the

accused all the statements (Exhibits 32—42) made by the witnesses to the police was distinctly opposed to the provisions of the law on this behalf and the rulings of this Court in *Queen-Empress* v. *Sitaram Vithal*, I.L.R., 11 Bom., 657 as also *Roghuni Singh* v. **[601]** *The Empress*, I. L. R., 9 Cal., 455. The positive prohibition under section 162, Criminal Procedure Code, cannot be set aside by reference to section 157 of the Evidence Act. This irregularity has not affected the merits and calls for no further notice. We confirm the conviction, but alter the substantive sentence of imprisonment to one of six months' rigorous imprisonment.

*Conviction confirmed.*

**NOTES.**

[1. See also (1905) 33 Cal., 1 : 10 C.W.N., 158 as regards disposal of the complaint.

2. As regards use against the accused, the Cr. P. C., 1898, Sec. 162 omits the words '*against the accused*.']

**[ 22 Bom. 601 ]**

## APPELLATE CIVIL.

*The 18th December, 1896.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE FULTON.

Ramangavda and others............(Original Opponents) Appellants

*versus*

Shivapagavda... .... ...(Original Applicant) Respondent.*

*Vatan—Share of vatan—Vatan divided into* takshims *or shares—Decree by holder of one share against holder of other—Execution of decree—Collector's certificate forbidding alienation—Vatan Act (Bom. Act III of 1874), Secs. 4 and 10† —Validity of Collector's certificate.*

There cannot be two separate vatans in connection with one hereditary office: therefore, when a vatan is broken up into shares or *takshims*, those *takshims* do not constitute separate vatans.

* Second Appeal, No. 591 of 1896.

† Section 4 of the Vatan Act (Bom. Act III of 1874):—

4. In this Act, unless there be something repugnant in the subject or context,

"Vatan property" means the moveable or immoveable property held, acquired, or assigned for providing remuneration for the performance of the duty appertaining to an hereditary office. It includes a right to levy customary fees or perquisites, in money or in kind, whether at fixed times or otherwise.

It includes cash payment in addition to the original vatan property made voluntarily by Government, and subject periodically to modification or withdrawal.

"Hereditary office" means every office held hereditarily for the performance of duties connected with the administration or collection of the public revenue, or with the village police, or with the settlement of boundaries, or other matters of civil administration.

The expression includes such office even where the services originally appertaining to it have ceased to be demanded.

The vatan property, if any, and the hereditary office, and the rights and privileges attached to them together constitute the vatan.

Section 10. When it shall appear to the Collector that by virtue of, or in execution of, a decree or order of any British Court any vatan, or any part thereof, or any of the profits there-

[602] Where the Collector's certificate under section 10 of the Vatan Act was based on a misunderstanding of the term "vatan,"

*Held* that his certificate was illegal and could not be accepted by the Court.

SECOND APPEAL from the decision of R. S. Tipnis, Assistant Judge (Full Power) of Sholapur-Bijapur at Bijapur, confirming the order of Rao Saheb Krishnarao M., Subordinate Judge of Bagalkot.

The patilki vatan of the village of Murnal, taluka Bagalkot in the Bijapur District, was divided into two *takshims* (shares), one called the Lingayat Takshim and the other Radi Takshim. These two *takshims* were held by two different families, who were in no way related to each other. In the year 1885, one Ramangavda, a representative of the Radi Takshim, got a decree against Shivapagavda, a member of the Lingayat Takshim, for the recovery of certain lands which formed part of the Lingayat Takshim. The Collector, however, issued a certificate under section 10 of the Vatan Act (Bom. Act III of 1874) forbidding the alienation. The certificate was in the following terms:—

"The lands below mentioned belong to the Lingayat Takshim; therefore, they cannot be alienated to others than vatandars of that same vatan. The decree should be set aside."

Relying on this certificate Shivapagavda applied to the Subordinate Judge to set aside the decree.

[603] The decree-holders contended that there was no objection to the alienation of the property to them, as they were the vatandars of the same vatan, and entitled to have the property made over to them in accordance with the decree.

The Subordinate Judge, however, acting on the Collector's certificate declared that the decree could not be executed, in so far as it related to the lands mentioned in the certificate.

On appeal by the opponents the Judge confirmed the order.

The opponents preferred a second appeal to the High Court.

*Branson* with *Dattatraya A. Idgunji*, for Appellants (the Decree-holders):—The owner of a *takshim* (share) of a vatan is a vatandar of the whole vatan. Each *takshim* does not form a separate vatan. The office connected with the two *takshims* is the same. There cannot be different vatans for the same office. The certificate of the Collector is, therefore, illegal, and cannot be given effect to. Civil Courts have the right to question the validity of the Collector's certificate—*Shankar Gopal* v. *Babaji*, I. L. R., 12 Bom., 550; *Bhau Balapa* v. *Nana*, I. L. R., 13 Bom., 343, *The Collector of Thana* v. *Bhaskar Mahadev*, I. L. R., 8 Bom., 264.

*Inverarity* with *Vasudev G. Bhandarkar*, for Respondent (Applicant):—The certificate issued by the Collector is in accordance with section 10 of the Vatan Act. It states that the property is vatan and, therefore, not alienable. The Collector considered that the land in question belonged to one *takshim*, and

of, recorded as such in the Revenue records or registered under this Act and assigned under section 23, as remuneration of an officiator, has or have after the date of this Act coming into force, passed or may pass without the sanction of Government into the ownership or beneficial possession of any person other than the officiator for the time being; or that any such vatan or any part thereof, or any of the profits thereof, not so assigned has or have so passed or may pass into the ownership or beneficial possession of any person not a vatandar of the same vatan, the Court shall, on receipt of a certificate under the hand and seal of the Collector, stating that the property to which the decree or order relates is a vatan or part of a vatan, or that such property constitutes the profits or part of the profits of a vatan, or is assigned as the remuneration of an officiator, and is therefore inalienable, remove any attachment or other process then pending against the said vatan, or any part thereof, or any of the profits thereof, and set aside any sale or order of sale or transfer thereof, and shall cancel the decree or order complained of so far as it concerns the said vatan, or any part thereof, or any of the profits thereof.

that such *takshim* was in itself an indepenent vatan. In his opinion the two *takshims* were distinct and separate, and could not be intermixed. He treated them as two vatans. He may be wrong, but the Civil Courts cannot interfere with his decision. The parties aggrieved may appeal to the Commissioner or Government. As long as the certificate stands, the Civil Courts cannot go behind it. The technical requirements of the certificate being complied with, the Civil Courts are bound to accept it as valid.

**Fulton, J.** :—The definition of "vatan" in section 4 of Bombay Act III of 1874 shows that there cannot be two separate vatans **[604]** in connection with one hereditary office, or, in other words, that when a vatan is broken up into shares or *takshims*, those *takshims* do not constitute separate vatans. The definition states that the vatan property, if any, and the hereditary office and the rights and privileges attached to them together constitute the vatan, and is inconsistent with the supposition that there can be two separate vatans connected with the same office. The material part of the Collector's judgment which has been set forth in the decision of the Assistant Judge is as follows:— "The land is not assigned for the payment of an officiator, but it is part of the vatan of the Lingayat *takshim* of the patilki vatan of Murnal, taluka Bagalkot, and it is likely to pass into the hands of the representative of Ramangavda, who is not a vatandar of the Lingayat Takshim of that vatan, but is a vatandar of the Radi Takshim. I accordingly issue another certificate to that effect to the Subordinate Judge."

Very possibly, if there had been different offices to which the separate *takshims* were severally attached, the finding of the Collector, that the two *takshims* constituted separate vatans, might have been binding on the Courts as suggested by Mr. Justite BIRDWOOD in his decision on an earlier stage of this litigation, P. J. for 1890, p. 263, but as the Collector has clearly decided that the two shares are merely *takshims* appertaining to one patilki, it is impossible to say that it appeared to him that by virtue of the decree complained of, any part of the vatan was likely to pass into the hands of a person not a vatandar of the same vatan. He doubtless thought that this was the case, but it was in consequence of his understanding the meaning of the word "vatan" in a sense different from that in which it is used in the Act.

Under these circumstances we think that as the Collector's decision was based on a misunderstanding of the term "vatan" and as under the circumstances section 10 of the Act gave him no jurisdiction to issue a certificate, it is not open to the Court to accept that certificate.

We, therefore, reverse the decrees of both Courts and reject the application with costs on the applicant throughout.

*Decree reversed.*

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**NOTES.**

[ This was followed in (1900) 2 Bom. L. R., 420.]

## [605] APPELLATE CIVIL.

*The 8th January, 1897.*

PRESENT:

SIR C. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Shidmallappa Nurandappa............(Original Plaintiff) Appellant

*versus*

The Gokak Municipality............(Original Defendants) Respondents.*

***Municipality—District Municipal Act (Bom. Act II of 1884), Sec. 48†—Suit for damages, possession and injunction—Notice of action.***

IN a suit brought against a Municipality to recover possession of a piece of land taken by it, for damages for pulling down a wall on the land, and for an injunction,

*Held*, that as regards damages the suit came under section 48 of the District Municipal Act (Bom. Act II of 1884), but as regards possession and injunction notice of action was not necessary under the section.

SECOND APPEAL from the decision of F. C. O. Beaman, District Judge of Belgaum, reversing the decree of Rao Saheb V. D. Joglekar, Subordinate Judge of Athni.

The plaintiff sued the defendants to recover possession of a certain piece of land alleged to have been wrongfully taken by them and Rs. 25 for loss occasioned to him by their pulling down a wall which stood on the land, and for an injunction restraining them from interfering with him in the free use and enjoyment of the said land in future.

The defendants pleaded that the land was theirs, and that they had pulled down the wall after giving the plaintiff notice under section 33 of the District Municipal Act (Bom. Act VI of 1873). They also contended that the suit was not maintainable [606] for want of notice under section 48 of the District Municipal Act Amendment Act (Bom. Act II of 1884).

The Subordinate Judge passed a decree for the plaintiff.

On appeal by the defendant, the Judge reversed the decree, holding that the suit was not maintainable for want of notice under section 48 of the District Municipal Act Amendment Act (Bom. Act II of 1884).

The plaintiff preferred a second appeal.

*Manekshah J. Taleyarkhan*, for the Appellant (Plaintiff).

*Mahadev V. Bhat*, for the Respondents (Defendants).

**Farran, C. J.**:—The suit in so far as it is a suit for damages is clearly such a suit as is contemplated by section 48 of the Municipal Act, but in so far as it is a suit for possession it falls within the Full Bench ruling in *Manohar Ganesh* v. *The Dakor Municipality, ante* p. 289, and consequently notice of

* Second Appeal, No. 629 of 1896.

† Section 48 of the District Municipal Act (Bom. Act II of 1884) :—

48. No action shall be commenced against any Municipality or against any officer or servant of a Municipality, or any person acting under the orders of a Municipality, for any thing done, or purporting to have been done, in pursuance of this Act, or of the principal Act, without giving to such Municipality, officer, servant or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of; and in the case of any such action for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

action was not necessary under that section. The injunction is merely ancillary to the ejectment suit, and in regard to such relief notice has always been held to be unnecessary —*Flower* v. *Local Board of Low Leyton*, 5 Ch. D., 347. The decree must, therefore, be reversed and the appeal remanded to be heard on the merits. Costs, costs in the cause.

*Decree reversed and case remanded.*

NOTES.

[This was followed in (1897) 22 Bom., 636; (1909) 32 Mad., 371; (1900) 25 Bom., 142; (1913) 20 I.C., 572 (Sindh); (1913) 23 I. C., 317 (Punjab). See, however, (1906) 28 All.. 600.]

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[22 Bom. 606]

## APPELLATE CIVIL.

*The 14th January, 1897.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Ganesh............(Original Defendant) Appellant

*versus*

Gyanu............(Original Plaintiff) Respondent.*

*Limitation Act (XV of 1877), Art. 85—Mutual account—Test of mutuality—Shifting balance not a decisive test.*

The dealings between the plaintiff and defendant consisted of loans from one to the other. Interest was charged on such loans. The parties were, besides, partners in certain transactions, and the shares of profit and loss falling to each partner's share were debited and credited in their accounts. The dealings lasted from 1884 to 1890. In 1892 the plaintiff sued to recover the balance due to him in respect of all these dealings. The defendant pleaded (*inter alia*) that the suit was barred by limitation.

[607] *Held*, that the account was a mutual, open and current account within the meaning of article 85 of the Limitation Act (XV of 1877) and that the suit was not barred by limitation. The fact that in such an account the balance is a shifting balance, sometimes in favour of one party and sometimes in favour of the other, though valuable as an index of the nature of the dealings is not always decisive as to the nature of the account.

The dealings to be "mutual" must be transactions on each side creating independent obligations on the other and not merely creating obligations on one side, and the other side being merely discharges of these obligations.

SECOND APPEAL from the decision of W. H. Crowe, District Judge of Poona.

The plaintiff sued to recover from the defendant the sum of Rs. 4,971-6-3 as the balance due on a mutual, open and running account between the parties.

The dealings between the parties began on the 15th July 1884, and ended on 12th November 1890. This suit was brought in 1892. The defendant denied that the dealings were such as to make the account between him and the plaintiff a mutual, open and current account within the meaning of article 85 of Schedule II of the Limitation Act (XV of 1877) and he pleaded that the plaintiff's claim was barred, and that in respect of dealings which fell within the period of limitation a balance was really due from the plaintiff to him.

It appeared that the transactions in the account were mutual loans

* Second Appeal, No. 422 of 1896.

The plaintiff and defendant had borrowed from each other from time to time, and charged interest on such loans. They were, moreover, partners in certain forest contracts, and each was debited and credited in the account with his share of the profits and losses incurred in the partnership business.

The Subordinate Judge held that the plaintiff's claim was not barred, and passed a decree in his favour for Rs. 4,500

This decree was confirmed, on appeal, by the District Judge. The following is an extract from his judgment:—

"I have to see what the nature of the dealings between the parties was, and I observe, in the first place, that in his written statement defendant contends that a balance of Rs. 291-8-6 is due to him by the plaintiff. In his deposition he states he used to borrow small sums from the plaintiff; he also says he furnished [608] funds for himself and the plaintiff, and that plaintiff's share of the profits used to be entered in the account books. In his *purshis* he again admits that he used to borrow money from time to time for immediate necessities, as the shop was in Ganesh Peth and the treasure chest in Shanvar Peth; he also says he used to pay plaintiff's share of debts due to savkars, as plaintiff had no means. The entries also show certain sums credited to defendant in the accounts for goods supplied by him. * * * * * * * In the present case, we have, by defendant's own admission, a shifting balance, as he claims that a balance of Rs. 291-8-6 is still due to him by plaintiff. I find, then, article 85 of the Limitation Act applies to this suit, and it is not barred."

Against this decision defendants preferred a second appeal.

The main question argued at the hearing of the appeal was whether the account between the parties was a mutual, open, and current account within the meaning of article 85 of the Limitation Act (XV of 1877).

*Inverarity* (with him *S. V. Bhandarkar*), for Appellant.

*Branson* (with him *N. G. Chandavarkar*), for Respondent.

The following authorities were referred to in argument:—*Narrandas* v. *Vissandas*, I. L. R., 6 Bom., 134; *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*, I. L. R., 5 Cal., 759; *Khushalo* v. *Behari Lal*, I. L. R., 3 All., 523; *Velu Pillai* v. *Ghose Mahomed*, I. L. R., 17 Mad., 293; *Lakshmayya* v. *Jagannatham*, I. L. R., 10 Mad., 199; *Mangalore Krishnappa* v. *Rakminibai*, P. J. for 1890, p. 295.

**Jardine, J.**:—The contentions about interest and about the set-off of sums due by the parties to one another allowed by the District Judge were disposed of by us in the course of the hearing of this appeal, and the only point reserved for judgment related to the question of limitation. Mr. Inverarity contended for the appellant that the account between the parties was not a mutual, open and current account under article 85 of the second schedule of the Limitation Act (XV of 1877) as there were no reciprocal demands between the parties, and the balance was always in respondent plaintiff's favour. Exception was taken to the District Judge's view that the account was mutual, inasmuch as the appellant in his written statement had claimed that the final balance was in his favour. This observation of the District Judge was only [609] made incidentally, and no great stress was placed upon it in the judgment of the lower Court. The District Judge based his view about the nature of the dealings between the parties chiefly on the admission of the appellant in his deposition, Exhibit 36, and his purshis, Exhibit 53, from which it appeared that appellant used to borrow sums on occasions from the respondent, just as the latter also borrowed money from him, and that the respondent's share of the profits was credited against these sums. The real question at issue, therefore, is whether the dealings between the parties, as disclosed by their accounts and admissions, were of the nature of dealings which created reciprocal demands within the meaning of article 85.

We feel satisfied that the District Judge has correctly decided this point in respondent's favour. The dealings between the parties in the present case were admittedly in the nature of mutual borrowings, and where the transactions are of that character, the test of a shifting balance, sometimes in favour of one party, and sometimes in favour of the other, though valuable as an index of the nature of the dealings, is not always decisive. This test of a shifting balance was first suggested in *Ghaseeram* v. *Manohar Doss*, 2 Ind. Jur., N. S., 241, and accepted by the Allahabad High Court in *Khushalo* v. *Behari Lal*, I. L. R., 3 All., 523, and by the Calcutta High Court in *Hajee Syud Mahomed* v. *Mussamut Ashrufoonissa*, I. L. R., 5 Cal., 759. The same test was adopted by Sir C. SARGENT in *Narrandas* v. *Vissandas*, I. L. R., 6 Bom., 134, with the important qualification that the dealings should be such as may possibly lead to such a shifting balance. This was the interpretation put upon Sir C. SARGENT'S judgment by the Madras High Court in *Velu Pillai* v. *Ghose Mahomed*, I. L. R., 17 Mad., 293, and by this Court in *Mangalore Krishnappa* v. *Rakminibai*, P. J. for 1890, p. 295. The mere fact that the balance was on some occasions in favour of the defendant is not always sufficient to constitute by itself a mutual, open, and current account—*Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*, I. L. R., 5 Cal., 759.

The dealings to be mutual must be transactions on each side creating independent obligations on the other, and not merely **[610]** creating obligations on one side, and the other side being merely discharges of these obligations—*Hirada Basappa* v. *Gadigi Muddappa*, 6 Mad. H. C. Rep., 142. As examples of the first class of dealings we may refer to *Shrinathdas* v. *Park Pittar*, 5 Beng. L. R., 550; *Lakshmayya* v. *Jagannatham*, I. L. R., 10 Mad., 199; and *Sitayya* v. *Ranga Reddi*, I. L. R., 10 Mad., 259, and of the latter class, *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*, I. L. R., 5 Cal., 759. The dealings in the present case clearly fall within the first class. Both parties claim to have the balance in their favour. Both admit they borrowed from each other, and charged interest on such loans. They were besides partners in forest contracts, and the shares of profit and loss falling to each partner's share were debited and credited in their accounts. In this state of things, the District Judge has very properly decided that the dealings between the parties fell within article 85, and that the respondent's claim was not time-barred. We must confirm the decree of the District Judge and reject the appeal with costs on appellant.

*Decree confirmed.*

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**NOTES.**

[Similar decisions were given in (1909) 32 All., 11; (1910) 8 M.L.T., 412 : 8 I.C., 141; (1912) 23 M.L.J., 516 : (1904) 7 Bom. L. R., 151; (1907) 6 C.L.J., 158; (1907) P.R., 132.]

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[ 22 Bom. 610 ]

## APPELLATE CIVIL.

*The 18th January, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS

Pandurang Sheshagir............(Original Plaintiff) Appellant

*versus*

Bhimrav Keshav Hiralikar and another............(Original Defendants) Respondents.*

*Vendor and purchaser—Sale of land—Trees standing on land—Transfer of Property Act (IV of 1882), Sec. 8.*

Trees being attached to the earth are included in the legal incidents of the land and pass to the transferee under a deed of sale of the land on which they stand, unless a different intention is expressed or necessarily implied. No such intention is necessarily implied because the trees are mortgaged prior to the sale and no mention of the mortgage is made in the sale-deed.

SECOND APPEAL from the decision of G. Jacob, District Judge of Sholapur-Bijapur, reversing the decree of Rao Bahadur K. N. Kher, First Class Subordinate Judge of Sholapur.

[611] Plaintiff sued for possession of certain mango trees standing on certain land which had been sold to him by defendant No. 2

Defendant No. 1 pleaded that he had been in possession of the trees as mortgagee of defendant No. 2.

The lower Court held that the trees had been mortgaged to defendant No. 1, and that subject to the mortgage the trees had been sold by defendant No. 2 to the plaintiff. It, therefore, passed a decree directing possession of the trees to be given to the plaintiff on his paying defendant No. 1 the amount of the mortgage-debt (Rs. 100), together with costs of suit.

The District Judge reversed the decree and dismissed the suit, holding that the parties to the plaintiff's deed of sale did not contemplate the conveyance of the trees to him. In his judgment he said:—

"Further I am of opinion that under the circumstances an intention to convey the trees with the land cannot be read into the deed of sale under which the plaintiff claims. His vendor himself had not exclusive title to the trees, and the omission to refer to his half share in them is almost conclusive evidence of the fact that they were outside the contemplation of the parties to the transaction, especially as it is clear that possession of the trees was not given to plaintiff or to Apparao Sheshgir, his predecessor in title to the land, but was continued with the mortgagee, to whom no reference is made in the deed of sale though he held under a registered mortgage-deed."

The plaintiff preferred a second appeal.

*G. S. Dandavate* and *N. G. Patwardhan* for the Appellant (Plaintiff).

*Mahadev V. Bhat* for Respondent No. 1 (Defendant No. 1).

**Parsons, J.**:—Section 8 of the Transfer of Property Act, which merely confirms a previously existing rule of law, provides that, "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof." The question

* Second Appeal, No. 599 of 1896.

in the present case is whether certain mango trees which stood on the land sold passed under the deed of sale of the land to the plaintiff. Trees being attached to the earth are included in the legal incidents of the land and they would, therefore, pass un-[612]less a different intention is expressed or necessarily implied. No such intention is expressed in the sale-deed; but it is argued that it is necessarily implied because the trees had been prior to the sale mortgaged to the defendant and no mention of the mortgage is made in the deed of sale. We do not think that from this any necessary inference arises that the intention of the parties was that the vendor's interest in the trees should not pass to the plaintiff.

We must, therefore, reverse the decree of the Lower Appellate Court and restore that of the Court of First Instance. Costs in this and the Lower Appellate Court to be on the defendant Bhimrav. The six months' time allowed for redemption will run from this date.

*Decree reversed.*

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[22 Bom. 612]

## MATRIMONIAL JURISDICTION.

*The 14th January, 1898*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

A (Husband)............Plaintiff

*versus*

B (Wife)............Defendant.*

*Divorce—Decree absolute—Appeal, right of—Limitation for such appeal—Indian Divorce Act (IV of 1869), secs. 55, 56 and 57†—Section 7, construction of—Limitation Act (XV of 1877), Art. 151.*

Under the Indian Divorce Act (IV of 1869) an appeal lies from a decree absolute although the decree *nisi* has been left unchallenged.

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* Suit No. 514 of 1896.

† Indian Divorce Act (IV of 1869), Secs. 55, 56 and 57:—

"55. All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force:

"Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage: nor from the order of the High Court confirming or refusing to confirm such decree.

"Provided also that there shall be no appeal on the subject of costs only.

"56. Any person may appeal to Her Majesty in Council from any decree (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise, and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to Her Majesty in Council.

*XIII.—Re-marriage.*

"57. When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired,

or when six months after the date of any decree of a High Court dissolving a marriage have

An appeal against a decree absolute must be filed within twenty days from the date of decree, that being the period prescribed for appeals from decrees made on the original side of the High Court under the law for the time being in force [see section 55 of the Divorce Act (IV of 1869)].

[613] The principles and rules referred to in section 7 of Divorce Act (IV of 1869) are not mere rules of procedure such as the rules which regulate appeals, but are the rules and the principles which determine the cases in which the Court will grant relief to the parties appearing before it or refuse that relief—rules of *quasi*-substantive rather than of mere adjective law.

SUIT for divorce. The husband had obtained a decree *nisi* on the 30th November 1896, which was made absolute on the 14th June 1897.

On the 9th December 1897, a memorandum of appeal was presented by the wife. The officer of the Court refused to accept it, being of opinion that it was barred by limitation. Next day it was presented in Court, and leave was obtained to move as of that date for the admission of the appeal. The questions which arose were (1) whether in divorce suits an appeal lay from the decree absolute and (2) as to the limitation for such appeal.

*Inverarity* for the intending Appellant (the wife):—We have presented an appeal, but the officer of the Court has refused [614] to receive it on the ground that it is barred by limitation. The decree *nisi* was passed on the 30th November 1896, but the decree was not made absolute until the 14th June 1897. Our memorandum of appeal was presented on the 9th December 1897, *i.e.*, within six months of the passing of the decree absolute. We contend that the Limitation Act (XV of 1877) does not apply to divorce suits, and that under section 57 of the Divorce Act (IV of 1869) six months is the time given for appeal. The time runs from the decree absolute. The decree *nisi* does not dissolve the marriage. He referred to sections 7, 45, 55, 56 and 57 of Act IV of 1869; *Abbott* v. *Abbott*, 4 Beng. L. R. (O. J.), 51; Browne on Divorce, p. 377; Statute 44 and 45 Vict., C. 68, Sec. 10; Stat. 20 and 21 Vict., C. 85; Stat. 23 and 24 Vict., C. 144; Stat. 31 and 32 Vict., C. 77; *Warter* v. *Warter*, 15 Pro. D., 152.

*Lang* (Advocate-General) *contra*:—The appeal is too late, and being an appeal from a decree absolute ought to be to the Privy Council. See section 56 of the Divorce Act (IV of 1869). He referred to sections 7, 16 and 55 of that Act, and to Stat. 31 and 32, Vict., C. 77.

**Farran, C. J.**:—The question before us is whether the appeal in this case should be admitted. The Prothonotary has refused to accept it as out of time.

The decree *nisi* was made on the 30th November, 1896. The decree absolute was pronounced on the 14th June 1897, and the appeal was presented to the Prothonotary on the 9th December following, that is to say, within six months of the pronouncement of the decree absolute.

Section 55 of the Indian Divorce Act (IV of 1869) gives a general right of appeal from all decrees in suits or proceedings under the Act under the laws,

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expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

or when any such appeal has been dismissed,

or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death:

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree.

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death."

rules and orders for the time being in force. "Decrees" in this section include, we think, both decrees *nisi* and decrees absolute, as, throughout the Act, when it is intended to distinguish between these two classes, they are distinguished in appropriate language. See *e.g.*, sections 44, 56 and 57. When no such distinguishing language is used, "decree" includes both classes. It might be thought that no appeal [615] would be allowed from a decree absolute in cases where the decree *nisi* was left unchallenged upon questions peculiarly within the purview of the decree *nisi*, but looking to the history of legislation upon this branch of the law no support is to be found for the supposition. In the Act of 1860 (23 and 24 Vict., C. 144), which introduced the practice of granting decrees *nisi* in the first instance, an appeal was given to the House of Lords from the decree absolute and not from the decree *nisi*. This was the state of the law in England when the Indian Divorce Act was passed, save that in 1868 it had been provided by 31 and 32 Vict., C. 77, section 3, that in suits for a dissolution of marriage no respondent or co-respondent not appearing and defending the suit on the occasion of the decree *nisi* being made should have any right of appeal to the House of Lords against the decree when made absolute unless the Court upon application made at the time of the pronouncing of the decree absolute should see fit to permit an appeal. In 1881 by the Judicature Act of that year (44 and 45 Vict., C. 68, section 10) it was enacted that "No appeal from an order absolute for dissolution * * * of marriage shall henceforth lie in favour of any party who having had time and opportunity to appeal from the decree *nisi* on which such order may be founded, shall not have appealed therefrom." This was the case here. The appellant allowed the decree *nisi* to be made in her absence. It was faintly contended by the Advocate-General for the respondent that, therefore, no appeal lies in this case, because by section 7 of the Indian Divorce Act it is enacted that, subject to the provisions contained in the Act, the High Court shall in all suits and proceedings thereunder act and give relief on principles and rules which in the opinion of the said Court are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief. The principles and rules here referred to, are not, we think, mere rules of procedure including rules which regulate appeals which are laid down in the subsequent sections (45 and 55) of the Act, but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief—rules of *quasi*-substantive rather than mere [616] adjective law. Exactly the same language was used in giving the Matrimonial Court in England jurisdiction to deal with cases over which the Ecclesiastical Courts had theretofore such jurisdiction: see 20 and 21 Vict., C. 85, Sec. 22. The above was the view taken in *Abbott* v. *Abbott*, 4 Beng. L. R. (O.J.), 51, and is, we think, the correct view.

The main contention, however, of the Advocate-General was based upon the language of section 55 of the Indian Divorce Act itself, which provides that all matrimonial decrees * * may be appealed from under the laws, rules and orders for the time being in force. The laws and rules which impose a limit upon the time within which an appeal can be brought are doubtless within the scope of that section. At the time when the Act was passed, a rule of the Bombay High Court made twenty days the limit of the time for appealing from a decree. This rule was, however, superseded by the Limitation Act (XV of 1877), Schedule II, Art. 151, which now by reason of section 4 governs the presentation of appeals in the High Court's original jurisdiction, and the former rule finds no place in the rules of the Bombay

High Court published since the passing of the Limitation Act. Hence it is contended that there is no rule for the limitation of the presentment of original side appeals except that laid down in the Limitation Act, and that the Limitation Act, section 1, enacts that nothing contained in Parts II and III applies to suits under the Indian Divorce Act. We cannot, however, it is said, have recourse directly to that enactment to determine within what time a party to a matrimonial suit is bound to appeal. Indirectly, however, the Advocate General contends that an out-of-time matrimonial appeal is prohibited, since section 55 places such an appeal under the laws, rules and orders for the time being in force for other original side decrees, and original side decrees must be appealed from within twenty days (we omit the provisions as to obtaining copies, as it does not affect the argument) from the time when they are made. Mr. Inverarity on the other hand contends that the above provision of the Limitation Act, which is later in point of time, virtually repeals so much of section 55 of the Divorce Act as is inconsistent with it. The short answer to that [617] argument appears to us to be that by section 3 "suit" does not include an appeal, and there is nothing, therefore, in the Limitation Act which interferes with the full scope of section 55 of the Divorce Act. In this view, the appeal is out of time, and the application to have it admitted must be refused.

Attorneys for the Plaintiff:—Messrs. *Little and Company.*

Attorneys for the Defendant:—Messrs. *Crawford, Burder and Company.*

**NOTES.**

[See also (1898) 23 Bom., 460; (1899) 22 All., 270; (1914) 23 I.C., 242 (Lower Burma) in which this was followed.]

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[22 Bom. 617]

## ORIGINAL CIVIL.

*The 11th February, 1898.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Abdul Razak............Plaintiff

*versus*

J. G. Kernan............Defendant.*

*Insolvency—Official Assignee—Vesting order—Lease—Leasehold property—Right of Official Assignee to accept or disclaim—Effect of taking possession—Liability for rent.*

In a Presidency town, the Official Assignee has the right to elect whether he will accept or repudiate onerous (*e.g.*, leasehold) property belonging to an insolvent and as such vesting in the Official Assignee under the Indian Insolvent Act (Stat. 11 and 12 Vict., C. 21).

Except under exceptional circumstances the taking of possession of leasehold property by the Official Assignee is proof of election on his part to take the lease.

*A* held certain premises in Bombay from the plaintiff as a monthly tenant at a rent of Rs. 125 with liberty to either party to terminate the tenancy on giving one month's notice. On the 9th April 1896 *A* was adjudicated insolvent by the Court for the Relief of Insolvent Debtors at Madras, and on that day the usual vesting order was made vesting all his estate

* Small Cause Court Reference, No. 3036 of 1897.

and effects in the defendant as Official Assignee. On the 20th August 1896, the Sheriff, who had taken possession of the premises in execution of a decree passed against *A*, handed over possession of them to the agent of the defendant, who remained in possession until the 30th September 1896, when he gave them up to the plaintiff. The plaintiff brought this suit against the defendant for the rent (Rs. 750) due from 1st April 1896, to the 30th September 1896.

*Held*, that the defendant was liable. By entering into possession on the 30th August 1896, the defendant had elected to accept the lease and had thereby become assignee of it. The acceptance dated back to the vesting order, and the Official Assignee (the defendant) became liable for the rent during the period that he continued to be assignee, his liability ending when with the landlord's consent he surrendered the term.

[618] CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts (Act XV of 1882), by C. W. Chitty, Chief Judge—

"1. This was a suit brought by the plaintiff to recover from the defendant a sum of Rs. 750, being the amount of rent due to him for certain premises situate in Apollo Street, Bombay, from the 1st April to the 30th September 1896, at a monthly rental of Rs. 125, or, in the alternative, the same sum as compensation for use and occupation of the same premises during the said period.

"2. The defendant is the Official Assignee at Madras and, as such, the assignee of the estate and effects of one A. Sábhapatty Moodeliar, an insolvent.

"3. The facts of the case on which my decision was based and the reasons for that decision are fully set out in my judgment, a copy of which is hereto annexed, and to which for brevity's sake I crave leave to refer. I gave judgment for the plaintiff for the full amount claimed and costs, and at the request of the defendant's attorney made my judgment contingent upon the opinion of the High Court."

The following is the statement of facts referred to in the above paragraph, taken from the Chief Judge's judgment:—

"The plaintiff is the landlord of certain property in Apollo Street which he purchased in January 1895. At the time of the purchase, a set of offices in the plaintiff's building was in the occupation of the firm of A. Sabhapatty Moodeliar and Co., as monthly tenants at a rent of Rs. 125, with liberty to either party to terminate the tenancy on giving one month's notice. The actual premises included in the lease consisted of one floor and a room on the floor above. Rent was paid regularly by the firm of A. Sabhapatty Moodeliar and Co. down to the 31st March 1896. On that day the firm gave to the plaintiff a notice to determine the tenancy on the 30th April 1896 (Exhibit A), but such notice was never acted on. Indeed the defendant was apparently unaware of it until it was produced in Court by the plaintiff's attorney. On the 9th of April 1896 A. Sabhapatty Moodeliar (who was, as I understand, the manager of a joint Hindu family carrying on a family business in Bombay, Madras and elsewhere in that name) was adjudicated an insolvent by the Court for the Relief of Insolvent Debtors at Madras, and on the same day the usual vesting order was made vesting all his estate and effects in the defendant. On the 9th April, Sardarmal Jugonath obtained a decree against the insolvent in the High Court at Bombay and on the same day the Sheriff in execution of that decree attached property of the insolvent consisting of office furniture and books lying at the [619] premises in question. The Sheriff kept the property on the premises which he closed with his own lock. The Sheriff remained in custody from the 11th April until the 20th August 1896. On the 15th April, Mr. Turner as constituted attorney of the defendant wrote to the Sheriff asking him to remove the attachment. As this request was not complied with, Mr. Turner on 6th May 1896 took out a Judge's summons in the High Court to have the attachment removed. That summons was made absolute on the 11th August 1896. The proceedings and the judgment are reported at length in I. L. R., 21 Bom. at p. 205. On the 20th August 1896, the Sheriff handed over possession of the attached property to the defendant's agent, Mr. Turner. Mr. Turner gave up possession of the office premises to the plaintiff on

the 30th September 1896. It should be here stated that the room on the upper floor was before the date of insolvency and during all the six months for which rent is now claimed in the occupation of one J. A. Grant, who had originally entered as a sub-tenant of the insolvent. The delivering up of possession by Mr. Turner, the Official Assignee, on the 30th September 1896, was by mutual agreement between him and the plaintiff. Before that date the plaintiff was able to secure new tenants on most favourable terms. He was able to let the office premises to the proprietors of the '*Advocate of India*' at Rs. 105, and to agree with Mr. Grant for the payment of rent direct to him for the upper room at Rs. 30, an advance on the whole of Rs. 10. It was also arranged that the new tenancies should commence from such date as the defendant should vacate, and they did actually commence from the 1st October 1896. I mention these facts in order to dispose of the argument of the plaintiff's attorney that if the plaintiff really considered himself entitled to claim rent from the defendant he would also have assuredly claimed an extra month's rent in lieu of notice. It will be patent, from the facts stated, that such a claim, if made, could not have been substantiated. It would, in effect, be a claim for damages which the plaintiff admittedly has not suffered. On the 9th June 1896, and again on the 24th July 1896, the plaintiff's attorney wrote to the Sheriff demanding the rent which had on those dates accrued due, but no notice was taken of his demands. On the 17th September 1896, plaintiff for the first time addressed Mr. Turner, and a lengthy correspondence ensued which eventually terminated in the filing of this suit."

The following were the questions referred to the High Court :—

(1) Whether in a Presidency town in India, in cases of onerous property (*e.g.* leasehold property) belonging to an insolvent and as such vesting in the Official Assignee under the Indian Insolvent Act, the Official Assignee has the right to elect whether he will accept or repudiate such property ?

(2) Whether the taking of, or remaining in possession of leasehold property by an Official Assignee is tantamount to an election on his part to accept the lease ?

[620] (3) Whether, on the facts stated, the defendant must not be deemed, in law, to have been in possession of the premises in question during the six months for which rent is claimed ?

(4) Whether the defendant is not liable to pay to the plaintiff such rent ?

(5) Whether, in the alternative, the defendant is not liable to compensate the plaintiff for use and occupation of the premises from 9th April to 30th September 1896 ?

*Lowndes*, for the Defendant:—The notice of the 31st March 1896 terminated the tenancy on the 30th April 1896—Transfer of Property Act (IV of 1882), section 111; Woodfall's Landlord and Tenant (14th Ed.), p. 357 The continuing in possession was not a continuance of the tenancy. The Sheriff entered into possession on 11th April. The assignee is not liable till he elects. There was no election here—*Turner* v. *Richardson*. 7 East, 335; *Copeland* v. *Stephens*, 1 B. and Ald., 593 at p. 604; Griffiths on Bankruptcy, Vol. 1, p. 267; *Levi* v. *Ayers*, 3 Ap. Ca.. 842; Statute 11 and 12 Vict., C. 21, sections 7 and 11; Stat. 1 and 2 William IV, C. 56; Bankruptcy Act, 1849, section 145; *Goodwin* v. *Noble*, 27 L. J. (Q B.), 204. Mere laches is not election. The possession of the Sheriff was not possession of the assignee. There was no use and occupation before the 20th August—Woodfall's Landlord and Tenant, p. 567; Transfer of Property Act (IV of 1882), section 116; *Churchward* v. *Ford*, 2 H. and N., 446; *Hyde* v. *Moakes*, 5 C. and P., 42. The Sheriff was in possession. The assignee is not liable for use and occupation till he enters—*How* v. *Kennett*, 3 Ad. and El., 659; *Jones* v. *Reynolds*, 7 C. and P., 335; Woodfall's Landlord and Tenant, p. 569; *Edge* v. *Strafford*, 1 Cr. and J., 391; *Sardarmal* v. *A. Sabhapathy*, I. L. R., 21 Bom., 205. He cited also Robson on Bankruptcy,

p. 443; Atkinson on Sheriffs, p. 303; *Titterton* v. *Cooper*, 9 Q. B. D., 473; Woodfall's Landlord and Tenant, Ch. VII, section 11.

*Scott*, for Plaintiff: —There was a waiver of notice. Any act showing an intention to continue the lease is a waiver of notice. [621] See Act IV of 1882, section 113, illustration. The lease vested at once in the Official Assignee as part of the personal estate of the insolvent. He might disclaim it. Abandonment is not equivalent to disclaimer. He referred to Stat. 49 Geo. III, C. 121, Sec. 19; Stat. 5 Geo. IV, C. 98, Sec. 73; English Bankruptcy Act, 1869, sections 23 and 24; *Aga Mahomed* v. *Koolsom Beebee*, L. R, 24 Ind. Ap., 196; *Ex parte Dressler*, 9 Ch. D., 252.

**Farran**, C. J.:—We agree with the Chief Judge of the Small Cause Court that the first question should be answered in the affirmative. Before us it was not argued that the Official Assignee was bound to take upon himself against his will the liabilities arising out of a leasehold vested in the insolvent at the date of his insolvency. That contention was not, we think open to the plaintiff after the decision of the Privy Council in *Levi* v. *Ayers*, 3 Ap. Ca, 842, which recognises the general law as settled by *Turner* v. *Richardson*, 7 East, 335, and other cases to be that "assignees in bankruptcy are not bound to accept a *damnosa hæreditas* and that they have consequently an option to accept or repudiate property which is or may be injurious to the estate."

The argument for the plaintiff was confined to the contention that the right of the Official Assignee was to disclaim the lease, or rather that he was bound by the lease, unless or until he expressed his intention by words or acts not to take it as part of the assets of the insolvent. In our opinion that contention cannot be supported. The earlier cases upon the question cited to us were *Bourdillon* v. *Dalton*, 1 Esp., 233; *Wheeler* v. *Bramah*, 3 Camp., 340; *Turner* v. *Richardson*, 7 East, 335; *Copeland* v. *Stephens*, 1 B. and Ald., 593. Though loose expressions such as "*abandonment*" by the assignees are used by Judges at *nisi prius*, the considered judgments make it, we think, quite clear that a lease was not considered to vest in the assignees unless they accepted it. In the last cited case Lord ELLENBOROUGH delivering the judgment of the Court says at p. 604 of the report: "We are of opinion that the general assignment of a bankrupt's personal [622] estate does not vest a term of years in the assignees unless they do some act to manifest their assent to the assignment, as it regards the term, and their acceptance of the estate, and upon this ground alone our judgment in the present case is given." The whole judgment places the question beyond doubt. This view of the law was recognised by the Legislature in 5 Geo. IV, C. 98, Sec 73, and was always acted upon in England until the law was altered by the passing of the Bankruptcy Act of 1869—*Ex parte Dressler*, 9 Ch. D., 252; *Titterton* v. *Cooper*, 9 Q B D., 473. In our opinion it is now the law in the Presidency towns in India.

2. The taking of possession of leasehold property of an insolvent by the Official Assignee has always been regarded as proof of election on his part to take the lease. This has been laid down in the earliest cases, *Turner* v. *Richardson*, *Copeland* v. *Stephens*, and was re-stated by the Judges in *Ex parte Dressler* and *Titterton* v. *Cooper*. In the latter case, BRETT, L.J., says: "It is not easy to enumerate what may be called unequivocal acts, but I may mention the taking of possession of the premises demised by the lease;" and COTTON, L.J., in the same case says: "It is true that in many of the cases possession is referred to; but possession of leasehold property is the very strongest proof that a person to whom a conveyance has been made has accepted it, and has

become assignee of the lease." The Judges in *Ex parte Dressler* are equally emphatic upon the effect of possession. *Goodwin* v. *Noble*, 8 E. and B., 587, was much relied upon in this and the next branch of the case. The circumstances in that case were very peculiar. The landlord was informed of the purpose for which the assignees wished to remain in possession, and the Court was of opinion that he could not reasonably have inferred, from what the defendants did, that they meant to take to the lease. Our answer to the second question will be that, except under exceptional circumstances, the taking possession by the Official Assignee of leasehold property is tantamount to an election on his part to accept the lease. As to the Official Assignee remaining in possession we do not see how the question arises.

[623] 3. Upon the third question, we do not think that the defendant must be deemed, in law, to have been in possession of the premises during the six months for which rent is claimed.

4. The fourth question must, we think, be answered affirmatively to the effect that the defendant is liable for the rent. On the 9th April, Moodeliar, the lessee of the premises, was declared an insolvent. He had some furniture and books on the leasehold premises. These the Sheriff attached on the 11th of April entering into possession and putting his lock on the doors. The Official Assignee took steps to remove the attachment, which he succeeded in doing on the 11th August. Down to this time the Official Assignee had done nothing to show an election to take over the lease. On the 20th August, the Sheriff made over the attached property to the Official Assignee, who on the same day entered into possession of the premises. He did not inform the plaintiff, the landlord, that he entered with any limited object or for any special purpose. There is nothing to distinguish the case from the ordinary one of an Official Assignee entering into possession of leasehold premises and thus consenting to become assignee of the lease. Having made the election the usual consequences follow. The acceptance of the lease dates back to the vesting order and the Official Assignee becomes liable for the rent during the period that he continues to be the assignee of the lease—his liability ending when with the landlord's assent he surrenders the term—*Titterton* v. *Cooper*, 9 Q. B. D., 473, or otherwise gets rid of his obligation.

It was contended for the defendant that the notice given on the 31st March 1896, terminated the lease on the 30th April and that the tenancy came to an end on that day. It has, however, been found as a fact that that notice was not acted on or in other words was waived. It does not appear to us that we have been asked whether what took place really amounted to a waiver. I have asked the Chief Judge whether he intended us to consider that question and he replied that he stated the notice and its waiver merely as facts in the history of the case. The waiver of the notice, he said, was not contested before him.

[624] 5. It is not necessary to answer this question.

Costs costs in the case.

Attorney for the Plaintiff :—Mr. *K. D. Shroff*.

Attorneys for the Defendant :—Messrs. *Craigie, Lynch and Owen*.

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[22 Bom. 624]

# APPELLATE CIVIL.

*The 19th January, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Martand Balkrishna Bhat and another............(Original Defendants) Appellants

*versus*

Dhondo Damodar Kulkarni............(Original Plaintiff) Respondent.*

*Mortgage—Mortgage by manager of undivided family—Redemption—Sale of mortgaged property under money decree obtained by mortgagee in respect of other debts—Purchase by mortgagee at Court sale—Right of member of family to redeem—Transfer of Property Act (IV of 1882), Sec. 99—Civil Procedure Code (Act XIV of 1882), Sec. 294.*

Shankraji, his son Shridhar and his grandson the plaintiff Dhondo (son of a predeceased son) were undivided. In 1875 Shankraji mortgaged the property in dispute to Hamirmal with possession. After Shankraji's death in 1877 Shridhar managed the whole estate. In 1878, during Dhondo's absence from his native village, Hamirmal sued Shridhar as the heir and representative of Shankraji in respect of other debts and, obtaining a money decree against him, attached the mortgaged property in execution of the decree. After the attachment, Hamirmal without notifying or disclosing his mortgage lien caused several of the properties to be sold and, without obtaining leave from Court to bid at the sale, purchased some of them in the names of his dependants at an under value and *benami* for himself. In 1892 Dhondo brought this suit against Hamirmal, Shridhar and the *benami* purchasers to redeem the properties so bought by Hamirmal. The lower Courts found that the money decree which Hamirmal obtained, and the execution proceedings thereon, bound the estate.

It was contended that the execution sales had not been objected to under section 294 of the Civil Procedure Code and were, therefore, valid, and that the plaintiff, consequently, could not redeem.

*Held*, that the plaintiff might redeem although he had not taken proceedings under section 294. The fact that the mortgagee Hamirmal had sold the property in execution of a money decree did not free him from the liability to be redeemed as mortgagee. The sale was rendered nugatory, not by the provisions [625] of section 294 (though permission to bid granted under that section might have validated the purchase), but by the impossibility of a mortgagee by such sales and purchases freeing himself from the liability to be redeemed.

SECOND APPEAL from the decision of Arthur H. Unwin, District Judge of Nasik, confirming the decree of the First Class Subordinate Judge.

Suit for redemption. One Shankraji Ramchandra and his son Shridhar and grandson the plaintiff Dhondo (the son of a predeceased son) were members of an undivided family. On the 31st March 1875, Shankraji mortgaged the property in question to the defendant Hamirmal and his father Khemchand with possession. Shankraji died in 1877-78, and after his death Shridhar managed the estate. The plaintiff Dhondo had left his village before Shankraji's death and only returned there occasionally.

During Dhondo's absence Hamirmal sued Shridhar as heir and representative of Shankraji, and obtained a money decree in respect of other debts against him, and in execution he attached the mortgaged properties. The lower Courts found, and the High Court accepted the finding, that the decree

* Second Appeal, No. 172 of 1896.

and execution proceedings against Shridhar as manager were binding on the plaintiff Dhondo as if he had been a party.

Hamirmal without disclosing his mortgage sold the mortgaged properties in execution of his money decree, and without obtaining leave to bid at the sale he bought several of them in the names of his servants.

Dhondo now brought this suit to redeem the properties so purchased by Hamirmal and to recover possession. He made Shridhar and the *benami* purchasers parties to the suit.

The Subordinate Judge found that the plaintiff and his uncle Shridhar were the heirs of Shankraji and that the plaintiff was entitled to redeem the mortgage; that the purchases by the defendants were collusive and *benami* for Hamirmal (defendant No. 1); that the mortgage was fully satisfied, and that nothing was due in respect of it. He, therefore, decreed the plaintiff's claim for redemption and possession.

On appeal by defendants the Judge confirmed the decree. Defendants Nos. 2 and 3 appealed to the High Court.

**[626]** *Daji A. Khare* appeared for the Appellants (Defendants Nos. 2 and 3) :—The plaintiff was joint with Shridhar against whom in his representative capacity Hamirmal obtained the money decree. Shridhar was the manager of the family and, therefore, the plaintiff was bound by the decree and the sales held under it, the debt for which the decree was passed being an ancestral debt. The first Court held that our purchases were *benami* for Hamirmal (defendant No. 1), and applying section 99 of the Transfer of Property Act allowed the claim. We contend that the Transfer of Property Act (IV of 1882) is not applicable, because the sales took place in 1880 and 1881 and the Act did not come into force in this Presidency until the year 1893.

Hamirmal did not bid at the auction sales. We purchased the property at the auction and have got nothing to do with him. Even supposing that he did purchase the mortgaged property at the auction, still his purchase would not be void *ab initio*. The plaintiff should have proceeded either under section 244 or section 294 of the Civil Procedure Code (Act XIV of 1882). No separate suit lies—*Javherbai* v. *Haribhai*, I. L. R., 5 Bom., 575; *Chintamanrao* v. *Vithabai*, I. L. R., 11 Bom., 588; *Paramasiva* v. *Krishna*, I. L. R., 14 Mad., 498.

*Manekshah J. Taleyarkhan* appeared for the Respondent (Plaintiff) :—Hamirmal, who was himself the mortgagee, purchased the equity of redemption at the Court sales without the leave of the Court. The general law of mortgage is that a mortgagee cannot purchase the mortgaged property without the leave of the Court—*Kamini* v. *Ramlochan*, 5 Beng. L. R., 450. When a mortgagee himself purchases the equity of redemption of his mortgagor under his own money decree, he thereby deprives the mortgagor of his equity of redemption—*Bhuggobutty Dossee* v. *Shamachurn Bose*, I. L. R., 1 Cal., 337.

We were not joined as a party to the suit in which the money decree was obtained. The suit was against Shridhar alone. We are, therefore, not bound by the sales in execution of the decree. The right, title and interest of Shridhar alone was sold. It was, **[627]** therefore, not necessary for us to proceed under section 244 of the Civil Procedure Code (Act XIV of 1882).

**Farran**, C. J. :—The facts which give rise to this appeal as found by the lower Courts are these :—On the 31st March 1875, Shankraji Ramchandra mortgaged the several properties, which the plaintiff, his grandson Dhondo Damodar, seeks to redeem, to the defendant Hamirmal and his father Khemchand with possession. The lower Courts have found that Shankraji Ramchandra and his son Shridhar and his grandson Dhondo were undivided, though Shridhar lived separate from his father. Shankraji died in 1877-78, and after his death Shridhar managed the whole estate. The plaintiff Dhondo

had left his native village Dindori before his grandfather's death and only occasionally returned to stay there after that event.

During the absence of the plaintiff in the Berars the defendant Hamirmal (in Suit No. 522 of 1878) sued Shridhar as the heir and representative of his father Shankraji Ramchandra and obtained a money decree against him, and in execution of that decree attached the mortgaged premises. The lower Courts have held that Shridhar sufficiently represented his father's estate for the purposes of that suit, and that the money decree which the defendant Hamirmal obtained (if in other respects valid) bound the estate, and that the execution proceedings which followed upon the decree similarly bound it. We think that we must accept this finding and hold that the decree obtained against Shridhar as manager of the property and representative of Shankraji was binding upon the plaintiff as though he had been made a party-defendant to perfect the representation.

The defendant Hamirmal without notifying or disclosing his mortgage lien caused several of the mortgaged properties to be sold in execution of his money decree ; and without obtaining leave from the Court to bid at the sale, purchased several of them in the names of his dependents and servants. The lower Courts have found that the purchases were made collusively and at an under value *benami* for the defendant Hamirmal, who was himself the real purchaser. Under these circumstances the plaintiff sues to redeem the several mortgaged properties which [628] were so bought by the defendant Hamirmal, and has made the several *benami* purchasers or their heirs, as well as his uncle Shridhar, parties to the suit.

The questions which present themselves for consideration are whether the plaintiff is debarred, by the sales in execution to which we have referred, from redeeming, and whether he can redeem without having had the sales set aside in execution proceedings. The lower Courts have applied to the case the principle deducible from section 99 of the Transfer of Property Act and have decreed redemption. For the appellants it is contended that the purchase by the execution-creditor without leave does not of itself vitiate the execution proceedings and sale, but only gives the judgment-debtor the right to object to the sale under section 294 of the Civil Procedure Code. When no objection is taken to the purchase under that section it is argued that the purchase is as valid as if the leave of the Court had been obtained to the execution-creditor himself bidding and purchasing. The authorities cited by the appellants—*Javherbai* v. *Haribhai*, I. L. R., 5 Bom., 575 ; *Chintamanrav* v. *Vithabai*, I. L. R., 11 Bom., 588; *Paramasiva* v. *Krishna*, I. L. R., 14 Mad., 498,—bear out that contention. The learned pleader for the respondent, while conceding that general principle, sought to bring the case within the authority of the ruling of the appellate Court in *Bhuggobutty Dossee* v. *Shamachurn Bose*, I. L. R., 1 Cal., 337, where the earlier authorities are cited, and where it is laid down, as a general proposition, that " a mortgagee is not entitled by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately, because by so doing he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, a Court of Equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. This privilege is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it ; to do that circuitously which he could not do directly." That is the principle which in an extended form is enacted as law in section 99 of the Transfer of [629] Property Act. The section extends it to an attachment arising out of any claim of the mortgagee against the mortgagor in respect of which he brings

a suit. In the case above cited, as in those * in accordance with which it was decided, the money-decree was based upon a claim arising out of the mortgage transaction itself, but it is difficult to read the judgments in these cases without seeing that the same reasoning applies to a mortgagee buying the equity of redemption under a decree obtained upon a claim independent of the mortgage as applies to a decree obtained upon a collateral instrument to secure the mortgage-debt. We refer particularly to the remarks of MACPHERSON, J., in *Kamini* v. *Ramlochoan*, 5 B. L. R., at p. 458.

In the present case it seems impossible to say that "the mortgagee did not avail himself of his position to obtain an undue advantage in the purchases or otherwise act *mala fide*," at p. 459 citing SHAU v. BUNJ, 33 Beav. 494. The question is one of much difficulty and doubt, but seeing that the Legislature has now adopted the principle in its widest aspect we think that we are justified in acting upon it. In this view the sale is rendered nugatory, not by the provisions of section 294 of the Code (though permission granted under that section to bid might have validated the purchase), but by the impossibility of a mortgagee by such sales and purchases as these freeing himself from his liability to be redeemed. In this view, the fact that Dhondo did not take proceedings under section 294 to set aside the sales does not affect his present right to redeem. We, therefore, confirm the decree with costs.

*Decree confirmed.*

**NOTES.**

1 A sale in contravention of sec. 99, Transfer of Property Act, 1882, was held to be voidable and not void in (1907) 35 Cal., 61 F. B.; (1907) 30 Mad., 362; (1905) 27 All., 517; (1899) 23 Mad., 377; (1899) 22 Mad., 347; (1899) 22 Mad., 372; (1905) 29 Mad., 421; (1907) 30 Mad., 313; (1904) 7 O.C., 307; (1905) 8 O.C., 327; (1909) 1 I. C., 952 (Sindh); (1910) 14 C. W. N., 579

2. In (1898) 23 Bom., 119; (1911) P.R. 15; (1907) 30 Mad., 313 the purchases were held to have been made *bona fide* by third persons.

3. It has been held that leave to bid puts the decree-holder in the same position as a stranger:—(1899) 23 Mad., 227; (1900) 4 C. W. N., 474. As regards the effect of contravention of this rule, see (1909) 32 Mad., 242.

4. As regards the effect of not joining the sons in the suit on mortgage, see also (1914) 36 All., 516.]

## [630] APPELLATE CIVIL.

*The 20th January, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Antu and others...............(Original Plaintiffs) Applicants

*versus*

Vishnu Govind Bawa and others............(Original Defendants) Opponents.†

***Mamlatdars' Act (Bom. Act III of 1876), Sec. 8 - Suit for possession—Parties—Tenants of defendant proper parties to suit—Practice—Procedure.***

Defendant No. 1 having obtained a decree against the plaintiffs for possession of certain land in the Mamlatdar's Court leased the land to defendants Nos. 2 and 3. Shortly afterwards the Mamlatdar's decree was reversed by the High Court on the plaintiffs' application.

* *Brajanath Kundu Chowdry* v. *Gobindmani Dasi*—4 B. L. R. O. J., p. 83; *Kamini Debi* v. *Ramlochan Sirkar*—5 B. L. R., 450; *Ramlochan* v. *Kamini*—Ibid., p. 460; *Neerunjun Mookerjee* v. *Oopendro Narain Deb*—10 Ibid p. 57.

† Application No. 257 of 1896 under the extraordinary jurisdiction.

Thereupon the plaintiffs sued the first defendant and his tenants (defendants Nos. 2 and 3) who were in actual possession to recover the land. The Mamlatdar rejected the plaint, holding that there was a misjoinder of causes of action, one suit being brought against different persons for different causes of action arising at different times.

*Held*, that the Mamlatdar should accept the plaint and hear the suit on its merits. The defendant, who had obtained possession under a decree which had been reversed, could not improve his position by letting third parties into possession as his tenants. They stood in the shoes of their lessor and were jointly liable with him to be ousted by proceedings taken in the Mamlatdar's Court.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb V. K. Sathe, Mamlatdar of Satara, in a possessory suit.

The first defendant Vishnu obtained a decree against the plaintiff for possession of the land in question in the Mamlatdar's Court and under that decree was put in possession on 26th March 1896. On the 1st June 1896, he let the land on lease to defendants Nos. 2 and 3.

On the 1st September 1896, on the application of the plaintiffs, the High Court reversed the above decree of the Mamlatdar.

On the 19th September 1896, the plaintiffs brought this suit against Vishnu (defendant No. 1) and his tenants (defendants Nos. 2 and 3) to recover possession.

The Mamlatdar returned the plaint for amendment by striking out the names of defendants Nos. 2 and 3, holding that there was a misjoinder of causes of action, *viz.*, that against defendant No. 1 **[631]** having arisen on the 26th March 1896, and that against defendants Nos. 2 and 3 on the 1st June 1896. The plaintiffs, however, again presented the plaint in the same form, urging that the suit should be proceeded with as it stood against all the three defendants. The Mamlatdar thereupon rejected the plaint.

The plaintiffs now applied under the extraordinary jurisdiction of the High Court and obtained a *rule nisi* calling on the defendants to show cause why the order of the Mamlatdar should not be set aside.

*Branson* with *Vasudeo R. Joglekar* appeared for Applicants (Plaintiffs) in support of the rule:—The Mamlatdar was wrong in requiring plaintiffs to strike out the names of defendants Nos. 2 and 3. If they were not proper parties he should have dismissed the suit as against them. Defendant No. 1 dispossessed us on the date stated in our plaint and subsequently he let out the property to defendants Nos. 2 and 3. Defendants Nos. 2 and 3 were, therefore, in possession through defendant No. 1. We desired to recover possession, and defendants Nos. 2 and 3 were, therefore, necessary parties. The Mamlatdar was wrong in holding that two different causes of action were joined. Our cause of action, strictly speaking, was against defendant No. 1 alone. Defendants Nos. 2 and 3 held under him. The Mamlatdar acted with material irregularity in rejecting the plaint.

*Sadashiv R. Bakhle* appeared for Opponent No. 1 (Defendant No. 1) to show cause.

**Farran, C. J.**:—I am of opinion that a person obtaining possession of land otherwise than by due course of law cannot alter or improve his position by letting third parties into possession as his tenants. Such tenants seem to me to stand in the shoes of their lessor and jointly with him to be liable to be ousted by proceedings taken in the Mamlatdar's Court. The setting out of the circumstances under which such tenants obtained possession is not an irrelevant allegation which the Mamlatdar can order to be struck out under section 8. If the law were otherwise, the Mamlatdars' Act would be little better than a dead letter. I would, therefore, set aside the Mamlatdar's order rejecting

the plaint and order him to proceed to deal with it upon the merits. [632] In the present case the defendants Nos. 2 and 3 came into possession pending the former litigation and are as much bound by the final order made in it as is the defendant No. 1. It is, moreover, the defendant No. 1 who is urging his own act in letting the defendants Nos. 2 and 3 into possession to defeat the jurisdiction of the Mamlatdar. The defendants Nos. 2 and 3 do not appear to take any objection to the plaintiffs' proceedings. I would make the rule absolute. Costs, costs in the cause.

**Parsons, J.**:—I see no illegality in the plaintiff suing in the Mamlatdar's Court for possession on the ground of illegal ouster, joining as defendants in his suit not only the person who he alleges has illegally ousted him, but also the other persons who after the ouster have obtained possession from the person who ousted him and are in possession at the time of suit. The date and cause of action would be that of the original ouster, while the subsequent transfer of possession to the other defendants would be a mere narration of the circumstances under which the cause of action arose as against those defendants. To hold the contrary would be to greatly detract from the benefit of the Act, for if the plaintiff were to sue only the persons actually in possession, they might plead that they had not ousted the plaintiff, and if he sued only the person who had ousted him, the other persons might in execution say that, as they were not parties to the decree, they could not be ousted under it. We make the rule absolute. Costs to be costs in the cause.

*Rule made absolute.*

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NOTES.

[See also (1899) 13 C. P. L. R. 9; (1899) 1 Bom. L. R. 71.]

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[22 Bom. 632]

APPELLATE CIVIL.

*The 21st January, 1897.*

PRESENT:

SIR C. F. J. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS AND MR. JUSTICE CANDY.

Haribai............Plaintiff

*versus*

Krishnarav Gopal............Defendants.*

*Stamp—Stamp Act (I of 1879), Secs. 33, 34, 35, 37 (a) (b), 45 and 50—Collector's decision that an instrument is chargeable with duty not conclusive—Duty of Civil Court—Practice—Procedure.*

The decision of the Collector under clause (b) of section 37 of the Indian Stamp Act (1 of 1879), that a particular instrument is chargeable with duty [633] and is not duly stamped, is not final and conclusive. If his decision under that clause is not obeyed, and the duty and penalty are not paid, any Civil Court before which the document may come has the duty cast upon it under section 33 of examining it and of determining for itself whether it is duly stamped or not, and if not, of taking the steps laid down in sections 33, 34 and 35, that decision being subject to revision under section 50.

REFERENCE by Rao Saheb B. S. Joshi, Subordinate Judge of Karad in the Satara District, under section 49 of the Stamp Act (I of 1879).

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* Civil Reference, No. 9 of 1896.

The will of one Haribai was presented for registration as a will. The Sub-Registrar, however, on perusing it considered that it operated otherwise than as a will and should be stamped, and he impounded it under section 33 of the Stamp Act (I of 1879) and sent it to the Collector under clause 2 of section 35.

The Collector having obtained the decision of the Revenue authority under section 45 of the Stamp Act as to its chargeability required the payment of stamp duty and penalty according to that decision (see section 37) and detained the document pending the payment.

In this suit the defendant pleaded that the debt in respect of which he was sued by the plaintiff was originally due by him to Haribai, but had been remitted by the terms of her will. It became necessary, therefore, to refer to the document, and the Subordinate Judge having required its production, the Collector sent it to the Court with a karkun. The Subordinate Judge on examining the document was of opinion that it was a will and was not chargeable with duty. By letter he requested the Collector to allow the will to remain with the record of the suit. The Collector having refused, the Subordinate Judge submitted the following question to the High Court:—

"1. Whether the Collector's decision that the instrument in question is chargeable with duty is binding on this Court? and if not,

"2. Whether the instrument is chargeable with duty, and if so, what is the amount of duty leviable on it?"

The opinion of the Judge on the first question was in the negative and on the second that the instrument (being a will) was not chargeable with duty.

**[634]** Rao Saheb *Vasudev J. Kirtikar* (Government Pleader), appeared for Government (the Collector): —The Revenue authorities held that the document required to be stamped. Their decision under section 45 is final and binding. The Collector acts under sections 33, 35, 37 and 39 of the Stamp Act, 1879. Until the stamp duty is paid, the document must remain impounded.

Some portions of the document in question operate as a gift and some as a release. Therefore the document requires to be stamped.

*Shamrav Vitthal*, for the Defendant:—The question is whether the Commissioner's decision is binding on the Civil Court. The document was produced before the Subordinate Judge and he was entitled to deal with it under the Evidence Act. The Commissioner's decision is final only for fiscal purposes. Under section 162 of the Evidence Act it is open to the Civil Court to decide the question of admissibility of a document in evidence. If the Legislature had intended that the decision of the Commissioner should be final for all purposes, they would have made a provision to that effect. There is no provision in the Stamp Act making the Collector's decision as to impounding a document final.

The document is clearly a will. No doubt it contains recitals of completed transactions, but it came into force after the death of the testatrix.

**Parsons**, J.:—The following two questions have been referred to this Court by the Subordinate Judge:—

1. Whether the Collector's decision that the instrument in question is chargeable with duty is binding on this Court? and if not,

2. Whether the instrument is chargeable with duty, and if so, what is the amount of duty leviable on it?

The reference has been made under the Stamp Act, but it has been argued, and we deal with it, as made both under the Stamp Act and under section 617 of the Code of Civil Procedure.

It appears that the instrument in question was presented for registration as a will, and that the Sub-Registrar impounded it under section 33 of the Indian Stamp Act, 1879, as it appeared [636] to him that the instrument was not duly stamped, and sent it to the Collector under the 2nd clause of section 35. The Collector under section 37, having first obtained the decision of the chief controlling Revenue authority under section 45, required the payment of stamp duty and penalty according to the decision of the chief controlling Revenue authority, and detained the instrument pending the payment. In a suit filed in the Subordinate Court of Karad the Subordinate Judge required the production of the instrument, and the Collector sent it with a karkun. The Subordinate Judge perused the document and was of opinion that the instrument was a will and was not chargeable with duty, and he has asked us the above two questions.

In regard to the first, it must be remarked that while the Act makes the certificate of the Collector given under clause (a) of section 37 conclusive evidence, there is nothing in it which provides that his decision under clause (b) shall be final or conclusive. If his decision is complied with, and the duty and penalty paid, then under section 39 the instrument will be admissible in evidence, but nothing is said in the Act as to what shall be done if the decision is not obeyed and the duty and penalty not paid. It appears to us that under these latter circumstances a Civil Court before whom the instrument may come has the duty cast upon it, under section 33, of examining the document and of determining for itself whether the instrument is duly stamped or not, and, if not, of taking the steps laid down in sections 33, 34 and 35, whatever decision it may come to being subject to revision under section 50. We, therefore, answer the first question in the negative. We answer the first part of the second question also in the negative. The instrument in question is clearly a will, and it does not become a deed of gift or a release or a deed of assignment merely because some past acts of disposition are recited in it.

*Order accordingly.*

NOTES

[This was criticised in (1906) 9 Bom. L. R., 119 with reference to the wording of the Stamp Act 1899; but see *Jagannatha Iyer's* Stamp Act (III Edn., 1916), p. 56.]

## [636] APPELLATE CIVIL.

*The 28th January, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Harilal Ranchodlal............(Original Plaintiff) Appellant

*versus*

Himat Manekchand and another...... .....(Original Defendants) Respondents.*

*Municipality—District Municipal Act Amendment Act (Bom. Act II of 1884)—Suit for an injunction to restrain municipality—Sections of the Act not applicable.*

A suit was brought by the plaintiff against a municipality for an injunction to restrain them from laying water pipes on his land. The lower Courts dismissed the suit for want

* Second Appeal, No. 577 of 1896.

of notice under section 48 of the District Municipal Act Amendment Act (Bom., Act II of 1884).

*Held*, reversing the decree, that the suit was not a suit for anything done in pursuance of the Act, but to prevent the municipality from doing what the plaintiff alleged to be an illegal act, and that section 48 did not apply.

SECOND APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad, confirming the decree of Rao Bahadur V. V. Vagle, First Class Subordinate Judge.

The plaintiff sued to obtain a perpetual injunction restraining the defendants from laying water pipes on his land.

The defendants denied that the land was the plaintiff's and alleged that it was public property. They further contended that the suit would not lie without notice under section 48 of the District Municipal Act Amendment Act (Bom. Act II of 1884).

The Subordinate Judge dismissed the suit, holding that it was not maintainable for want of notice under the Act (section 48).

On appeal by the plaintiff the Judge confirmed the decree. The plaintiff appealed to the High Court.

*Govardhanram M. Tripathi*, for the Appellant (Plaintiff):—We sued for an injunction. Section 48 of the District Municipal Act relates to something done in pursuance of the Act. A suit for an injunction is not a suit for anything done. We rely on *President of the Taluk Board, Sivaganga* v. *Narayanan*, I. L. R., 16 Mad., 317.

*Ramdatt V. Desai*, for the Respondents (Defendants):—The plaintiff seeks to prevent the municipality from acting in pursu-[637]ance of the District Municipal Act. Such a suit is governed by section 48 of the Act—*Nagusha* v *Municipality of Sholapur*, I. L. R., 18 Bom., 19.

**Farran, C. J.**:—In this case the plaintiff, who has resisted the municipality in laying pipes on his land, now sues for an injunction to restrain them from doing so. It is clearly not a suit for anything done in pursuance of the Act, but to prevent the municipality from doing what the plaintiff alleges to be an illegal act. The sections conversant with this subject have always been held not to apply to actions for an injunction—*Flower* v. *Local Board of Low Leyton*, 5 Ch. D., 347; *President of the Taluk Board, Sivaganga* v. *Narayanan*, I. L. R., 16 Mad., 317; *Manohar Ganesh* v. *The Dakor Municipality*, *ante*, p. 289; *Shidmallappa* v. *Gokak Municipality*, *ante* p. 605.

We must reverse the decrees of the lower Courts and remand the suit to be heard upon the merits by the Court of First Instance. We make all costs costs in the cause.

*Decrees reversed and suit remanded.*

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**NOTES.**

[ See the notes to 22 Bom., 605. ]

[22 Bom. 637]
APPELLATE CIVIL.

*The 8th June, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

The Municipality of Faizpur............*(Original Defendant) Appellant

*versus*

Manak Dulab Shet............(Original Plaintiff) Respondent.

*Municipality—Bombay District Municipal Act Amendment Act (II of 1884), Sec. 48—Suit for specific performance of a contract or for damages for breach thereof.*

Section 48 of the Bombay District Municipal Act Amendment Act (II of 1884) does not apply to a suit for the specific performance of a contract or for damages for breach thereof.

SECOND APPEAL from the decision of Rao Bahadur Chunilal Maneklal, Subordinate Judge, First Class, with appellate powers at Dhulia, in Appeal No. 232 of 1896.

[638] The plaintiff brought this suit against the Municipality of Faizpur, alleging that there were three *otas* in front of his house, which he allowed the municipality to pull down in July 1894, for the purpose of constructing a gutter under an agreement that they should rebuild the *otas* at their own cost after the gutter was constructed; that after the completion of the gutter the municipality refused to rebuild the *otas* in accordance with the agreement; that thereupon he applied to the general body of the municipal councillors, who decided against him on 24th August 1895.

Under these circumstances the present suit was filed on 9th January 1896, to compel the municipality to rebuild the *otas*, or, in the alternative, to recover damages for breach of the agreement.

The Court of First Instance rejected the claim, holding that the suit was time-barred under section 48 of Bombay Act II of 1884, as it was not filed within three months from the date of the act complained of.

On appeal, this decision was reversed by the Subordinate Judge, A. P. who held that section 48 of Bombay Act II of 1884 had no application to the present case. The suit was, therefore, remanded for a fresh decision on the merits.

Against this order of remand the defendant municipality appealed to the High Court.

*D. P. Kirloskar*, for the Appellant: —Section 48 of Bombay Act II of 1884 is wide enough to cover a case like this. The plaintiff complains of a breach of agreement by the municipality and seeks to recover damages for such breach. Such a suit is within the scope of the section—*Nagusha* v. *The Municipality of Sholapur*, I. L. R., 18 Bom., 19. Moreover, in pulling down the plaintiff's *otas* in order to construct a gutter, the municipality were acting in exercise of the powers vested in them by the Act; the present suit is, therefore, an action against the municipality for an act done in pursuance of the Act. On this ground also the suit falls within section 48 of the Act, and ought to have been brought within three months after the accrual of the cause of action.

[639] *N. V. Gokhle* for Respondent:—The contract made by the municipality with the plaintiff before his *otas* were pulled down, may no doubt be said

* Appeal, No. 8 of 1897 from order.

to be an act done in pursuance of the District Municipal Act. But the Act does not, and cannot authorize the municipality to commit a breach of a contract. This suit is, therefore, not "an action for anything done or purporting to have been done in pursuance of the Act" within the meaning of section 48 of Bombay Act II of 1884. Our cause of action is not the contract, but the breach thereof. The section does not apply to suits based on contracts—*Mayandi* v. *McQuhae*, I. L. R., 2 Mad., 124; see also *Manohar* v. *The Dakor Municipality*, *ante*, p. 289, where RANADE, J., remarks that "claims based on contracts can never be included under this section." The ruling in *Nagusha* v. *The Municipality of Sholapur*, I L. R., 18 Bom., 19, is practically overruled by the Full Bench decision in the case of the *Dakor Municipality*, *ante* p. 289.

**Parsons, J.**:—This suit was brought on the allegations that the plaintiff allowed the defendant municipality to remove some *otas* belonging to him, and that the latter agreed that they would rebuild them on the completion of a gutter which they intended to build beneath the site, but that they now refuse to perform their agreement. It is thus a suit for specific performance of a contract, or for damages for breach thereof. Such a suit is not an action for anything done or purporting to be done in pursuance of the Bombay District Municipal Act; for the Act, though it may give the municipality power to make contracts, does not authorize them to refuse to perform them, and no section of the Act has been quoted as one under which they are now purporting to act. That section 48 does not apply to actions on contracts was ruled in *Mayandi* v. *McQuhae*, I. L. R., 2 Mad., 124, and was also stated in the judgment of RANADE, J., in *Manohar* v. *The Dakor Municipality*, *ante*, p. 299.

We confirm the order with costs.

*Order confirmed.*

# [640] APPELLATE CIVIL.

*The 2nd February, 1897.*

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Nemagauda............(Original Plaintiff) Appellant

*versus*

Paresha............(Original Defendant) Respondent.*

*Civil Procedure Code (Act XIV of 1882), Secs. 278, 283 and 12—Execution—Attachment—Claim to attached property by holder of several mortgages—Order made on claim—Claim partly allowed and partly disallowed—Sale in execution—Suit for redemption by auction-purchaser within a year—Claim by defendant (mortgagee) in respect of mortgage disallowed by order—Such claim barred—Limitation Act (XV of 1877), Art. 11.*

Certain property was attached in execution of a money decree. *A* intervened, and applied to have the property sold, subject to the incumbrances created in his favour by the judgment-debtor under six mortgage-bonds. The Court after investigating *A*'s claim passed an order directing the property to be sold subject to the mortgage-debt due under five out of the six mortgage-bonds. This order was made on the 20th February 1893.

In November 1893 (*i.e.*, within a year of the above order), *B*, who had purchased the property at the Court sale, filed a suit to redeem the five mortgages subject to which the property had been sold. *A* contended that the property was also liable to the debt due under the sixth mortgage-bond. The District Judge held that *A* was entitled to have his claim under the sixth bond investigated in this suit, inasmuch as the plaintiff had filed this suit before the expiration of the year allowed to *A* to establish his right by article 11 † of Schedule II of the Limitation Act (XV of 1877), being of opinion that once the present suit had been filed *A* could not have sued under section 12 of the Civil Procedure Code (Act XIV of 1882). On appeal to the High Court,

*Held*, that *A* could not claim in the present suit in respect of the sixth mortgage-bond which had been disallowed by the order in execution on the 20th February 1893. The rule is that an unsuccessful intervenor in execution proceedings must establish his right by a regular suit within twelve months, at the expiration of which the order passed in execution becomes conclusive against him. The fact that the purchaser had filed the present suit before the year had expired, did not exempt the defendant from this rule.

* Second Appeal, No. 29 of 1896.

† [Art. 11:—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| By a person against whom an order is passed under section 280, 281, 282, or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order. | One year ... | The date of the order.] |

Section 12 of the Civil Procedure Code (Act XIV of 1882) did not affect the question. That section only provides that no suit shall be *tried* if the same issues are involved in a previously instituted suit. It does not dispense with the institution of a suit within the proper time when the law requires such institution.

[641] APPEAL from the order of remand passed by F. C. O. Beaman, District Judge of Belgaum.

Suit for redemption. The property in question had been mortgaged by one Nemappa to the defendant under six mortgage-bonds.

In execution of a money decree obtained against Nemappa by another creditor, the property was attached. Thereupon the defendant intervened under section 278 of the Civil Procedure Code (Act XIV of 1882) and asserted his lien as mortgagee upon the attached property under the six mortgage-bonds passed in his favour by Nemappa. On the 20th February 1893, the Court passed an order directing that the property attached should be sold subject to the mortgage lien created by five out of the six mortgage-bonds produced by the defendant. His claim under the sixth bond was disallowed.

The property was accordingly sold in execution, and plaintiff purchased it at the Court sale.

In November 1893, (*i.e.*, nine months after the order in the execution proceedings) plaintiff as purchaser of the equity of redemption filed this suit to redeem the property from the mortgage-debts subject to which the property had been sold.

The defendant (mortgagee) contended that the property was also liable to the debt due under the sixth mortgage-bond.

The Court of First Instance held that as the defendant had not sued to establish his right under this bond within one year from the date (20th February 1893) of the order in the execution proceedings, that order had become conclusive under section 283 of the Code of Civil Procedure, and that, therefore, the property was not liable to the debt due under the sixth mortgage-bond.

This decision was reversed, on appeal, by the District Judge, who held that as the present suit by the purchaser had been brought within a year of the order of the 20th February 1893, (*i.e.*, before the expiration of the time within which the defendant could have sued to establish his claim) the defendant had not lost his right to prove his claim in this suit. He was of opinion that once this suit was filed, a suit brought by the defendant for the [642] purpose would have been barred by section 12 of the Civil Procedure Code.

On these grounds the Judge reversed the decision of the Court of First Instance and remanded the case for trial on its merits.

Against this order of remand the plaintiff appealed to the High Court.

*S. R. Bakhle*, for the Appellant.

*T. R. Kotwal*, for the Respondent.

The following authorities were referred to in argument:—*Krishnaji* v. *Bhaskar*, I. L. R., 4 Bom., 611; *Nilo Pandurang* v. *Rama*, I. L. R., 9 Bom., 35; *Yashwant Shenvi* v. *Vithoba Sheti*, I. L. R., 12 Bom., 231; *Shivapa* v. *Dod Nagaya*, I. L. R., 11 Bom., 114; *Badri Prasad* v. *Muhammad Yusuf*, I. L. R., 1 All., 381; *Bailur Krishna* v. *Lakshmana*, I. L. R., 4 Mad., 302; *Velayuthan* v. *Laksmana*, I. L. R., 8 Mad., 506.

**Ranade, J.**:—In this case, the lands in dispute belonged originally to one Nemappa, and were mortgaged by him with the respondent, original defendant. A creditor of Nemappa attached the lands in execution of his decree against him, and in these attachment proceedings the respondent applied that the sale might be ordered subject to the incumbrances created in his favour by Nemappa,

On 20th February 1893, the Subordinate Judge passed an order directing that the sale should take place subject to the mortgage-debt represented by five out of the six bonds produced by respondent. The sale accordingly took place, and the present appellant became the purchaser of the equity of redemption; and in November 1893, he brought his suit for possession of the lands, offering to pay off the debts subject to which the sale had taken place

The respondent in his written statement claimed in addition the debt due under the sixth bond. The Court of First Instance held that as the respondent had not brought a suit under section 283, his right to claim repayment of the disallowed debt was lost, and that the auction-purchaser was not bound to pay off that [643] debt. A decree was passed directing redemption on payment of the sum due on the other bonds.

The District Judge in appeal reversed this decree on the ground that as the one year's period allowed by article 11 of the Limitation Act to the respondent to establish his right had not expired when the suit was brought by the auction-purchaser, the order of 20th February 1893, had not become conclusive, and that the respondent had not lost his right to require the Court to inquire into the validity of his claim on the disallowed bond. He also expressed his opinion that as the auction-purchaser had already brought his suit, a counter suit by respondent would have been open to the bar created by section 12 of the Civil Procedure Code. He accordingly remanded the case back for a final decision on the merits.

The principal question we have to consider in this case is thus whether the respondent's right to claim re-payment of the disallowed mortgage-bond was or was not barred by reason of his not having brought a suit to establish the right which he claimed under it. We are of opinion that the District Judge was in error in holding that the bar did not operate in the present case, because of the fact that the appellant auction-purchaser's suit against the respondent was brought within twelve months from the order dated 20th February 1893. The authorities are quite clear about the general position that the unsuccessful objector or intervenor, whether he happens to be plaintiff or defendant in the regular suit, is equally bound by the order in the miscellaneous proceedings and that the only way open to him is to establish his right by a regular suit brought within twelve months, at the expiration of which period the order becomes conclusive as against him. The Court of First Instance referred in its judgment to *Nilo Pandurang* v. *Rama Patloji*, I. L. R., 9 Bom., 35 ; *Yeshwant Shenvi* v. *Vithoba Sheti*, I. L. R., 12 Bom., 231, and *Badri Prasad* v. *Muhammad Yusuf*, I. L. R., 1 All., 381.

The District Judge does not appear to have discussed any of these cases in his judgment, nor were the earlier and later rulings on the same point represented by *Rango* v. *Rikhivadas*, 11 Bom. H. C. Rep., 174 ; *Krish*-[644]*naji* v. *Bhaskar*, I. L. R., 4 Bom., 611, at p. 617 ; *Bailur Krishna* v. *Lakshmana*, I. L. R., 4 Mad., 302 ; *Velayuthan* v. *Laksmana*, I. L. R., 8 Mad., 506, brought to his notice.

The law was clearly laid down in the first of these Madras cases in which the judgment states that "where a summary declaration of want of title in the objector is made in answer to a claim made by him to property under attachment, and when this order is not set aside by a regular suit within one year, it becomes equivalent to a final adjudication against him." In most of the cases noted above, the unsuccessful objector was defendant in the regular suit, and the Full Bench of the Allahabad High Court have held that this circumstance was not at all pertinent and made no difference.

The District Judge appears to think that the present case was distinguished from the rulings noted above by the fact that in the present case the one year's time allowed by law had not expired when the suit was brought and the written statement was filed. We do not think that this circumstance warrants any departure from the general rule of law. It is true, in most of the cases noted above, the one year's time had expired, but apparently this was not the case in the two Madras cases. The judgment in *Velayuthan* v *Laksmana* observes in regard to the earlier case—*Bailur Krishna* v. *Lakshmana*—that though the suit in that case had been brought within one year allowed to the objector, it was nevertheless held that the latter could not plead his right, though he might have himself brought a suit to establish it. Looking at the wording of section 283, it is plain that the Legislature intended to provide only one remedy, that of a regular suit, to set aside the otherwise conclusive effect of the miscellaneous order, and it cannot be open to the objector to adopt any other alternative to get rid of the adverse order.

The respondent's pleader faintly suggested that there was no binding order in the present case, as the order in the miscellaneous attachment proceedings was silent about the disallowed debt, and only makes mention of the five other bonds. We cannot accept this contention. The circumstances of the present [646] case clearly resemble those of *Yashwant Shenvi* v. *Vithoba Sheti*, where out of two mortgage-bonds the debt due under one of them was recognized as a valid charge, and nothing was said of the other bond, apparently because it only provided that this latter debt should be paid off before the mortgage-debt was paid off. This circumstance did not, however, affect the order, so far as it disallowed the charge claimed.

It was also urged that the order was binding only as between the parties to it, and that the appellant-plaintiff, who was auction-purchaser, was not a party. This contention also must be disallowed. The question of parties raised in *Shivapa* v. *Dod Nagaya*, I. L. R., 11 Bom., 114, and *Kartick* v. *Tilukdhari Lall*, I. L. R., 15 Cal., 667, had reference to the rights of the judgment-debtor, who under the procedure now adopted is not a party to the attachment proceedings as between the attaching creditor and the intervenor or objector. The mortgagee-objector in the present case was admittedly a party, and he was unsuccessful, and the section gives clear directions as to what the unsuccessfully objecting party should do to prevent the adverse order from becoming conclusive against him.

Finally, the District Judge's reference to section 12 of the Civil Procedure Code appears to be inconclusive. That section only provides that no suit shall be *tried* if the same issues are involved in a previously instituted suit in a competent Court. This provision is merely intended to secure general convenience; it cannot be construed as dispensing with the institution of a suit within the proper time when the law expressly requires such institution. On the whole, we feel satisfied that the District Judge was in error in reversing the decree of the Court of First Instance and remanding the case for fresh inquiry.

We reverse the order of the District Judge and restore the decree of the Subordinate Judge. The respondent to bear appellant's costs in both the appellate Courts.

*Order reversed.*

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**NOTES.**

[1. As regards the nature of the objection proceedings, see also, (1907) 35 Cal., 202 P. C.; (1908) 31 Mad., 347; (1900) 27 Cal., 714; (1904) 1 A. L. J., 531; (1901) P. L. R., 74; (1905) N. L. R., 150.

2. As regards the *bar* of trial, see also (1914) 25 I. C., 597 (Mad.)]

## [646] APPELLATE CIVIL.

*The 15th February, 1897.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE TYABJI.

Vaman Tatyaji and others.........(Original Plaintiffs) Appellants

*versus*

The Municipality of Sholapur...........(Original Defendants) Respondents.*

*Municipality—Municipal fund—Misapplication of fund by municipality—Right of taxpayer to sue to restrain municipality from such misapplication—Parties—Practice—Civil Procedure Code (Act XIV of 1882), Sec. 30—Specific Relief Act (I of 1877), Sec, 56, Cl. (k).*

A suit will lie at the instance of individual taxpayers for an injunction restraining a municipality from misapplying its funds.

SECOND APPEAL from the decision of G. Jacob, District Judge of Sholapur.

The plaintiffs, who were three in number, were taxpayers of Sholapur. They sued for an injunction to restrain the Municipality of Sholapur from expending any sum out of the municipal funds on the purchase of musical instruments for a band, which they had resolved to establish. The plaintiffs contended that this was not one of the purposes for which the municipality was authorized by law to spend municipal funds.

The municipality pleaded that the plaintiffs had no right to sue; that they had no cause of action; and that the proposed expenditure of municipal funds was not illegal.

The Joint Subordinate Judge of Sholapur, Rao Saheb A. G. Bhave, held that the plaintiffs as taxpayers were interested and were entitled to see that the money contributed by them to the municipal funds was properly applied; that the plaintiffs were, therefore, competent to sue. He further held that the municipality was not authorized to expend municipal funds in the manner proposed, and he, therefore, granted the injunction sought, restraining the municipality from carrying their resolution into effect.

On appeal the District Judge held that the plaintiffs were not entitled to sue in their individual capacity without proof of special damage. He, therefore, reversed the lower Court's decree and dismissed the plaintiffs' suit.

[647] The following extract from his judgment gives his reasons: —

"I am of opinion that the plaintiffs, as mere individual voters and taxpayers, representing their own opinions and wishes alone, have no right to sue for such relief. It is not pretended that the expenditure proposed will have the effect of adding to the burdens of the taxpayer, nor is it alleged that the presence of a band will be likely to trouble or annoy the plaintiffs in any way. They merely want to force their opinions against the majority of the commissioners, who voted in favour of the resolution.

"I am of opinion that the plaintiffs are not entitled to sue as individuals without proof of special damage (see Broom's Common Law, 8th Edition, pp. 723-4). This would also, I think, be deducible from section 56 (k) of the Specific Relief Act.

"If any individual were at liberty to harass a municipality by suits to set aside resolutions which do not meet with their personal approval, the conduct of the municipal affairs would obviously become impossible."

* Second Appeal, No. 565 of 1896.

Against this decision the plaintiffs appealed to the High Court.

*M. B. Chaubal*, for Appellants.

Rao Bahadur *V. J. Kirtikar*, Government Pleader, for the Respondents.

**Tyabji, J.**:—This suit was instituted by the plaintiffs as voters and taxpayers of Sholapur for an injunction restraining the Municipality of Sholapur from expending any sum of money out of the municipal funds on the purchase of a band of music on the ground that the resolution in favour of such a purchase was *ultra vires*.

The contention of the municipality was, that the plaintiffs had no cause of action, that they were not competent to sue, and that the purchase of a band was not illegal. The Subordinate Judge decided all these points in favour of the plaintiffs and passed a decree against the defendants.

The District Judge without deciding the question whether the purchase of the band would or would not be *ultra vires* reversed the decree of the Subordinate Judge and dismissed the plaintiffs' suit with costs, on the ground that the plaintiffs, as individual voters and taxpayers, could not maintain the suit. I am, however, of opinion that the District Judge was wrong in [648] the course pursued by him and that he ought to have decided the question of the legality of the proposal to purchase the band.

First, as to the question of pleading. It is no doubt true, as a general rule, that Courts of Justice will not permit individuals interested in any fund or estate to institute or maintain a suit without bringing before the Court all persons who are interested in the matter. The convenience and indeed the necessity of this rule is obvious; for, otherwise, different individuals might file different suits against the same defendants in respect of the same cause of action, and such defendants might thus be unnecessarily harassed by a multiplicity of suits. The ordinary method of avoiding this inconvenience and difficulty is by the plaintiff suing not only on his own behalf but also on behalf of all other persons in the same situation as himself (see Daniell's Chancery Practice, 6th Ed., p. 194). This general rule has been expressly recognized by section 30 of the Civil Procedure Code and by clause (5) of section 13 which makes a decision in such a suit *res judicata* against all persons interested in the subject-matter of the suit There can, therefore, be no doubt that the best and safest course for the plaintiffs would have been to proceed under section 30 of the Civil Procedure Code.

This general rule, however, is not without exceptions, and it is now clearly settled that any individual member of a corporation may file a suit for the purpose of restraining the corporation from doing any act which may be illegal or *ultra vires* of the corporation. In *Simpson* v. *Westminster Palace Hotel Co.*, 8 H.L. Cases, 712, Lord CAMPBELL, Lord CHANCELLOR, observed: "The funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires*, and although sanctioned by all the directors and by a large majority of the shareholders, *any single shareholder* has a right to resist it and a Court of Equity will interpose on his behalf by injunction." This doctrine is more fully explained by JESSELL, M. R., in *Russell* v. *Wakefield Waterworks Co*, L. R., 20 Equity, 474 at p. 481, where he says: "It remains to consider what are these exceptional cases in which, for the due attainment of justice, such a suit (that is, a suit by [649] individual members) should be allowed. We are all familiar with one class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is

beyond the powers of the corporation. Such a bill, indeed, may be maintained by a single corporator *not suing on behalf of himself and of others*, as was settled in the House of Lords in the case of *Simpson* v. *Westminster Palace Hotel Co.*" Again in *Hoole* v. *The Great Western Railway Co.*, L. R., 3 Ch., 262 at p. 272, Lord CAIRNS, L.J., said: "I have a very strong opinion that any corporator or member of a company may maintain a bill against the corporation and the executive, to restrain them from doing an act which is *ultra vires*, and therefore illegal."

I confess I can see no substantial distinction between an individual shareholder or an individual policy-holder suing a company, in the funds of which he is interested, and an individual ratepayer suing a municipal corporation, to the funds of which he contributes and in the proper application of which he is necessarily interested. His personal interest may be small, but it is not less real. The case of *Attorney-General* v. *Vestry of Bermondsey*, 23 Ch. D., 60, which was relied on by the defendant's pleader, is not in any way inconsistent with this judgment. That suit was no doubt filed by the Attorney-General, jointly with an individual ratepayer, but there is nothing in it to show that even according to the practice in England, the individual ratepayer could not have maintained it by himself without the intervention of the Attorney-General. On the contrary, I think, it is an authority in support of our conclusion that a ratepayer has a sufficient interest in the funds of the Vestry to maintain an action, provided only it is properly framed.

Again in the case of *Mayor, &c., of Liverpool* v. *The Chorley Waterworks Co.*, 2 De Gex, M. & Gor., 852, it was held that the plaintiffs there who sued without the intervention of the Attorney-General, were entitled to maintain that suit in so far as they had shown that they were in any way interested in the subject-matter of the suit, [660] and that they were not entitled to maintain it in so far only as they were absolute strangers. There Lord CRANWORTH in delivering judgment at p. 860 observed: "Still the question arises whether the acts of the defendants . . . are acts of which the plaintiffs have any right to complain, or demand the prevention in the actual circumstances; for, though we accede to the general observation, that persons, obtaining from the Legislature powers like those before us . . . are bound strictly to adhere to the powers so conceded to them—to do no more than the Legislature has sanctioned . . . yet it does not follow that any one of Her Majesty's subjects has a right to complain whenever Parliamentary powers of this nature are intended to be transgressed. In such cases (we of course except any proceeding at the instance of the Attorney-General) a plaintiff seeking the assistance of a Court of Equity by way of injunction is bound to show that he has an interest in preventing the defendants from doing what is in fact, or may well be called, a violation of their contract with the Legislature. He must show, not only that the defendants are committing or intend to commit a wrong, but also that the wrong, complained of, does occasion or will occasion loss or damage to him; that he has a special or private interest in confining the defendants within the limits of their Parliamentary powers. Now in this respect the corporation of Liverpool appear to us to have failed. The plaintiffs have no interest whatever in the lands, through or over which the water may be made to flow; and to them it must be matter of indifference, of no importance in any sense, whether it is carried by a longer or shorter line,—by an open channel or a culvert,—by a course convenient or inconvenient to the defendants."

From these observations it seems to me to be clear that although in England the Attorney-General may sue in every case for the purpose of preventing a corporation from exceeding its powers, yet a private individual

can sue and indeed may only sue without the intervention of the Attorney-General, if, to use Lord CRANWORTH'S words, "he has an interest in preventing the defendants from violating their contract with the Legislature." The principle on which, in England, the Attorney-General intervenes on behalf of the public for the purpose of preventing improper application of public funds, is thus stated by Sir J. L. KNIGHT [651] BRUCE, V. C., p. 427: "Where property affected by a trust for public purposes is in the hands of those who hold it devoted to the trust, it is the privilege of the public that the Crown should be entitled to intervene by its officers for the purpose of asserting on behalf of the public generally that public interest and that public right which probably no individual could be found willing effectually to assert, even if the interest were such as to allow it."—*Attorney-General* v. *Compton*, 1 Y. & C. (Ch.), 417.

It, therefore, follows that if there are individuals sufficiently interested and sufficiently public-spirited to enter into litigation with a powerful public body, there is nothing especially in a place like Sholapur, where there is no such public officer as the Attorney-General, to prevent their doing so. This right of the individuals to sue, is also forcibly stated by GREEN, J., in *Shepherd* v. *The Trustees of the Port of Bombay*, I. L. R., 1 Bom., 132 at p. 142, in these terms: "There can, I think, be no doubt that if the Port Trustees or any other corporation or public company in Bombay were to do or attempt to do any act in excess of their powers, as contained in the charter or legislative act from which they derive their being, and such act would be injurious to the rights of property of an individual, such individual would, on general principles, have a right to the protection of this Court by injunction or other appropriate relief." These authorities seem to me to show very clearly, first that the plaintiffs can sue in their individual capacity if they are sufficiently interested in the municipal fund, and secondly, that any interest however small is sufficient to entitle them to do so.

As I have already said before, the plaintiffs in the present case, as ratepayers, are, in my opinion, not mere strangers, but are directly interested in the proper application of the municipal funds. The absence of interest could have been urged against them with great force, if they had been merely inhabitants of Sholapur and not ratepayers, and as such contributors to the fund. It would, in my opinion, have been fatal to them if they were not even residents of Sholapur and, therefore. not interested in the administration of the Sholapur Municipality at all. In [652] this case, however, the observations of Lord CRANWORTH already quoted above, directly apply to the plaintiffs, and in my opinion sufficiently dispose of the District Judge's argument based upon section 56 of the Specific Relief Act, clause (*k*), as to the sufficiency of the plaintiffs' interest as individual ratepayers.

I am, therefore, of opinion that the decree must be reversed. We must remand the case to the lower Court with a direction to record a finding on the issue, whether the resolution in favour of purchasing the band is *ultra vires* or not, having regard to the provisions of section 24 of the Bombay District Muncipal Act, (Bombay Act VI of 1873).

**Parsons, J.**:—This suit was brought by three taxpayers against the Municipality of Sholapur to obtain an injunction restraining the latter from expending any money out of the municipal fund on the purchase of a band which they had resolved to buy, the allegation being that such expenditure was *ultra vires* and unauthorized by law. The District Judge without deciding upon this allegation dismissed the suit on the ground that the plaintiffs were not entitled to sue as individuals without proof of special damage.

I am of opinion that this decision cannot be supported. Section 18 of the Bombay District Municipal Act of 1873 creates the municipal fund, and section 17 of the same Act vests it in the municipality to be held and applied by them as trustees for the purposes of the Act, which purposes it proceeds to state in detail. An appropriation, therefore, of the fund or any part thereof to a purpose not allowed by the Act, would be a breach of trust on the part of the municipality. In the case of individuals and companies, co-trustees or beneficial owners or individual shareholders would be entitled to sue for an injunction to prevent such a breach of trust: see section 54 of the Specific Relief Act, 1877, Illustrations (*b*), (*c*), (*d*).

It is, however, argued before us that the plaintiffs as individual taxpayers have no personal interest in the fund or its application, and cannot, therefore, maintain the suit—see section 56 (*k*) of the Specific Relief Act, 1877. I am unable to accept this argument as sound. No doubt the personal interest [653] of an individual taxpayer in a large municipality, and in the case of a small expenditure from the fund, might be very little indeed; but it would always be something, and in the case of a small municipality and a large expenditure it might be very great; much, too, would depend upon the amount of taxes the individual had paid or was liable to pay. It is clear, therefore, that the actual amount of personal interest must be disregarded, and that it is sufficient if there is any personal interest at all. That personal interest must, I think, be held to exist in the case of every individual taxpayer, since he who is liable to contribute to the fund cannot but be interested in its proper application. It was conceded in argument by the pleader for the defendant that the suit for an injunction would lie if brought by the whole body of taxpayers, or if brought by one on behalf of all the others under the provisions of section 30 of the Civil Procedure Code. But if the whole body of taxpayers can sue, it can only be because they are interested in the proper application of the fund; and if the whole body are so interested, it can only be because they contribute and are liable to contribute to the fund. It seems, therefore, to me to follow that each individual who contributes, and is liable to contribute, to the fund, must be held to be personally interested in the due application of that fund and does not, therefore, fall within the prohibition of clause (*k*) of section 56 of the Specific Relief Act, 1877. My learned colleague has dealt with the case on the English law authorities. I am glad to be able to come to the same conclusion on the Indian statute law, for there is no Attorney-General in this country in whose name such suits as these could be filed, and it would, I think, be monstrous if a municipality seeking to misapply its funds were not liable to a suit to restrain them so doing at the instance of a taxpayer for whom they really hold the fund in trust. We agree to reverse the decree and remand the appeal for a decision on the real point at issue, *viz.*, the legality of the expenditure which the municipality propose to make. Costs to be costs in the cause.

*Decree reversed and case remanded.*

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## [654] APPELLATE CIVIL.

*The 15th February, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Shidappa bin Shetteppa..........(Petitioner) Appellant.*

*Practice—Procedure—Pleader—Appointment by pleader of another pleader without client's authority—Regulation II of 1827, Sec. 54—Civil Procedure Code (Act XIV of 1882), Secs. 36, 39 and 652—Charter Act, 24 and 25 Vict., C. 104, Sec. 15—High Court's Civil Circular Orders, No. 18, Cl. (i)—Proviso as to the appointment of another pleader—Proviso not* ultra vires.

The proviso to sub-clause (i) of clause 18 of the Civil Circular Orders of the High Court†, namely, that a pleader may appoint another pleader on his behalf, and that in such case the hearing will proceed, unless the Court see reason to the contrary, is not *ultra vires.*

REFERENCE by F. C. O. Beaman, District Judge of Belgaum, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The circumstances which gave rise to the reference were stated by the Judge as follows:—

"A pleader of the Athni Court appointed another pleader to appear for him without the authorization of the client. The (Subordinate) Judge refused to recognize the appointment, and held that the party was not represented. In my opinion the Judge below was right. Section 54 of Regulation II of 1827 ‡ contains the statute law on the subject. According to that, there [655] can be no doubt that the action of the pleader was illegal, and that the Judge was right in refusing to recognize it. * * The difficulty arises out of the words of clause (*i*) of section 18 of the High Court Circular order. The only judgment on the point with which I am acquainted, is reported at p. 67 of Printed Judgments, 1895, where the Judges of the High Court gave full effect to the provisions of the Legislature. * * I may add that since the proviso in clause (*i*) of section 18 of the Circular Orders practically overrides section 54 of the Regulation and can scarcely be held to be consistent with either the terms or the policy of that section, while it is difficult to show with what part

* Civil Reference, No. 13 of 1896.

† Bombay High Court Civil Circulars, 1889, No. 18, cl. (i).—The Courts have no power to give leave of absence to pleaders. Any pleader unable to attend the Court for any cause contemplated in clause 1 of section 54 of Regulation II of 1827 should follow the procedure therein laid down: Provided that he may appoint another pleader to appear in his behalf, and in such case the hearing will proceed, unless the Court see reason to the contrary.

‡ Bombay Regulation II of 1827:—

Sec. 54.—*First.*—If a pleader is unable to attend the Court in consequence of indisposition or other necessary cause, he shall notify the same to the Court in writing, in which case proceeding in the suit shall be stayed for such time as the Court deems reasonable to enable the party to transfer by endorsement or otherwise his power of attorney (either temporarily or until the suit is determined) to another pleader: and any pleader absenting himself without written notice as above prescribed may be punished by fine not exceeding Rs. one hundred, to be adjudged by the Court in which the failure of duty occurred, and levied as the amount of a decree by the same.

*Second.*—In case of the resignation, dismissal or death of a pleader, proceedings in the suit shall in like manner be stayed.

of the Civil Procedure Code it is consistent, it may well be doubted whether the order is not *ultra vires*."

The opinion of the Judge was that one pleader could not appoint another for him without the authorization of the client.

*Manekshah J. Taleyarkhan* (*amicus curiæ*) appeared against the Reference: – Section 18 of the Circular Orders does not contravene but merely extends the operation of section 54 of the Regulation. Section 652 of the Civil Procedure Code (Act XIV of 1882) empowers the High Court to frame rules. See also section 635 of the Code and section 15 of the Charter Act, 24 and 25 Vict., C. 104. The Allahabad High Court has also framed a similar rule and it was held to be valid—*Matadin* v. *Ganga Bai*, I. L. R., 9 All, 613. The case of *Shivdayal* v. *Khetu*, I. L. R., 20 Bom., 293, is distinguishable. In that case the defendant did not accept the substituted pleader as his pleader, while in the present case the party did so.

*Vasudeo G. Bhandarkar* (*amicus curiæ*) appeared in support of the Reference:—Section 18 of the Circular Orders is *ultra vires* and is not consistent with section 652 of the Civil Procedure Code. The ruling in *Shivdayal* v. *Khetu*, I. L. R., 20 Bom., 293, shows that the Civil Procedure Code does not allow the transfer of a case by one pleader to another. Regulation II of 1827 merely declares the common-law rule, that one agent cannot appoint another agent. Section 15 of the Charter Act also requires that the rules framed by the High Court should not be inconsistent with the law in **[656]** force. Section 18 of the Circular Orders is inconsistent with the provisions of the Civil Procedure Code and Regulation II of 1827.

**Farran, C. J.**:—This reference directly raises the question as to the legality of the proviso to clause 18 (*i*) of Chapter I of the Circular Orders of this Court printed at page 11 of the publication which directs that a pleader may appoint another pleader to appear on his behalf, and that in such case the hearing will proceed unless the Court see reason to the contrary. In *Shivdayal* v. *Khetu Gangu*, I. L. R., 20 Bom., 293, it was held by SARGENT, C. J., and FULTON, J., that under the Civil Procedure Code a duly appointed pleader could not delegate to another pleader his authority to appear for his client in the Presidency Court of Small Causes so as to render the appearance of the latter an appearance for the client. The Civil Circular above referred to did not apply to the Small Cause Court, so that decision does not really touch the question now before us. The decision was based upon the principle that *potestas delegata non potest delegari* unless expressly or impliedly authorized by the Legislature, and that it was not so authorized. The Legislature could, there can be no doubt, vary that principle in connection with pleaders, and a rule duly made under legislative authority would have the same effect as if enacted by the Legislature itself. A similar rule was held to be a valid rule by the High Court at Allahabad in *Matadin* v. *Ganga Bai*, I. L. R., 9 All., 613. That rule, however, applied only to pleaders appearing in the High Court itself. It was made under section 635 of the Civil Procedure Code.

The power of the High Court to make general rules for the procedure and conduct of business in the Subordinate Courts is derived from Statutes 24 and 25 Vict., C. 104, section 15, and from section 652 of the Civil Procedure Code. Under the former statute it is provided that such general rules shall not be inconsistent with the provisions of any law in force, and under the latter such rules must be consistent with the Civil Procedure Code itself.

The first question which has to be determined is whether the above rule is consistent with clause 1 of section 54 of Regula-**[657]**tion II of 1827 which is a law still in force. It enacts that when a pleader is unable to attend the

Court in consequence of indisposition or other necessary cause, he shall notify the same to the Court in writing, in which case proceedings in the suit shall be stayed * * * to enable the party to transfer by endorsement or otherwise his power of attorney (either temporarily or until the suit is determined) to another pleader. That enactment plainly does not authorize one pleader getting another pleader to hold his brief, but the question is whether a rule which gives that additional power to a pleader is inconsistent with it. Can the two stand together? The section is intended to prevent a client being prejudiced by the absence of his pleader. It does not appear to us to be inconsistent with that protection that a pleader should (still being himself responsible) request another pleader with the leave of the Court to appear for him. The legality of the rule does not appear to us to be affected by that enactment. The rule merely adds a proviso to the section which is not at variance with its general purport.

We must now consider whether the Rule (*i*) can stand having regard to sections 36 and 39 of the Code. Section 36 is an enabling section and (omitting reference to authorized agents with which we are not now concerned) enables any appearance, application or act which is required or authorized to be done by a party to be done by a pleader duly appointed to act in his behalf. Section 39 provides that the appointment of a pleader to make or do any appearance, application or act shall be in writing and filed in Court. The result is that a pleader whose appointment is in writing and filed in Court can appear for his client just as the client could do himself. We cannot see, as the Allahabad High Court could not see, anything inconsistent with that enactment in a rule which authorizes a pleader (without ceasing to be responsible to client) to ask another pleader to hold a brief for him. This is what the rule does by way of proviso to the section—" Provided that a pleader may appoint another pleader to appear in his behalf and in such case the hearing will proceed unless the Court see reason to the contrary.". The section regulates the mode in which a party must appoint a pleader. The rule provides how in certain cases the pleader so appointed may with [658] the leave of the Court transact the business with which he is so entrusted. The rule was passed to facilitate the work of the Court, and to obviate the unnecessary postponements of cases, and is one which has, we believe, worked well. For many years it has been in existence without objection being made to it.

As to the objections now made to it by the District Judge, they refer more to its possible abuse than to its legality. With reference to them it must be remarked that the rule is merely permissive with the leave of the Court. If a client objected, the Court would doubtless see reason to the contrary, and so if it considered that the rule was being abused. It was certainly never intended to allow experienced pleaders to transact their clients' business by the agency of inexperienced juniors, but only to avoid unnecessary adjournments in unimportant matters when the pleader engaged by the party is temporarily absent. We answer the question in the negative.

*Order accordingly.*

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**NOTES.**

[See also (1905) 9 O. C., 65 (another pleader arguing an appeal).]

[22 Bom. 658]

APPELLATE CIVIL.

*The 23rd February, 1897.*

PRESENT :

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Dholidas Ishvar............(Original Plaintiff) Appellant

*versus*

Fulchand Chhagan and another............(Original Defendants) Respondents.*

*Marriage—Contract of marriage—Contract to pay money to a father for giving his child in marriage—Public policy.*

A contract which entitles a father to be paid money in consideration of giving his son or daughter in marriage is against public policy and cannot be enforced in a Court of law.

SECOND APPEAL from the decision of Gilmour McCorkell, District Judge of Ahmedabad, confirming the decree of Rao Saheb V. M. Mehta, Second Class Subordinate Judge of Ahmedabad.

Suit for recovery of damages for breach of a marriage contract.

The defendants were the minor son and the widow of one Chhagan Purshotam, deceased. The plaintiff alleged that Chhagan in his life-time had contracted to give his daughter Ganga in marriage to his (the plaintiff's) son, and the plaintiff now sued to [659] recover Rs. 805 as damages in breach of that contract. The following statement of facts is taken from the judgment of TYABJI, J. :—

"The plaintiff had a son, and one Chhagan Purshotam had a daughter, and it was agreed between the plaintiff and Chhagan that Chhagan should give his daughter in marriage to the plaintiff's son and should also pay to the plaintiff the sum of Rs. 337 for *peheramni* and Rs. 51 for *purat*, making together Rs. 388. In furtherance of this agreement the plaintiff gave to Chhagan's daughter a *kudda* worth Rs. 15. Chhagan having died, and his widow and son having refused to carry out the agreement, this suit was brought. The Subordinate Judge passed a decree in favour of the plaintiff for the value of the *kudda*, but refused to allow the plaintiff's claim to the Rs. 402 for *pulla* given by the plaintiff to the other girl, whom the plaintiff's son afterwards married, on the ground that the plaintiff would, according to his own admission, have been obliged to pay the same amount of *pulla* to Chhagan's daughter if the agreement had been carried out. He also rejected *in toto* the plaintiff's claim to the Rs. 388, on the ground that the agreement by Chhagan to pay any such sum to the plaintiff was immoral and against public policy.

"On appeal, the District Judge agreed with the Subordinate Judge and confirmed the decree on the ground that the agreement to pay the *peheramni* and the *purat* to the plaintiff was void."

The plaintiff preferred a second appeal.

*Goverdhanram M. Tripathi*, for the Appellant (Plaintiff).

*Girdharlal H. Mehta*, for the Respondents (Defendants).

**Farran, C.J.** :—The plaintiff in the suit out of which this appeal arises, sued to recover damages from the defendants, the widow and son of one Chhagan Purshotam, for breach of a contract, whereby Chhagan agreed to give his daughter in marriage to the plaintiff's son. The agreement provided that Chhagan should pay the plaintiff Rs. 337 as *peheramni* and Rs. 51 as *purat* at the time of the marriage.

* Second Appeal, No. 735 of 1896.

**[660]** The plaintiff, when the marriage contract was broken, married his son to another girl to whom he gave Rs. 402 as *pulla*, but he received no *peheramni* from the father of the bride. He admitted that he would have had to pay the same sum as *pulla* to Chhagan's daughter had the original contract been carried out, so that on that account the breach of the contract caused him no loss. The only damages which he could show as arising out of the defendants' breach of Chhagan's contract were, therefore, loss of the *peheramni* and *purat* which Chhagan had agreed to pay to him at the time of the marriage. The lower Courts have held that the agreement, in so far as it stipulated that the plaintiff should be paid Rs. 388 on the marriage of his son, was contrary to public policy and void under section 23 of the Contract Act.

The argument for the appellant is two-fold : (1) that *peheramni* thus paid to the father of the bridegroom at the marriage is, in reality, made as a provision for the bridegroom, or bridegroom and bride (as *pulla* is given as a provision for the bride) and does not constitute a payment to the father for his own benefit; and (2) that the payment of *peheramni* to a father upon the marriage of his son is a customary caste payment regulated by the usages of the caste, and that there is nothing immoral or contrary to public policy in a father stipulating for such a payment, or for its amount.

As to the first argument, I think it is plain upon the pleadings, and it was so understood in both the lower Courts, that the claim was made by the plaintiff in his own right, and not by him suing on behalf of his son. The extracts which Mr. Goverdhanram has read to us from Borradaile's Caste Customs show that *peheramni* on occasions of marriage is sometimes given to the bridegroom and sometimes to his father, and at times to his other relations to secure their approval of the marriage, or to disarm their opposition to it. There is no ground, therefore, for the contention that it should be assumed that the *peheramni* in the present case is sued for by the father on behalf of his son. We must, I think, take it, as the lower Courts have done, that the plaintiff is suing on his own account and that the contract was that it should be paid to him. Were it otherwise, it is the son who should sue for damages under this head, and not the father.

**[661]** The suit is, I think, in effect, though not in form, a suit to give effect to the agreement of the father for *peheramni* on the marriage of his son. The question, therefore, directly arises whether a contract which entitles a father to be paid *peheramni* on the marriage of his son is against public policy. When a father or other guardian of a boy or girl has to betroth his ward, his primary and only consideration ought to be the happiness and welfare of the child. The stipulating for a monetary payment for himself is, or may be, I think, an incentive to the parent or other guardian to have regard to other considerations than the child's happiness in marrying him or her into another family. The danger is manifestly less obvious in the case of a father seeking a wife for his son than in that of a father seeking a husband for his daughter, but in principle it would be difficult to distinguish between the two. Such an agreement would clearly be invalid under English law. The principal authorities are collected by JARDINE, J., in *Dulari* v. *Vallabdas*, I. L. R., 13 Bom., 126.

Such contracts do not appear to me to be less opposed to public policy because the children to be married are of tender years and have no voice in the matter. The duty imposed on the parent is, I think, even more direct and imperative in such cases. The English law has been followed in our High Court by JARDINE, J., in *Dulari* v. *Vallabdas* (*supra*) and by SCOTT, J., in an earlier case there referred to, and I think that we ought also to follow it. The decision on the reference in *Jogeswar* v. *Panch Kauri*, 5 B. L. R., p. 395, is

somewhat opposed to this view. There the *pun* money had been paid to the brother of the girl who was to be married. The marriage having gone off, the intending bridegroom sued to recover it back, and it was held that he could do so. There was no argument, and the judgment, for which no reasons are assigned, was based upon the particular circumstances of the case. It was not, I think, intended as a decision that such *pun* money could be recovered in an action by the brother. This case was followed in *Ram Chand Sen* v. *Audaito Sen*, I. L. R., 10 Cal., 1054, but GARTH, C. J., expressed in his judgment in the latter case a strong opinion that a suit to enforce such an agreement would [662] not lie. The other cases cited before us—*Umed Kika* v. *Nagindas*, 7 Bom. H. C. Rep., (O. C. J.), 122; *Mulji* v. *Gomti*, I. L. R., 11 Bom., 412; *Rambhat* v. *Timmayya*, I. L. R., 16 Bom., 673—have no direct bearing upon the question which I am considering. They decided that damages, if suffered, can be recovered for the breach of such a contract as the present, and that money paid or ornaments given for the benefit of the bride or bridegroom, or of both, can be recovered by suit if the marriage contract is broken.

As to the argument of Mr. Goverdhanram that to enforce such a payment is merely giving legal effect to a legal caste custom, I think that there is a great distinction between a father contracting for a sum to be received by him on the marriage of his child and receiving a customary present upon such an occasion. The latter is a voluntary payment enforceable possibly by caste rules and regulations, but not affording ground for an action at law. The former is the reduction to the form of a binding agreement of a custom harmless in itself so long as it is voluntary and in accordance with caste rules, but capable of abuse and opposed to public policy when it takes the shape of a contract which the Courts are called upon to enforce. If this Court were to enforce such a contract when the agreed amount is small and in accordance with caste principles, it would be impossible, I think, to treat other contracts of a similar kind, but differing only in amount, as unenforceable. I would confirm the decree appealed from with costs.

**Tyabji, J.**:—In this case the plaintiff sued to recover Rs. 790 as damages for the breach of a contract of marriage, and Rs. 15 as the value of a *kudda* ornament given to the intended bride. The sum of Rs. 790 was made up as follows:—*viz.*, Rs. 337, which was agreed to be paid to the plaintiff as *peheramni*, Rs. 51 which was agreed to be given to him as *purat* at the time of the marriage, and Rs. 402 which was the amount of the *pulla* which had to be paid to another girl after the breach of the defendant's agreement.

The facts of the case are as follows (His Lordship stated the facts as above set forth and continued:—)

[663] On appeal, the District Judge agreed with the Subordinate Judge, and confirmed the decree on the ground that the agreement to pay the *peheramni* and the *purat* to the plaintiff was void.

The only question argued before us was, whether the Lower Appellate Court was right in holding that the agreement, so far as the *peheramni* and the *purat* to the plaintiff were concerned, was invalid.

In considering this question it must be remembered that the plaintiff was the father of the intended bridegroom, and, therefore, stood in the position of a guardian. We take it to be quite clear, that under the English law an agreement to pay money to a father in consideration of his giving his child in marriage would be considered as being against public policy, and would not be enforced. —See Fonblanque's Treatise of Equity, Vol. I, p. 260, (5th Ed.), *Duke of Hamilton* v. *Lord Mohun*, 1 p. Will., pp. 118 and 120; *Osborne* v. *Williams*, 18 Ves. Jun., 379, and the cases collected under *Scott* v. *Tyler* in White and Tudor's

Leading Cases in Equity (7th Ed.), Vol. I, p. 535. The same doctrine has been applied by the Bombay High Court to the cases of Hindu fathers and guardians. In *Jaikisondas* v. *Harkisondas*, I. L. R., 2 Bom., 9 at p. 15, GREEN, J., followed and applied the injunction of Manu, where it is laid down (section 51) :—"Let no father who knows the law receive a gratuity, however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for that purpose is a seller of his offspring." Again in *Pitamber* v. *Jagjivan Hansraj*, I. L. R., 13 Bom., 131, foot-note, SCOTT, J., said : "Was this contract, in so far as it promised money payment for the negotiation of a marriage by a third party, immoral and contrary to public policy? In England such a contract would not be enforced at law—*Kean* v. *Potter*, 3 P. Will., p. 76 ; Story's Eq. J., Plac. 260-261. It would be held to be against public policy and public interest as having a tendency to cause matrimony to be contracted as a mere matter of bargain and sale, a 'kidnapping into conjugal servitude,' as one of the Judges expressed it" See also *Dulari* v. *Vallabdas Pragji*, I. L. R, 13 Bom., 126, where JARDINE, J., approved and followed SCOTT, J.'s decision.

**[664]** The above authorities seem to me to establish conclusively that a promise to pay money to a Hindu father, in consideration of his giving his son or daughter in marriage, cannot be enforced in a Court of law. It is no doubt true, however, that the Asura form of marriage, which is legal among the lower castes, is nothing more than the purchase of a wife from her father by the husband. It has, therefore, been contended that so long as such a form of marriage is permitted, payment of money to the father of a boy or girl cannot be illegal and must be enforced. I agree, however, with SCOTT, J., in thinking that this argument is not well-founded, for though the Asura form of marriage when actually performed may be recognized as valid, it does not follow that an agreement for such a marriage would be legally enforced. Manu himself denounces it strongly, and lays it down in section 24 that "the ceremonies of Asura must never be performed." I think, therefore, that though the money if actually paid to the father in consideration of the marriage cannot be recovered back when once the marriage is solemnized, it by no means follows that a suit to recover the money, where it has not been paid, would lie. It is no doubt true that it has been held by the High Court of Calcutta that a suit will lie to recover money paid to the father or guardian if the contract for the marriage is broken : see *Jogeswar* v. *Panch Kauri*, 5 Beng. L. R., 395, and *Ram Chand Sen* v. *Audaito Sen*, I. L. R., 10 Cal., 1054. It must be observed, however, that in this last case GARTH, C. J., drew a distinction between a case to enforce an agreement for payment such as this is and a case to recover back money already paid such as was before him. There the defendant in consideration of a hundred rupees had promised to give his minor daughter in marriage to the plaintiff ; the defendant failed to fulfil his part of the promise, and the plaintiff brought the suit to recover the money which he had paid as consideration for the promise, and GARTH, C.J., at p. 1055 observed :—

"In this case I have grave doubts whether the opinion of the Judge of the Small Cause Court" (who had held that the suit was not maintainable as being contrary to public policy) "is not correct : and if we were now asked to enforce an agreement to **[665]** pay *pon* to a girl's father in consideration of his giving her in marriage, I should have wished to refer the case to a Full Bench. But the facts are these. The plaintiff paid Rs. 100 to the defendant No. 1 in consideration of his giving his daughter to him in marriage, and the defendant No. 2, who is a brother of the defendant No. 1, was a party to the contract. After the money was paid, the defendant No. 1 failed to fulfil his promise and gave his daughter in marriage to some one else. The plaintiff now seeks to

recover back his moneys, and the defendant attempts to take advantage of the illegality of the contract by way of a defence to the claim. Under these circumstances I consider that the case referred to *Jogeswar* v. *Panch Kauri*, 5 Beng. L. R., 395, is directly in point, and apart from the question whether the contract is illegal, the justice of the claim is entirely with the plaintiff. Upon the authority of that case, therefore, and because it is manifest justice that the defendants should not be allowed to retain the money, I agree that the claim should be decreed.

"Had the question been whether as against the plaintiff we could enforce payment of the Rs. 100 to the defendant No. 1, I should have doubted very much whether we ought to do so. In England, a bargain of this kind, for payment of money to a father, in consideration of his giving his daughter in marriage, is considered to be a marriage brokerage contract and illegal as against public policy. . . And without going the length of saying at present, that I consider such contracts to be illegal in this country, I certainly should be disposed, as at present advised, to hold that they were so far void as to be incapable of being enforced by the rules of equity and good conscience."

I am of opinion that the distinction drawn by GARTH, C.J., is clear and well-founded, and that, though payment of money once made to a father cannot be recovered if the marriage is performed, as in the case of an Asura marriage, and that though it can be recovered if already paid when the marriage is not performed, as in the cases before the Calcutta High Court, yet no suit will lie to enforce the payment if not already made as in the cases before SCOTT and JARDINE, JJ. This conclusion will, I think, be [666] found to reconcile all the cases which are to be found on the subject (see *Rambhat* v. *Timmayya*, I. L. R., 16 Bom., 673; *Umed Kika* v. *Nagindas*, 7 Bom. H. C. Rep., (O. C. J.), 122; *Mulji Thakersey* v. *Gomti*, I. L. R., 11 Bom., 412; *Ranee Lallun Monee Dossee* v. *Nobin Mohun Singh*, 25 Cal. W. R, 32, and *Amratlal* v. *Bapubhai*, P. J., for 1887, p. 207).

Applying the above principles to the present case, it seems to me that the plaintiff must fail, from whatever point of view his claim is considered. If Chhagan's promise to pay the *peheramni* and the *purat* to the plaintiff was the consideration for the plaintiff giving his son in marriage to Chhagan's daughter, it is void as being contrary to public policy; for I can see no distinction between the father of a girl and the father of a boy, so far as this point is concerned. If on the other hand the *peheramni* and the *purat* formed no part of the consideration, but was an independent collateral arrangement, sanctioned or recognized by the caste—if, in other words, it was not to be the consideration for the marriage, but merely as a voluntary gift or present to the plaintiff as the bridegroom's father, I see nothing in it which can be properly considered immoral or against public policy. It is the practice among most communities in India to make presents not only to the bride and the bridegroom but also to their parents and relations, and nothing which I have said in this judgment is intended to convey that I look upon such a practice as improper or vicious from a moral point of view, however much I may deprecate it on other grounds. It is obvious, however, that even in this view of the case, which is, however, not the view taken by the lower Courts, the plaintiff must fail; for, a promise to make a present or gift being without consideration cannot be enforced in a Court of law. In this connection I may observe that the distinction between the Bombay and the Calcutta cases will be more intelligible, and the apparent conflict between them will be better reconciled, if we remember that in the Bombay cases the payment was the direct consideration for the marriage, whereas in the Calcutta cases it was more in the nature of a gift or

present made in contemplation of the marriage, on the understanding that it was to become absolute and complete if the [667] marriage actually took place, but was to be returned if it was broken off. It is true that this is not directly stated to be the ground on which the Calcutta decisions were based, but it seems to me to be the ground on which they can be best supported consistently with the doctrine that it is illegal for a father to receive money in consideration of giving his child in marriage, as laid down in the Bombay cases.

It was, however, contended before us that though the *peheramni* and the *purat* was ostensibly to be given to the plaintiff, yet he was to receive it in reality for the benefit of his son, and can, therefore, be recovered. It is a sufficient answer to this argument to say that the suit is brought by the plaintiff personally, and not on behalf of his son, and that there is nothing in the case to support this contention. It is clear that presents such as *peheramni* and *puratar* often made to the father and other relations of the boy for their own benefit (see 2 Borradaile's Gujarat Caste Rules, p. 597, Question 25), and there is nothing in the case to show that these were intended for the plaintiff's son rather than for the plaintiff personally. For the above reasons, we must hold that the promise to pay the *peheramni* and the *purat* to the plaintiff peronally cannot be enforced, and we must, therefore, confirm the decree with costs.

*Decree confirmed with costs.*

**NOTES**

[This was followed in (1908) 32 Mad., 18 F.B.; (1909) 33 Bom., 411; (1911) 15 C.W.N., 447; (1900) 3 O.C., 241; (1901) 23 All., 495; (1905) 1 C.L.J., 261.]

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[22 Bom 667]

## APPELLATE CIVIL.

*The 24th February, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Shankar Bisto Nadgir and others............(Original Plaintiffs) Appellants

*versus*

Narsingrav Ramchandra Jahagirdar and others............(Original Defendants) Respondents.*

*Possession—Symbolical possession obtained in execution of former decree—Fresh suit against the same defendants to obtain actual possession.*

A plaintiff who has obtained only symbolical possession in execution of a former decree is entitled to maintain a fresh suit against the same defendant to obtain real possession.

APPEAL from the decision of Rao Bahadur Gangadhar V. Limaye, First Class Subordinate Judge of Dharwar.

[668] Suit for possession of land and for mesne profits.

The plaintiffs alleged that in October 1875, their father had obtained a decree for possession against the defendants which decree was finally confirmed by the High Court in 1878; that in January 1886, in execution of that decree they had obtained symbolical possession, but that when they applied for actual possession it was, at the defendant's instance, decided that having obtained

* Appeal, No. 155 of 1895.

symbolical possession, no further possession could be awarded to them in execution. They, therefore, now sued to recover actual possession of the land in question together with mesne profits.

The defendants contended (*inter alia*) that the suit was not maintainable, and that the plaintiff's remedy lay in the execution of the former decree.

The Subordinate Judge found that the delivery of symbolical possession to the plaintiffs in execution of the former decree was not proved, that a suit for the recovery of the land was barred by the former suit, but not the claim for the recovery of mesne profits. He, therefore, rejected the claim for possession, and awarded to the plaintiffs Rs. 2,023-2-0 for mesne profits.

The plaintiffs appealed.

*Inverarity* with *Shamrao Vitthal*, for the Appellants (Plaintiffs).

*Branson* with *Vishnu K. Bhatavdekar*, for the Respondents (Defendants).

**Farran, C. J.** :—If the plaintiff obtained symbolical possession under the decree of October 1875, it is in our opinion unquestionable law that the plaintiff can maintain a fresh suit to obtain real possession from the defendants, and the Court will not scan with too great nicety the averments of the plaintiff, if his plaint in substance shows that he seeks to recover the possession which the original decree in his favour awarded him.

Such being the plaint in this suit, and the defendants being admittedly in possession after the alleged symbolical possession, the only question for determination is, did the plaintiff obtain symbolical possession. In the original suit when the plaintiff asked for further possession, it was at the defendants' instance **[669]** decided that the plaintiff had already obtained symbolical possession, and that no further possession could be awarded to him in execution. This appears to us to be decisive of the question. The matter has become *res judicata* between the parties, and it is immaterial upon what grounds the judgment proceeded, and it is also immaterial that the plaintiff did not originally in his pleadings rely upon the judgment as absolutely decisive in his favour. He put the judgment in evidence, and full effect ought, in our opinion, to have been allowed to it. We must allow the appeal with costs.

*Appeal allowed.*

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**NOTES.**

[This was followed in (1900) 25 Bom., 358; 275; (1907) 17 M. L. J., 595; (1903) 16 C. P. L. R., 109. See also (1913) 21 I. C., 972 (Punjab).]

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[22 Bom. 669]

## APPELLATE CIVIL.

*The 25th February, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Chamanlal and others............(Original Defendants) Appellants

*versus*

Bapubhai............(Original Plaintiff) Respondent.*

*Vatan—Cash allowance—Suit for arrears of share—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 62*—Res judicata—*Point of law decided in previous suit between same parties—Decree for future payment of share—Practice—Procedure.*

The plaintiff in this suit sought to recover eleven years' arrears of his share in a certain Government allowance received by the defendants and also prayed for an order directing the defendants to pay him and his heirs his proper share in future. The defendants contended that under the Limitation Act (XV of 1877) only three years' arrears could be recovered. In a previous suit brought by the plaintiff in 1874 against the same defendants it was decided by the High Court that twelve years' arrears could be recovered. The lower Court now held that this decision continued to bind the parties, and that, therefore, the present claim should be allowed. It accordingly passed a decree for the plaintiff for the amount claimed, and also directed that the defendants should pay to the plaintiff and his heirs for the future his share in the allowance.

*Held*, (varying the decree) that the plaintiff under the Limitation Act (XV of 1877) was only entitled to recover arrears for three years.

A point of law though decided in a suit between the same parties can never be *res judicata*.

*Held*, also, that the order in the decree as to payment in future was bad. It could not be executed, as the amount of the allowance was variable and the [670] defendants were not liable until they obtained payment of the allowance from Government.

SECOND APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad.

In 1894 the plaintiff brought this suit to recover eleven years' arrears (*viz.* 1882—1893) of his share in a cash allowance received annually by the defendants from the Government treasury and for an order directing the defendants to pay him and his heirs his proper share in future.

The defendants pleaded that under the Limitation Act (XV of 1877) article 62,† the plaintiff could only recover three years' arrears.

It appeared that in 1869 the plaintiff had obtained a decree declaring his title to a share of this allowance, and by that decree six years' arrears were awarded to him.

In 1874 he sued again for arrears for twelve years, *viz.*, from 1862 to 1874, and in that suit the High Court awarded the whole of his claim, holding that

* Second Appeal, No. 739 of 1896.

†[Art. 62:—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. | Three years... | When the money is received.] |

it was not barred by limitation under section 132 of Act IX of 1871 (I. L. R., 5 Bom., 68).

In the present suit the Subordinate Judge awarded the plaintiff's claim, and also directed the defendants to pay in future to the plaintiff and his heirs his share in the allowance.

The decree was confirmed, on appeal, by the District Judge, who held that the High Court's decree in the former suit of 1874 being between the same parties was conclusive and binding on the parties as to the plaintiff's right to claim twelve years' arrears. His judgment on this point was as follows:—

"The next point which arises is that of limitation. While the plaintiff claims eleven years' arrears, the defendant contends that he can claim only three years' arrears. In the judgment in I. L. R., 5 Bom., p. 68, the High Court held that the plaintiff could recover up to twelve years. It is true that that ruling has been dissented from by their Lordships in I. L. R., 7 Bom., 191, and I. L. R, 8 Bom., 426. I am, however, humbly of opinion that the early ruling, which was in a suit between the same parties, continues to bind those parties, although in other causes and as between other litigants the ruling may have been dissented from or overruled. The only way in which the decision in I. L. R., 5 Bom., 68 can be set aside as between the parties is by a judgment of the Privy Council, and pending such decision I hold that the plaintiff can recover up to twelve years of arrears."

**[671]** Against this decision the defendants preferred a second appeal to the High Court.

*Ghanasham Nilkant* with *G. S. Rao*, for Appellants:—The lower Court was wrong in holding that the High Court's ruling in the former suit on the question of limitation operates as *res judicata* between the parties. That ruling is no longer good law. It is expressly dissented from in subsequent cases—*Harmukhgauri* v. *Harisukhprasad*, I. L. R., 7 Bom., 191; *Maneklal* v. *Shivlal*, I. L. R., 8 Bom., 426; *Dulabh* v. *Bansidharrai*, I. L. R., 9 Bom., 111. A decision on a question of law does not operate as *res judicata*—*Parthasaradi* v. *Chinnakrishna*, I. L. R., 5 Mad., 304.

*G. M. Tripathi*, for Respondent:—The ruling in *Chhaganlal* v. *Bapubhai*, I. L. R., 5 Bom., 68, is conclusive and binding on the parties to this suit.

**Parsons, J.**:—We do not think that the decision of this High Court in a suit between the same parties, that arrears for twelve years could be awarded—*Chhaganlal* v. *Bapubhai*, I. L. R., 5 Bom., 68,—is *res judicata* in the sense that this Court is bound ever after to decide that a claim for twelve years' arrears is good. That decision was passed when either Act XIV of 1859 or Act IX of 1871 applied to the claim. The present suit was brought after Act XV of 1877 came into force, and it, therefore, must be applied. This Court has, in several more recent cases, held that the decision in *Chhaganlal* v. *Bapubhai* was not a correct one—see *Harmukhgauri* v. *Harisukhprasad*, I. L. R., 7 Bom., 191; *Desai Maneklal* v. *Desai Shivlal*, I. L. R., 8 Bom., 426; *Dulabh Vahuji* v. *Bansidharrai*, I. L. R., 9 Bom., 111. It appears to us that a point of law can never be *res judicata*. It has been held in *Parthasaradi* v. *Chinnakrishna*, I. L. R., 5 Mad., 304, that "the erroneous decision by a competent tribunal of a question of law directly or substantially in issue between the parties to a suit does not prevent a Court from deciding the same question, arising between the same parties in a subsequent suit, according to law."

We must, therefore, decide this case according to what we believe to be the correct interpretation of the law contained in the Limitation Act and reduce the amount of arrears awarded to **[672]** that due for the three years preceding suit, *viz.*, Rs. 17-7-10. We can find no precedent for such an order in the decree as that the defendants shall pay in future to the plaintiff and his heirs his share in the allowance without giving any further trouble. It could not be executed, for the amount of the allowance is variable, and defendants are not

liable till they recover payment from Government. We must erase that from the decree, substituting therefor a declaration of the plaintiff's title. We amend the decree in the two points above mentioned; in other respects we confirm it. The respondent must bear the costs of this appeal.

*Decree confirmed.*

**NOTES.**

[1. Where a decree or order has been based upon a mistake of law, it does not operate as *res judicata* so long as the *operation* of such previous decree or order is not called in question:—(1909) 33 Mad., 102; (1907) 30 Mad., 461; (1905) 28 Mad., 517; (1901) 26 Bom., 25; (1906) 31 Bom., 128; (1912) 39 Cal., 848; (1910) 13 C.L.J., 119; (1909) 11 C.L.J., 461; (1911) 15 C. L. J., 684; (1905) 32 Cal., 749; (1901) 28 Cal., 318; (1899) 2 O.C., 267; (1905) 8 O.C., 37; (1901) 14 C. P. L. R., 109; (1901) P. R., 44; (1902) P. R., 92.

2. As regards the scope of Art. 131 and Art. 62, see also (1909) 12 Bom. L. R., 157.]

[ 22 Bom. 672 ]

## APPELLATE CIVIL.

*The 2nd March, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Ravji Appaji Kulkarni and another............(Original Plaintiffs) Appellants

*versus*

Mahadev Bapuji Kulkarni............(Original Defendant) Respondent.*

*Limitation—Limitation Act (XV of 1877), Sec. 22—Civil Procedure Code (Act XIV of 1882), Sec. 27—Court sale—*Benami *purchase—Suit by* benami *purchaser—Addition of real purchaser as co-plaintiff—Continuation of suit.*

The plaintiff Ravji as owner of certain land brought this suit on the 31st January 1894, for damages for loss of crops, and in respect of loss caused by the defendant's obstructing him in cultivating the land. The dates of the causes of action set forth in the plaint were, respectively, the 12th September 1891, the 12th March 1892, February 1892, and 27th October 1892. In the course of the proceedings, the defendant ascertained that Ravji was not the real owner of the land, but had purchased it and was holding it *benami* for his uncle. Ravji admitted that he had no interest in the land. On the 30th March 1895, Ravji's uncle applied to be made a party to the suit, and was thereupon added as second plaintiff. The Subordinate Judge on the merits passed a decree awarding damages to the second plaintiff. The defendant appealed, and in appeal for the first time objected that Ravji (plaintiff No. 1) being only a *benamidar* could not bring the suit in his own name, and that the claim of the second plaintiff, or a large portion of it, was barred by limitation under section 22 of the Limitation Act (XV of 1877). The District Judge reversed the decree on the point of limitation and dismissed the suit. On second appeal to the High Court.

[673] *Held* that the Lower Appellate Court was wrong in dismissing the suit, and that the appeal should be heard on the merits.

*Per* **Parsons, J.**:—That any defect there might have been in the suit as originally filed by the first plaintiff, who was only *benamidar*, had been cured by the Court acting under section 27 of the Civil Procedure Code (Act XIV of 1882).

*Bhola Pershad* v. *Ram Lall*, I. L. R., 24 Cal., 34, and *Subodini Debi* v. *Cumar Ganoda*, I. L. R., 14 Cal., 400, followed.

*Per* **Ranade, J.**:—The first plaintiff as *benami* purchaser had full right to bring the suit. If the true owner holds back, a decree against a *benamidar* owner would bind him as *res judicata*. The present suit was, therefore, properly instituted. The addition of the second plaintiff's name made no difference in the character of the suit. The defendant was estopped by his conduct in the previous proceedings, carried on between him and the first plaintiff for over seven years, from questioning his right to sue. The rights of the parties

* Second Appeal, No. 688 of 1896.

**must, therefore, be dealt with on the footing that the first plaintiff had a right to bring this suit, and that he fully represented in his own person all the rights of the second plaintiff, for whom he acted as agent all along. The joinder of plaintiff No, 2 on 30th March 1895, did not, therefore, deprive plaintiff No. 1 of his rights or create a new period of limitation as held by the lower Court of appeal.** *

SECOND APPEAL from the decision of S. Tagore, District Judge of Satara, reversing the decree of the Subordinate Judge of Islampur.

Suit for damages. The defendant Mahadev and his brother Balkrishna were owners of certain land which Balkrishna mortgaged. Subsequently in execution of a decree against Balkrishna his right, title and interest in the land were sold. The plaintiff Ravji became the purchaser, and then paid off the mortgage-debt and obtained possession of the property. The defendant Mahadev then sued Ravji for his half-share of the land, and obtained a decree for partition on payment of his portion of the mortgage-debt. The defendant paid the amount into Court in September 1889, and partition was effected in September 1890. The plaintiff Ravji objected to the partition as unfair, and a fresh partition was made in October 1892.

On the 31st January 1894, the plaintiff Ravji alone brought this suit against the defendant Mahadev for Rs. 1,695 as damages, alleging that after the first partition was made the defendant on **[674]** 12th September 1891, took possession of the crops of 1890 which had been raised by plaintiff. He complained also of the loss of the crops of 1891, putting the date of that loss as the 12th March 1892, of loss by the defendant's obstructing him in cultivating the land in 1892, and of the loss of certain manure wrongfully taken by the defendant. The dates of these two last mentioned causes of action were the 27th October 1892, and February 1892, respectively.

The defendant answered (*inter alia*) that the plaintiff had no right to claim the standing crops, inasmuch as they were raised after the partition decree was passed; that he never obstructed the plaintiff in the cultivation of his share; and that he had not taken any manure belonging to the plaintiff.

In the course of the proceedings, the defendant ascertained that Ravji (plaintiff No. 1) had purchased the property *benami* for his uncle. He thereupon objected that the plaintiff had no right to sue in his own name. On the 30th March 1895, Ravji's uncle applied to be made a party to the suit, and was made party plaintiff (plaintiff No. 2). Ravji (plaintiff No. 1) admitted that he had no interest in the property.

The Subordinate Judge passed a decree for the second plaintiff, awarding as damages Rs. 702.

The defendant appealed and raised the objection then for the first time that the suit was barred by limitation under section 22 of the Limitation Act (XV of 1877). The Judge allowed the objection and reversed the decree, holding that plaintiff No. 1 being only a *benamidar* could not sue in his own name, and that the second plaintiff was added as a party too late, *viz*., more than three years after the date of the cause of action.

The plaintiffs filed a second appeal.

*Balaji A. Bhagvat*, for the Appellants (Plaintiffs):—Though plaintiff No. 1 admittedly purchased the property *benami* for plaintiff No. 2, still he being the

* [Sec. 316:—When a sale of immoveable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: provided that the decree under which the sale took place was still subsisting at that date.]

Certificate to purchaser of immoveable property.

certified purchaser could maintain the suit—sections 316* and 317 of the Civil Procedure Code (Act XIV of 1882). A *benamidar* can bring a suit in his own name—*Nand Kishore Lal* v. *Ahmad Ata*, I. L. R., 18 All., 69; *Shangara* v. *Krishnan*, I. L. R., 15 Mad., 267. [676] No issue was raised in the first Court as to whether plaintiff No. 1 alone could institute the suit, or as to whether the claim was time-barred. It was only in appeal that the defendant raised the point of limitation. Even supposing that plaintiff No. 1 was not entitled to bring a suit in his own name, still the whole of our claim would not be time-barred. Our claim to damages for the year 1892 was not barred.

Further, no change was effected in the nature of the suit by joining plaintiff No. 2 at a late stage. After joining him the same suit continued at the instance of two plaintiffs instead of one.

*Gangaram B. Rele*, for the Respondent (Defendant): —A *benamidar* is not entitled to bring a suit in his own name— *Kalee Prosunno Bose* v. *Dinonath Bose*, 19 Cal. W. R., 435; *Hari Gobind Adhikari* v. *Akhoy Kumar*, I. L. R., 16 Cal., 364. The suit as it was originally brought was not properly constituted, being brought by plaintiff No. 1 alone. Plaintiff No 2, being the real owner, was the proper person to bring the suit, and when he was joined, the claim was clearly time-barred.

**Parsons, J.**:—The District Judge has reversed the decree of the first Court and dismissed the plaintiffs' suit on the ground that plaintiff No. 1 was a *benami* purchaser for plaintiff No. 2, and plaintiff No. 2 not having been added as a party till the 30th March 1895, the claim by him is time-barred. He has overlooked the fact that for the crops of 1892 the cause of action is said not to have arisen till the 27th October 1892, so that that claim would not be time-barred.

The correctness of the rest of the decision depends upon whether the suit was rightly brought in the name of the first plaintiff. It appears that at the Court sale the right, title and interest of Balkrishna, who had mortgaged the property to the Belages, was purchased by the first plaintiff. He then sued the Belages and obtained a decree for redemption and was placed in possession on payment of the amount of the debt. He was then sued by the present defendant, who obtained a decree for partition on payment of his share of the debt. This suit is the result of what was done in the execution of that decree.

[676] No objection was taken to the suit when it was filed by the plaintiff in January 1894. It was not till the 30th March 1895, that the defendant said the plaintiff had admitted in another suit that the land was not his, and asked that his suit be dismissed, upon which the second plaintiff asked to be joined as a co-plaintiff and was so joined; but the point of limitation was not raised until the case came up to the Court of appeal. The *benami* character of the purchase is admitted by the plaintiffs, so that there is no doubt that the second plaintiff is the owner of the property. Considering, however, that all the former transactions were in the name of the first plaintiff, I should hesitate before deciding that this suit was wrongly filed in his name.

The decisions as to whether a suit can be maintained in the name of the *benamidar* only are somewhat conflicting. In what is perhaps the latest reported case on the point, *Bhola Pershad* v. *Ram Lall*, I. L. R., 24 Cal., 34, it was held that a decree could be made in his favour, unless objection was taken, but I need not examine these cases here, since any defect that there may have been in the suit as originally filed has now been cured by the Court acting under section 27 of the Civil Procedure Code (Act XIV of 1882). In a similar case the Calcutta High Court has ruled that the original suit is continued and that the change of names does not affect the question of limitation. See *Subodini Debi* v. *Cumar Ganoda*, I. L. R., 14 Cal., 400. Adopting that deci-

sion for the purposes of this suit I would reverse the decree of the Lower Appellate Court, and remand the appeal for disposal on the merits. Costs to be costs in the cause.

**Ranade, J.**:—In this case, appellant No. 1 (as sole plaintiff) instituted this suit on 31st January 1894, to recover damages in respect of four items, the causes of action for which were stated to have accrued due on four different dates, for the crops of 1890 on 12th September 1891, for the loss of crops of 1891 on 12th March 1892, for loss by obstruction caused in 1892 on 27th October 1892 and for the value of certain manure in February 1892.

Appellant No. 1 as auction-purchaser of the right, title and interest of one Balkrishna, brother of respondent, had paid off a mortgage-debt due by Balkrishna and respondent, and taken **[677]** possession of certain land. Later on, respondent obtained a decree for a partition of his half-share in the land, and in execution of this decree the first partition took place on 12th October 1890, and this was set right by a second partition effected on 27th October 1892. The respondent (original defendant) did not, in his written statement, question appellant No. 1's right to bring the suit in his own name, but later on he raised the objection, and thereupon appellant No. 2 was made a co-plaintiff on 30th March 1895, on his own application, as being the party really interested in the field, and for whom appellant No. 1 had purchased at the auction, and had carried on the subsequent execution and partition proceedings. The Court of First Instance disposed of the claim on its merits by awarding a part of the damages claimed to appellant No. 2.

In appeal, a preliminary objection under section 22 of the Limitation Act was raised by the present respondent, and the District Judge held that the objection was fatal to the claim of both plaintiffs, as plaintiff No. 1, being only a *benamidar*, could not bring the suit in his own name, and the claim of plaintiff No. 2, his uncle, was made more than three years after the cause of action accrued due, reckoning the date of the institution of the suit to be 31st March 1895, when he was joined as a party. He held that the claim was barred under article 109.

Mr. Bhagvat on behalf of the appellants contended, chiefly on the authority of the ruling in *Nand Kishore Lal* v. *Ahmad Ata*, I. L. R., 18 All., 69, and *Shangara* v. *Krishnan*, I. L. R., 15 Mad., 267, that the lower Court was in error in holding that the appellant No. 1 as *benamidar* could not institute the suit in his own name. It was further contended that even accepting the view of the lower Court on this point to be correct, it was in error in holding that the claim in respect of all the four items was time-barred, seeing that the cause of action for the third item accrued due on 27th October 1892, within three years from the date when appellant No. 2 was made a party.

As regards the first objection, I am of opinion that there was nothing irregular in the institution of the suit by appellant **[678]** No. 1. He was the certified purchaser. He obtained possession by paying off the mortgage-debt. Respondent sued him in the partition proceedings. Even in this suit he did not raise any objection to appellant No. 1's right to sue in his written statement. Under these circumstances appellant No. 1's admission later on that he was only a *benamidar* purchaser for his uncle, who was the real owner, did not affect the right under which he had carried on these proceedings for so many years, in his own name, at least as between him and the respondents. A *benamidar*, who is a certified purchaser, acquires certain rights under his certificate of sale, and among these rights is the right to recover possession of the land, and not even the true owner for whom he made the purchase can under section 317 question his right except in the way pointed out in the latter part

of the section. The object of that section has been judicially declared to be to protect third parties who might deal with the certified purchaser against the claims of the undeclared or secret owner who put forward the certified purchaser as legal owner—*Bodh Sing* v. *Guneschunder Sen*, 19 Cal. W. R., 356, *Mor Joshi* v. *Muhammad Ibrahim*, 10 Bom. H. C. Rep., 344. If the *benamidar* himself raises no objection, and admits the title of the true owner, or the owner obtains a transfer of possession, section 317 does not come in the way of the true owner asserting his right as against third parties or *vice versâ*—*Satapa* v. *Karbasapa*, 7 Bom. H. C. Rep., 21 (A. C. J.), and *Karamuddin* v. *Niamut Fatehma*, I. L. R., 19 Cal., 199, but all this implies the consent of the *benamidar*.

In *Kalee Prosunno Bose* v. *Dinonath Bose*, 19 Cal. W. R., 435, the Calcutta High Court did indeed express an opinion that if the certified purchaser is a *benamidar*, the name of the true owner should be joined as co-plaintiff, and that the omission to do so would justify the dismissal of the suit. In a later case—*Hari Gobind Adhikari* v. *Akhoy Kumar*, I. L. R., 16 Cal., 364,—it went much further, and held that a *benamidar* could not maintain a suit for the recovery of the land bought by him. The Allahabad High Court in its judgment in *Nand Kishore Lal* v. *Ahmad Ata* has, however, carefully examined all the authorities on the subject, and has shown good reasons for its [679] dissent from the Calcutta ruling. The Madras High Court has adopted a similar view in *Shangara* v. *Krishnan*.

We are inclined to agree with the Allahabad and Madras High Courts, and hold that a *benami* certified purchaser can sue in his own name even when the true owner's name is disclosed. In *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 M. I. A., 53, and *Mussumat Buhuns Kowar* v. *Lalla Buhooree Lall*, 14 M. I. A., 496, this whole subject has been examined by their Lordships of the Privy Council, and the theory that *benami* transactions are presumably fraudulent has been shown to be not correct.

This review of the authorities shows clearly that appellant No. 1 as *benami* purchaser had full right to bring the suit. If the true owner holds back, a decree against the *benamidar* owner would bind him as *res judicata*. The present suit was, therefore, properly instituted. The addition of appellant No. 2's name made no difference in the character of the suit. The respondent was estopped by his conduct in the previous proceedings carried on between him and appellant No. 1 for over seven years from questioning his right to sue. The rights of the parties must, therefore, be dealt with on the footing that the appellant No. 1 had a right to bring this suit, and that he fully represented in his own person all the rights of appellant No. 2 for whom he acted as agent all along. The joinder of appellant No. 2 on 30th March 1895, did not, therefore, deprive appellant No. 1 of his rights, or create a new period of limitation as held by the lower Court of appeal.

We may note also that even if the District Judge's view on the first point be accepted as correct, he was plainly in error in rejecting the claim for Rs. 194 which is alleged to have become due on 27th October 1892, and part of which was allowed by the Court of First Instance.

For these reasons, we reverse the decree of the lower Court and remand the case for a decision on the merits.

*Decree reversed and case remanded.*

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**NOTES.**

[1. As regards the effect of the addition of the real owner on limitation, see also (1897) 22 Bom., 820; (1909) 20 Cal., 675; (1903) 28 Bom., 11; (1910) 8 I.C., 890; (1918) 19 C.L.J., 5.

2. As regards the right of the benamidar to bring a suit by himself, see also (1897) 22 Bom., 820; (1900) 25 Bom., 438; (1907) 30 Mad., 245; (1910) 8 M. L. T., 151; 377; (1902) 30 Cal., 265: (1910) 12 C. L. J., 537; (1899) 21 All., 380; (1899) 13 C. P. L. R., 33.]

## [680] APPELLATE CIVIL.

*The 2nd March, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Chintaman Bhat ...........(Original Plaintiff) Appellant

*versus*

Shrinivas Bhat............(Original Defendant) Respondent.*

*Oaths Act (X of 1873)—Refusal to take an oath—Effect of such refusal—Estoppel—Evidence.*

The plaintiff sued to recover certain land from eight defendants, alleging it to be his exclusive property. One of the defendants pleaded that he was a co-owner with the plaintiff, who had hitherto paid him his share of the rent. In the course of the case he offered to withdraw his opposition to the plaintiff's claim if the plaintiff would swear a binding oath that his (the defendant's) allegations were false and that the plaintiff had held exclusive possession of the property. The plaintiff refused to take the proposed oath. The Court, however, attached no importance to the refusal, and on the evidence passed a decree for the plaintiff. The defendant appealed and in the appellate Court the plaintiff's son on behalf of his father refused the oath, while on the other hand the defendant said he was willing, if required, to swear to the truth of his case. The Judge was of opinion that the plaintiff's refusal to take the proposed oath and the defendant's readiness to take it was, under the circumstances of the case, conclusive, and disregarding the recorded evidence he reversed the decree of the lower Court and allowed the defendant's claim.

*Held* (reversing the appellate decree and restoring the decree of the lower Court) that the appellate Court was wrong in deciding the case on the ground of the plaintiff's refusal to take the proposed oath. That refusal did not conclusively prove the falsity of the plaintiff's claim. It was merely a piece of conduct which was evidence to be considered in the case together with the other evidence. In this case there was abundant other evidence all of which was in favour of the plaintiff, and his refusal to take the oath did not necessarily constitute a sufficient reason to set aside that evidence.

A party who makes an oath as prescribed by his adversary confers by so doing on his statement the character of conclusive proof, but his mere refusal to make the oath does not under the terms of the Oaths Act (X of 1873) justify any legal presumption against him. Such refusal is to be considered merely as a piece of conduct to be considered along with the other evidence.

SECOND APPEAL from the decision of F.C.O. Beaman, District Judge of Belgaum.

The plaintiff sued to recover possession of certain land, alleging that the defendants were his tenants and denied his title. Defendant No. 8, who alone resisted the plaintiff's claim, pleaded [681] that he was a co-sharer with the plaintiff and that they owned the land in equal shares.

In the Court of First Instance the defendant proposed that, if the plaintiff would take an oath that the defence was false and that he (the plaintiff) had been in exclusive possession and enjoyment of the land in dispute, he would withdraw from the case.

The plaintiff refused to take the oath as proposed.

The Subordinate Judge attached no importance to this refusal by the plaintiff to take the proposed oath, and decided, on the evidence before him, that the plaintiff was the sole owner of the land in dispute, and passed a decree in his favour.

On appeal the District Judge, reversed this decision, holding that the plaintiff's refusal to take the oath rendered it impossible to resist the conviction

* S. A. No. 767 of 1896.

that the truth lay on the side of the defendant. On this ground alone the District Judge reversed the decree of the lower Court and rejected the plaintiff's claim.

The following is an extract from the judgment:—

"The defendant's contention is that although the land was entered in the plaintiff's name, that was because it formed a part of the undivided estate (another part outlying in other villages) and that notwithstanding the plaintiff always paid the defendant his share of the rent pursuant to the understanding evidenced in the documents, fraudulent or otherwise, of 1858. The defendant went further and agreed that, if the plaintiff would swear a binding oath that his presentment of the case was false, he (the plaintiff) had had exclusive possession and had never paid to him (the defendant) his half-share of the *phala*, he (the defendant) would at once withdraw from the case. The plaintiff refused to take the oath on the ground that he was an old man.

"Now it is evident, on the pleadings and record, that, apart from this business of the oath, the evidence is all in favour of the plaintiff. The defendant had to rely on the solitary statement of one witness to prove the payment once of his share eight years ago.

* * * * * * *

"But I am greatly inclined to decide this case by the ordeal. There is nothing in the Oaths Act, 1873, which enjoins upon a Court the duty of presuming adversely to a plaintiff or defendant who refuses to take an oath tendered under its provisions. It was once held (*Issen Meah* v. *Kalaram*, 2 Cal. L. R., 476, *per* MITTER, J.) that a Court was well justified in doing so, and in practically deciding the case on the presumption so drawn. MITTER, J., is of course a particularly valu-[682]able authority on such a point; he is especially qualified to guage the working of a native conscience and apportion the real value to be attached to such a refusal. But in this case more happened. At the hearing I asked the plaintiff to come forward and say why he would not take the oath if his allegations were true. He is an old man and was represented by his son, a priest of apparently about 45. This man was instructing Mr. Chhatre and was the active mover in the case. He refused on behalf of his father to take the oath, though at first he was partly disposed to take it himself. Not being a party, however, that would not do. He then in his turn said that if the defendant would take a similar oath of the truth of his case, he for his part would not oppose the appeal further. This the defendant at once agreed to do. Now I doubt whether such a tender could be made by any one but the actual party, and Mr. Chhatre very rightly declined to ratify the proposal without instructions from his client. Yet the mind of the Court was inevitably influenced by this episode in favour of the defendant (appellant). The point at issue is very simple, and it is one on which while all the evidence might well be (as it is) on the plaintiff's side, there might be a true explanation such as the defendant gives. When, then, such explanation being difficult of proof the defendant comes forward and stakes his whole interest on the plaintiff's oath that his apparently true evidence is really true, and the plaintiff refuses to take that oath; when, in turn, the plaintiff's side tenders a like challenge to the defendant which is promptly accepted, it is impossible to avoid the conviction that truth lies on the side of the defendant. It is all very well to say, as was faintly urged here, that a defendant ought not to have the option of imposing this kind of unpleasant ordeal on a plaintiff; that respectable natives have a great dislike to taking any sort of solemn oath of the sort, and so forth. But it has to be remembered that in tendering an oath under the Act the party so tendering stakes his whole case absolutely on his confidence in his opponent's veracity under a peculiarly solemn sanction, that if the oath be taken it concludes the case against the party tendering it, while if it be refused, the law says nothing about the view which the Judge is to found on the episode: so that it is not an ordeal which could be lightly and generally proffered. I have no doubt at all, from my observation of the demeanor of the parties while the point was under discussion, that the defendant was in the right, and as, after all, the main function of a Court is to see justice done, though the approaches to that result may be a little irregular, I shall venture here to answer the issue in defendant's favour, and hold that he is entitled to one-half he claims."

Against this decision plaintiff preferred a second appeal to the High Court.

*B. A. Bhagvat*, for Appellant.

*N. V. Gokhale*, for Respondent.

[683] **Parsons, J.** :—The point which I have to consider is, how far the Judge of the Lower Appellate Court was justified in disregarding the evidence on the record and deciding the case on a presumption drawn from the refusal of the plaintiff to take a solemn oath under the Oaths Act of 1873 that defendant's presentment of the case was false. I assume that there was such a refusal, because although the statement in the Exhibit 39 is signed by plaintiff's pleader, I take it that he had asked his client and was stating to the Court what his client had said. The refusal, however, was made in the Court of First Instance, and the Judge of that Court said that under the circumstances of the case he attached no importance to the refusal. There was no refusal by the plaintiff himself in the appellate Court; his son only was present there, and it would have been much better if the District Judge had caused the plaintiff himself to be asked whether he would take an oath or abide by the result of an oath taken by the defendant, before he decided the appeal in the way he has done.

So far as the Oaths Act itself deals with the subject, no presumption one way or the other is directed to be drawn. The refusal to take an oath, then, can only be a piece of conduct, which is evidence to be considered in the case. I do not know, and the Judge does not tell me, why in this particular case the refusal should be considered as conclusive evidence of the falseness of the claim. In order, therefore, to support his decision I should have to hold that in every case in which a plaintiff is called on to take an oath, and refuses to do so, judgment is to be passed against him. I am satisfied that this would not be right. There are many good reasons why a man should refuse to solemnly swear to the truth even of a true claim. It is in the case of a false defence that a defendant would most readily as a last resource risk everything on the chance of an oath being taken by the plaintiff I think that, at the most, a refusal can only be considered along with other evidence. Where there is evidence on both sides, and a doubt arises as to which is the true case, then a refusal might well be taken into evidence to decide the point. Such was the case in *Issen Meah* v. *Kalaram Chunder* [684] *Naw*, 2 C. L. R., 476. I do not think that a refusal can be held to work as an estoppel, so as to conclusively prove the falseness of the claim made by the person refusing.

As the Judge finds that the evidence is all in favour of the plaintiff, and that the defendant would not resist the claim otherwise than by what the Judge calls the ordeal, and as I think he has wrongly decided the case by the ordeal, I must reverse his decree and restore that of the Court of First Instance with costs in both Courts of appeal on the defendant.

**Ranade, J.** :—The contest in this case lies between the appellant-plaintiff, who claims the land in dispute to belong exclusively to himself, and the respondent (original defendant No. 8), who contends that he and the appellant are entitled to share it equally as reversionary heirs of Shankar after his widow Umabai's death. The undisputed facts are, that these two parties were reversionary heirs, and had, in 1858, agreed to keep this land joint, when they partitioned other property. In 1864, the appellant took a kabulayat of the land from the tenants in his own name, and in 1866, after Umabai's death, the land was entered in the appellant's name, and all the rent-notes from 1867 to 1893 were taken by him. The respondent contended that the appellant during all this time paid a portion of the rent to him, but the Court of First Instance held that these alleged payments were not proved. Respondent then offered to give up

his contention, if appellant denied on solemn oath that he ever paid a portion of the rent to respondent. The appellant refused to take the oath, but the Court of First Instance attached no importance to this refusal, and awarded the appellant-plaintiff's claim.

In appeal, the District Judge, while admitting that, apart from the oath incident, the evidence was all in favour of the present appellant, held that the appellant's refusal to take the oath prescribed satisfied him that the present respondent was in the right, and he accordingly allowed respondent the half-share claimed by him.

The point we have to consider is, whether the District Judge was justified, by the terms of the Oaths Act, in inferring from [685] the appellant's refusal to take the oath, that he had been paying his half-share of the rent to the respondent, when admittedly all the evidence on the record supported appellant's claim. Section 9 of the Act provides that, if any party to a proceeding offers to be bound by any special oath under section 8, if such oath be made by the other party, the Court may ask such other party or cause him to be asked if he will make the oath. If such other party agrees to make the oath, the oath may be administered to him (section 10). The evidence so given shall, as against the party who offered to be bound by the oath, be *conclusive proof* of the matter stated (section 11). Finally, if the party refuses to make the oath, the Court shall record as part of the proceedings the nature of the oath, and the fact of refusal with reasons for such refusal (section 12).

It will be seen from these sections that, while a party, who makes an oath as prescribed by his adversary, confers by so doing on his statement the character of conclusive proof, his mere refusal to make the oath does not, under the terms of the Act, justify any legal presumption against him. The refusal is to be considered apparently as a piece of conduct—evidence in the case, to be judged of along with other evidence. Of course where, as in the case reported in *Issen Meah* v. *Kaluram Chunder Naw*, 2 C. L. R., 476, there is no such other evidence, the refusal by itself may justify the Court in presuming that his case was false. But where, as in the present case, there is abundant evidence all in favour of the party refusing to make the oath, the mere refusal will not necessarily constitute a sufficient reason to set aside that evidence. As ruled in *Muhammad Zahur* v. *Cheda Lal*, I. L. R., 14 All., 141, following in this respect an earlier ruling in *Vasudeva* v. *Naraina Pai*, I. L. R., 2 Mad., 356, the Oaths Act does not constrain the Court to pass a decision in favour of a particular party. This is the case, even if the party make the oath prescribed. His statement on such oath will, of course, bind the other party *pro tanto*, but it does not prevent the Court from exercising its mind judicially in deciding the whole case. A party may well refuse to take the oath prescribed for other reasons than his consciousness that his case is [686] false. He may, as a respectable man, dislike the odium of winning his case on the strength of the oath ordeal, instead of on the strength of his evidence. This seems to have been the case with the present appellant. If the whole evidence was in his favour, he might very well refuse to take the ordeal. The proceedings in the District Court do not even show clearly that appellant was not, like the respondent, ready to stake the case on his adversary's oath. On the whole, we feel satisfied that the District Judge was bound, under the circumstances, to dispose of the case solely on the evidence before him, irrespective of the oath incident. We accordingly reverse the decree and restore the decree of the Court of First Instance. All costs on respondent.

*Decree reversed.*

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**NOTES.**

[ See, however, (1911) 10 I.C., (472 Nagpur) ; also (1907) 31 Mad., 1 ; (1907), 2 M.L.T., 327.]

[22 Bom. 686]

## APPELLATE CIVIL.

*The 3rd March, 1897.*[*]

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Ramchandra Vithuram..........(Original Plaintiff) Appellant

*versus*

Jairam and others...........(Original Defendants) Respondents.

*Mortgage—Mortgage-debt payable by instalments—Money decree obtained by mortgagee for two instalments—Execution—Sale of mortgaged property in execution of money decree for such instalments without notice by mortgagee of lien for future instalments—Property sold free of incumbrances—Civil Procedure Code (Act XIV of 1882), Secs. 237 and 287.*

The effect of sections 237 and 287 of the Civil Procedure Code (Act XIV of 1882) plainly is to impose a duty on the person applying for execution to disclose to the Court his own lien (which he must know of) in his application for sale and on the Court the duty of specifying the same in the proclamation

Where, therefore, in execution of a simple money decree obtained for some of the instalments due on his mortgage-bond a mortgagee brought to sale the property which he held in mortgage, but in his application for execution did not mention his lien on the property for the instalments that were still to fall due,

*Held*, that the purchaser, if he supposed that he was purchasing the full proprietary title, purchased the property free of the mortgagee's lien.

*Agarchand* v. *Rakhma*, I. L. R., 12 Bom, 678; *Khemraj* v. *Lingayya*, I.L.R., 5 Bom., 2; *Sheshgiri* v. *Salvador Vas*, I L.R., 5 Bom. 5; and *Dhondo* v. *Raoji*. I. L. R., 20 Bom., 290, referred to.

[687] SECOND APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Dhulia with appellate powers, confirming the decree of Rao Saheb R. T. Kirtane, Subordinate Judge of Erandol, in the Khandesh District.

Suit by a mortgagee to recover instalments remaining due on his mortgage.

On the 25th April 1885, the father of defendants Nos. 1 and 2 mortgaged the property in question to the plaintiff for Rs. 1,000 which was to be repayable in five instalments.

The first instalment was paid by a bond executed to the plaintiff by his debtors. After the second and third instalments fell due the plaintiff brought a suit for their amount, asking in his plaint that the property should continue liable for the instalments that were still to fall due. The Court, however, passed a simple money decree in his favour for the amount sued for.

Having obtained this decree the plaintiff applied for execution by sale of the mortgaged property. In his application he made no mention of his lien upon it for the fourth and fifth instalments of his debt. The execution sale took place, and the right, title and interest of defendants Nos. 1 and 2 was sold to one Dodhu, whose widow afterwards sold it to defendants Nos. 3 and 4. The certificate of sale obtained by Dodhu described the subject-matter of the sale as the right, title and interest of the defendants Nos. 1 and 2 in the property.

[*] Second Appeal, No. 808 of 1896.

In 1895 the plaintiff filed this suit to recover the fourth and fifth instalments due under his mortgage from the defendants Nos. 1 and 2 personally and by sale of the mortgaged property in the hands of defendants Nos. 3 and 4.

Defendants Nos. 1 and 2 admitted the claim.

Defendants Nos. 3 and 4 contended that the property having been sold in execution, and no notice having been then given by the plaintiff of his mortgage, it was sold free of the incumbrance and was no longer liable to the plaintiff's claim.

The Subordinate Judge passed a personal decree only against defendants Nos. 1 and 2 for the fifth instalment, being of opinion that the fourth was barred by limitation, having fallen due on [688] the 8th November 1888. He dismissed the suit against defendants Nos. 3 and 4, holding that plaintiff not having given notice of his mortgage at the execution sale the property was free of the incumbrance. On appeal the Judge confirmed the decree.

The plaintiff preferred a second appeal.

*Ratanji R. Desai*, for the Appellant (Plaintiff):—The lower Court was wrong in holding that the mortgaged land was no longer liable, because at the auction sale we did not notify our lien in respect of future instalments. No such duty is imposed upon us by the Civil Procedure Code (Act XIV of 1882) —*Dhondo* v. *Raoji*, I. L. R., 20 Bom. 290. The mortgage was registered and all subsequent purchasers took the property with notice of the mortgage and, therefore, of the unpaid instalments.

The Judge erred in not allowing us to recover both the instalments. They were a charge on the land. Article 132, Schedule II, of the Limitation Act applies, and the whole of our claim was in time—*Lallubhai* v. *Naran*, I. L. R., 6 Bom., 719.

*Sadashiv R. Bakhle*, for Respondents (Defendants):—The point of limitation depends upon the view which would be taken as to whether the land continued to be charged. If it is not, the limitation would not be twelve years under article 132, but six years. Article 132 applies only when money is sought to be recovered out of the property charged with it—*Ramdin* v. *Kalka Pershad*, L. R., 12 I. App., 12; *Kameswar* v. *Rajkumari Ruttun Koer*, L. R., 19 I. App., 234.

The plaintiff cannot recover the money out of the land by reason of his failure to notify his lien on the property when he brought it to sale in execution of his own decree. The ruling in *Dhondo* v. *Raoji*, I. L. R., 20 Bom., 290, can be distinguished. There it seems it was conceded that if the sale had been in execution of a decree on the mortgage, the decision would have been otherwise. Here the sale was in execution of plaintiff's own decree on the mortgage for two previous instalments. Under section 287 of the Civil Procedure Code the plaintiff was bound to specify the incum-[689] brance to which the property was subject if he knew of it. Much more was his duty to do so when he brought the property to sale for part of his mortgage-debt—*Tinnappa* v. *Murugappa*, I. L.R., 7 Mad., 107; *Agarchand* v. *Rakhma*, I. L. R., 12 Bom., 678. Owing to the plaintiff's omission to disclose his lien at the execution sale he is now estopped from claiming out of the mortgaged property. At the sale both the interest of the mortgagor and mortgagee passed to us—*Khevraj* v. *Lingaya*, I. L. R., 5 Bom., 2; *Sheshgiri* v. *Salvador Vas*, I. L. R., 5 Bom., 5.

If the plaintiff intended to sell only a limited interest in the property he should have stated it, and not having done so we purchased the whole interest not subject to any future instalments. We paid full value for the purchase as

found by the Judge. We would not have done so if we had known that the property was subject to any charges.

*Ratanji R. Desai*, in reply:—The Judge had not found expressly as to whether the auction-purchaser was led to pay a full value in consequence of our omission to proclaim our lien. Nor is it a fact that full value was paid, for though originally the property was sold for Rs. 300, it was immediately afterwards mortgaged for Rs. 1,000. The value, therefore, must be more than Rs. 300.

**Farran, C. J.** :—This appeal raises a question upon which the rulings of our Court do not appear to be altogether consistent. On the 25th April 1885, Jairam, the father of Shamji (defendant No. 1), and the defendant No. 2, Gangaram, by a registered deed mortgaged certain property to the plaintiff to secure payment of the sum of Rs. 1,000 payable by five instalments. For the first instalment the plaintiff accepted a bond from his debtors. After the second and third instalments fell due he filed a suit to recover their amount, asking by his plaint that the mortgaged property should continue liable for the instalments that were still to fall due. The Court, however, passed a simple money decree in his favour, considering, it must be presumed, that the plaintiff by a properly framed application could work out the decree in the manner which he desired in execution.

**[690]** The plaintiff applied (Exhibit 16) for execution of the decree by sale of the property which he held in mortgage, but did not therein mention his lien on the property for the fourth and fifth instalments. The right, title and interest of the defendants in the property in question was accordingly put up for sale and purchased by one Dodhu for Rs. 300. Dodhu's widow subsequently sold the property to the defendants Nos. 3 and 4. The certificate of sale (Exhibit 12) described the subject-matter of the sale as the right, title and interest of the defendants in the property.

The lower Court have found that Rs. 300 was the full value of the property, as the plaintiff to whom it had originally belonged had sold it for that sum to Jairam and Gangaram. This does not appear to us to be a satisfactory mode of ascertaining its value. The plaintiff advanced Rs. 1,000 on the security of the property, which points to its value as being, at the date of the mortgage, considerably more than Rs. 300. The basis which the lower Courts adopted to ascertain the value of the property at the date of the Court's sale, seems to us to be mere guess work, and if it was of importance to ascertain the value, was not one which should have been so readily assumed.

The plaintiff in 1895 filed the present suit to recover the fourth and fifth instalments due under his mortgage from the defendants Nos. 1 and 2 personally and by the sale of the mortgaged premises in the hands of the defendants Nos. 3 and 4. This claim as against defendants Nos. 3 and 4 has been disallowed in both the lower Courts, but a personal decree has been passed against defendants Nos. 1 and 2 for the fifth instalment only, the appellate Court holding that the claim for the fourth instalment was barred by limitation. The latter ruling is plainly correct under the decision of the Privy Council in *Ramdin* v. *Kalka Pershad*, L. R., 12 Ind. App., 12, and *Kameswar* v. *Rajkumari*, L. R., 19 Ind. App., 234. The fourth instalment became due on the 8th November 1888, while the suit was not brought until 1895, more than six years after that date.

As to the plaintiff's claim against the mortgaged property, it has been held by the Lower Appellate Court that, inasmuch as the plaintiff had in his previous suit asked for a declaration of his **[691]** lien for the remaining instalments, which prayer the Court did not grant, he was bound to notify his

lien in the execution proceedings, especially when he saw that the purchaser was paying the full value of the property.

In *Dhondo* v. *Raoji*, I. L. R., 20 Bom., 290, it was held that when the holder of a registered mortgage, having obtained a money decree upon a separate claim against his mortgagor, without notifying his lien put up the mortgaged premises for sale, and the same were purchased by a third person without notice of the plaintiff's mortgage, the mortgagee could still, except in the case of a fraudulent concealment, enforce his mortgage against the property in the hands of the *bonâ fide* purchaser without notice. The decision is based upon the theory that the purchaser had notice of the mortgage by reason of its being registered, and professes to follow the rulings in P. J., 1877, p. 4 (*Motiram* v. *Hari*) and P. J., 1877, p. 83 (*Nanabhat* v. *Lakshman*). In these cases the sales took place under the old Civil Procedure Code of 1859. The present Code, section 237, contains the following provision :—

" Whenever an application is made for the attachment of any immoveable property belonging to the judgment-debtor, it shall contain * * * a specification of the judgment-debtor's interest therein to the best of the belief of the applicant, and so far as he has been able to ascertain the same."

This the applicant is to verify. Section 287 provides that on a sale by the Court of immoveable property by auction, the proclamation shall specify any incumbrance to which the property is liable. The effect of these two sections plainly is to impose a duty on the applicant to disclose to the Court his own lien (which he must know of) in his application for sale, and on the Court the duty of specifying the same in the proclamation. This was pointed out in the judgment in *Tinnappa* v. *Murugappa*, I. L. R., 7 Mad., 107. The old Code did not expressly impose any such obligation on the judgment-creditor. It may, therefore, be doubted whether the decisions above quoted from the P. J. of 1877, really support the decision in *Dhondo* v. *Raoji*, and whether the distinction drawn between the latter case and *Agarchand* v. *Rakhma*, I. L. R., 12 Bom., 678, is [692] not too fine. If an execution-creditor refrains from in any manner notifying that he holds a lien over the property which he brings to sale, it matters little to the purchaser, who does not know of the lien, what the motives of the execution-creditor are in refraining to notify that which he is bound in law to disclose. Fraud is not a necessary ingredient in raising an estoppel. It is not, however, necessary for us to do more than express our doubt as to the soundness of the distinction between the two cases, for it is admitted in *Dhondo* v. *Raoji* (*supra*), that the ruling does not apply to a decree obtained on a mortgage. Upon a Court's sale held at the instance of a mortgagee under a decree upon his mortgage, it has been held that both the interest of the mortgagor and of the mortgagee passes, though the right, title and interest of the mortgagor only is ostensibly sold— *Khevraj* v. *Lingaya*, I. L. R., 5 Bom., 2, and *Sheshgiri* v. *Salvador Vas*, I. L. R, 5 Bom., 5. This is of course only when the sale is not expressly limited to the lesser interest.

In the present case, it is not expressly found by the appellate Court that the purchaser Dodhu supposed that he was purchasing the full proprietary title in the property which he bought at the Court sale, but there is a finding to that effect by the Court of First Instance, and the appellate Court does not dissent from that view and, we think, intends to adopt it. If that be so, we think that under the ruling in *Agarchand* v. *Rakhma* (*supra*) as well as under the decisions above quoted from the 5th Vol. of the Bombay Series of the I. L. Reports, the decree of the Lower Appellate Court is correct. The purchaser, if he knew of the mortgage, was entitled to assume, unless notified to the contrary, that the plaintiff was selling the whole interest in the mortgaged property, and if he

did not know of the mortgage, that the plaintiff at all events had no lien over the property which he was bringing to sale, and was not, under the provisions of the present Code, bound to search the register to ascertain whether the plaintiff held a lien over the property or not. Decree confirmed with costs.

*Decree confirmed with costs.*

NOTES.

[See also (1898) 23 Bom., 119; (1911) 14 Bom. L R., 254; (1909) 1 I.C., 952 (Sindh).]

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## [693] ORIGINAL CIVIL.

## FULL BENCH.

*The 4th March, 1898.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE CANDY, AND MR. JUSTICE B. TYABJI

Heera Nema and others.......... Plaintiffs

*versus*

Pestonji Dossabhoy and another............Defendants.*

*Civil Procedure Code (Act XIV of 1882), Secs. 257 A, 258 - Settlement of decree without sanction by giving promissory note payable on demand—Note renewed from time to time —Suit on note —Note void under section.*

On the 4th December 1889, the plaintiffs obtained a decree against the defendants for Rs. 941. The decree was made payable in eight days, *i.e.*, on or before the 12th December 1889. On the 9th December 1889, *i.e.*, before the decree was capable of execution, it was settled by the defendants' paying Rs. 600 in cash and passing a promissory note for Rs. 341 payable on demand and carrying interest at 3 per cent. per mensem The decree was satisfied and handed over to defendants, and plaintiffs also endorsed the summons to that effect. That compromise was not sanctioned by the Court.

On the 9th November 1892, and again on the 4th November 1895, the plaintiffs made up their account with defendants and obtained new promissory notes from them or the amount found due in renewal of the note passed in 1889. The present suit was brought on the note passed on the 4th November 1895, which was for Rs. 815, and carried interest at 3 per cent. per mensem.

*Held* that the note sued on fell within the purview of section 257A of the Civil Procedure Code (Act XIV of 1882) and was void and unenforceable under the provisions of that section.

The consideration for the note given in 1889 was the agreement of the plaintiffs to accept it in satisfaction of the decretal balance due to them. If that agreement was void the note given for the void consideration was void also. The note was not, in fact, the agreement, but was given in performance of the agreement.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act, XV of 1882, by C. W. CHITTY, Chief Judge:—

* Small Cause Court Reference, No. 19624 of 1897.

"This was a suit brought by the plaintiffs to recover a sum of Rs. 1,418-1-7 representing the principal moneys and interest due on a promissory note for Rs. 815, dated the 4th November 1895, and executed by both the defendants.

[694] "2. The facts of the case which are not in dispute, together with the reasons for my decision, are fully set out in my judgment, a copy of which is annexed, and to which for brevity's sake I crave leave to refer.

"The following is the statement of facts referred to :—

"In 1889 the present plaintiff and one Luckna Sada, now deceased, filed a suit (No. 24103 of 1889) against the present defendants for Rs. 821-6-4.

"That suit was based on two promissory notes for Rs. 100 each, the balance of the claim being for interest. The defendants were served but did not appear, and on the 4th December 1889, the plaintiffs in that suit obtained a decree against both the defendants for the full amount and the Court costs, and for a further sum of Rs. 51, professional costs against the first defendant.

"The decree was made payable by the first defendant in eight days, *i.e.*, on or before the 12th December 1889, and execution was stayed against the second defendant for one month, with liberty to him to come in and apply for instalments.

"On the 9th December 1889, *i.e.*, before the decree was capable of execution, it was settled by both the defendants by a payment of Rs. 600 in cash and the passing of a promissory note for Rs. 341 payable on demand and carrying interest at 3 per cent. per mensem. The decree was satisfied and handed over to the defendants, and plaintiffs also made an endorsement on the defendants' summons to the same effect. That compromise was not sanctioned by the Court.

"On the 9th November 1892, shortly before the promissory note for Rs. 341 would become barred by limitation, the plaintiffs made up their account with the defendants and obtained from them a promissory note for Rs. 525 in renewal of the former note for Rs. 341 with interest at 1½ per cent. per mensem in addition ; that note also bore interest at 3 per cent. per mensem. On the 4th November 1895, a similar procedure was adopted, and the promissory note in question in this suit was passed for Rs. 815, the rate of interest being the same.

"The sole question in this suit is whether this promissory note is not void and unenforceable by reason of the provisions of section 257A of the Code of Civil Procedure.

"3. I came to the conclusion, though not without doubt, that the promissory note was governed by the provisions of section 257A of the Code of Civil Procedure. As to the interpretation of that section, I considered myself bound by authority, and dismissed the suit, and certified Rs. 51 professional costs of the defendants' counsel, making my judgment contingent on the opinion of the High Court. If that decision is wrong, there [695] would be a verdict for the plaintiffs for the full amount claimed and costs, and Rs. 51 professional costs.

"4. The questions for their Lordships' consideration are :

"(i) Whether the promissory note in question falls within the purview of section 257A of the Code of Civil Procedure ?

"(ii) If it does, whether it is void and unenforceable by reason of the provisions of that section ?

"5. The plaintiffs have deposited in Court Rs. 51 for the professional costs and Rs. 50 to meet the costs of reference.

"6 I may add that, since my judgment was delivered, the December number of the Bombay Law Reports has been published, at p. 819 of which are some remarks of their Lordships on the section in question, which seem to support the view that the interpretation of its provisions may have to be revised by a Full Bench. See *Krishna* v. *Vasudev* (I. L. R., 21 Bom., 808)."

*Lang* (Advocate General) for Plaintiffs:—Section 257A of the Civil Procedure Code (Act XIV of 1882) only applies to applications to execute the decree and does not apply to compromises—*Juji* v. *Annai*, I. L. R., 17 Mad., 382; *Sellamayyan* v. *Muthan*, I. L. R., 12 Mad., 61; *Ramghulam* v. *Janki Rai*, I. L. R., 7 All., 124; *Haji Abdul Rahiman* v. *Khoja Khâki Aruth*, I. L. R., 11 Bom., 6.

This is not an agreement for satisfaction of a judgment-debt. It is itself the satisfaction of the debt. The judgment-debt is gone—*Madhavrav* v *Chilu*, P. J., 1881, p. 315; *Ganesh* v. *Abdullabeg*, I. L. R., 8 Bom., 538; *Davlatsing* v. *Pandu*, I. L. R., 9 Bom., 176; *Vishnu* v. *Hur Patel*, I. L. R., 12 Bom., 499; *Swamirao* v. *Kashinath*, I. L. R., 15 Bom., 419; *Bank of Bengal* v. *Vyabhoy Gangji*, I. L. R., 16 Bom., 618; *Krishna* v. *Vasudev*, I. L. R., 21 Bom., 808; *Dan Bahadur* v. *Anandi Prasad*, I. L. R., 18 All., 435; *Dalu* v. *Palakdhari*, I. L. R., 18 All., 479. It is an agreement *in* satisfaction of the judgment-debt and not *for* the satisfaction of such debt. The latter contemplates a further transaction.

[696] He relied on *Hukum Chand* v. *Taharunnessa Bibi*, I. L. R., 16 Cal., 504; *Jhabar* v. *Modan Sonahar*, I. L. R., 11 Cal., 671; *Gunamani* v. *Prankishori*, 5 Beng. L. R., (F.B.), 223; *Thakoor Dyal* v. *Sarju*, I. L. R., 20 Cal., 22.

*Scott*, for Defendants, cited *Dym* v. *Campbell*, 25 L. J. (Q.B.), 277; *Wallis* v. *Littell*, 11 C. B. (N.S.), 369; *Bank of Bengal* v. *Vyabhoy Gangji*, I. L. R., 16 Bom., 618 at p. 625. The cases of *Ramghulam* v. *Janki Bai*, I. L. R., 7 All., 124; and *Gunamani* v. *Prankishori*, 5 Beng. L. R. (F.B.), 223, are cases on old section 258. See *Haji Abdul* v. *Khoja Khaki*, I. L. R., 11 Bom., 6 at p. 35. The scheme of the Code cannot override the plain words of the sections.

**Farran, C.J.**:—The first question which we have to consider upon this reference is that suggested by the argument of the Advocate General, *viz.*, whether the promissory note for Rs. 341 payable on demand with interest at 3 per cent. per mensem which the plaintiffs make the basis of their claim is an agreement for the satisfaction of the judgment-debt due to the plaintiffs within the meaning of section 257A of the Civil Procedure Code (Act XIV of 1882). This is not an exact way of stating what is the true question, but it sufficiently explains, I think, the contention of the Advocate General.

On the 9th December 1889, the plaintiffs held a decree against the defendants for Rs. 934-8-0, and Rs. 6-8-0 were payable to them for expenses in connection with the decree, making a total of Rs. 941. The parties met together. The defendants paid Rs. 600 in cash, and for the balance agreed to give the plaintiffs their promissory note for Rs. 341 payable with interest. That indisputably was an agreement for the satisfaction of the decree, and, if the contention of the defendants on the main point is correct, it was a void agreement. In pursuance of that agreement, *ex hypothesi* void, the defendants gave their promissory note to the plaintiffs and the plaintiffs thereupon treated the decree as satisfied, handed it over to the defendants, and endorsed the summons to that effect. The consideration for the promissory note was the agreement of the plaintiffs to accept it in satisfaction [697] of the decree. The plaintiffs have performed their part of the agreement, but none the less on that account is the consideration for the note the agreement of the plaintiffs to accept it in satisfaction of the decretal balance, and if that agreement is void, the promissory note given for a void consideration is itself void. This is, however, merely a verbal disquisition in answer to a verbal argument. Every adjustment of a decree presupposes an agreement to adjust it, and if the agreement to adjust the decree is void, the adjustment, in so far as it is executory on either side, cannot be enforced. I can see no essential difference between an agreement *for* the satisfaction of a judgment-debt and an agreement *in*

satisfaction of the same. In numerous cases decided upon the section, the agreements ruled to be void were similar to the agreement in the present case, and this objection was never suggested. The concluding clause of the section makes the matter, I think, quite clear. In this view it is unnecessary to consider the argument of Mr. Scott, that the agreement was also an agreement to give time for the satisfaction of the judgment-debt. The promissory note was not, in fact, the agreement, but was given in pursuance of the agreement.

Upon the main question discussed I am of opinion that the previous rulings of this Court upon the effect of section 257A are correct and should be followed. I wish to express my full concurrence in the view forcibly expressed by the learned Chief Justice of Allahabad in the following passage: "Where the Legislature has thought fit to declare an agreement void, unless the Legislature expressly limits the application of its enactment, Courts are bound to give effect to it. There is no such limitation to be found in section 257 A" — *Dan Bahadur Singh* v. *Anandi Prasad*, I. L. R., 18 All., 435 at p. 436. After considering the reason relied upon in the decision of the Calcutta and Madras High Courts for limiting the operation of section 257A to the Courts executing the decree I have come to the conclusion that it is not entitled to the weight which the learned Judges who took part in those decisions attribute to it. The Legislature evidently, I think, judging from the section which they framed, considered that the power of executing a **[698]** decree placed the holder of it in a position to exercise undue pressure over the judgment-debtor and enabled him to obtain terms too favourable to himself from the latter, whose interests needed protection at the hands of the Court which passed the decree. Therefore, it was resolved to enact the law now contained in section 257A of the Civil Procedure Code (Act XIV of 1882). The question would naturally then present itself: In what enactment should such a provision of law find place? Not, I think, in the Code of substantive law relating to contracts. That Code deals generally with void agreements, but a provision that a particular agreement shall be void unless approved by a Court would naturally find its place in an enactment prescribing the procedure of the Court rather than in an Act dealing with general principles. At all events, it is not, I think, out of place in such an enactment. The argument based upon its position in a Procedure Code has, therefore, I think no substantial force. Mr. Scott put the case concisely when he said: In determining the meaning of a legislative enactment "you cannot let the scheme of the Code outweigh the expressed will of the Legislature." When considering the meaning of the language of section 257A it is not, I think, out of place to contrast it with the language of the succeeding section. "An adjustment of a decree not certified to the Court shall not be recognised as an adjustment by a Court executing the decree" (section 258). "Every agreement for the satisfaction of a judgment-debt" (which provides better terms for the decree-holder than the decree gives him) "shall be void unless it is made with the sanction of the Court which passed such decree" (section 257A). In instituting this contrast I do so with the recollection of the circumstances under which the language of section 258 was varied. It does not, in my opinion, detract from the force of the comparison. It is impossible, I think, to conceive that the Legislature intended to express the same meaning by such entirely different language. In short, if the section in question were found in an enactment other than a Procedure Code, it would be impossible, I think, to contend that it had the limited application ascribed to it by the Calcutta and Madras High Courts. Its position in a Procedure Code and in a chapter of that Code which is headed "of the execution of decrees" does **[699]** not, in my opinion, alter its meaning. If the language was ambiguous it would be

permissible to resort to these aids to interpretation, but not, I think, when the language is plain. The Legislature, for reasons which seemed to it to be good, has declared that such agreements shall be void unless sanctioned by the proper Court. It is, I conceive, the duty of the Courts to give effect to that clearly expressed declaration, and not to explain it away.

I may add that the facts of this case show the undue advantage which grasping decree-holders would be in a position to obtain from their judgment-debtors in the absence of the provision which has been referred for our construction. It would be of little advantage to the latter to be protected from the Courts executing the decree against them if their judgment-creditors could obtain the full fruits of their undue pressure by regular suit.

We answer both questions in the affirmative. Costs costs in the case.

**Candy, J.**:—If the first question is answered in the affirmative, then in my opinion the second question must also be answered in the affirmative.

On the second question I have but little to add to the remarks of the learned Chief Justice.

No doubt the arguments used by MAHMOOD, J., in *Ramghulam* v. *Janki Rai*, I. L. R., 7 All., at pp. 127 to 134; by GARTH, C. J., and GHOSE, J., in *Jhabar* v. *Modan Sonahan*, I. L. R., 11 Cal., at p. 672; by PRINSEP and GHOSE, JJ., in *Hukum Chand* v. *Taharunnessa Bibi*, I. L. R., 16 Cal., at pp 507, 508, and by MUTTUSAMI AYYAR and BEST, JJ., in *Juji* v. *Annai*, I. L. R., 17 Mad., at p. 383, deserve the fullest consideration; but I agree with the learned Chief Justice at Allahabad (I. L. R., 18 All., at p. 436), that where the Legislature has thought right to declare an agreement void, unless the Legislature limits the application of its enactment, Courts are bound to give effect to it. There is no such limitation to be found in section 257 A. Cases may occur where a merciful judgment-creditor may give time for the satisfaction of a judgment-debt by taking an instalment bond from his judgment-debtor and seeking no [700] advantage to himself. On the other hand, cases may occur where the judgment-creditor armed with the decree may extort a bond from his judgment-debtor with onerous conditions. The Legislature must be taken to have had regard to these considerations when enacting the plain provisions of section 257 A. It was open to the Legislature in 1888 to amend section 257A just as it amended section 258. It did not do so, and, therefore, we are bound by the plain words of the law.

As to the first question, it seems to me, on a comparison of the language of sections 257A and 258, that whereas an adjustment of a decree under section 257A may also fall within the terms of section 258, an adjustment under section 258 cannot fall within the terms of section 257 A unless it is an agreement which gives time for the satisfaction of the decree, or unless it provides for payment of something in execution of the decretal debt. To the argument of the learned Advocate-General, that the bond in the present suit is an adjustment of the decree under section 258, there is an obvious answer. Granted, but it also falls within the terms of section 257 A. If so, the agreement is void. Not only are the requisites laid down in section 257 A, and the effect of the absence of the requisites, different, but the subject-matter is different. Section 258 would seem to apply to a satisfaction *in presenti pro tanto* of a decree. Illustrations of the section may be gathered from numerous reported cases: *e g.* payment of money or delivery of grain, cattle or ornaments or such like, the decree-holder being satisfied with this compromise in satisfaction *pro tanto* of his decree. All that is necessary for such payment or delivery to be recognised by the Court executing the decree is that it must be certified. But section 257 A would seem to apply to an agreement for the satisfaction, *in futuro*, of a judgment-debt: the money is admitted to be due, and the parties agree as to

the manner in which the money is to be paid. That agreement is the foundation of a new contract; but if the agreement gives time for the payment of what is admitted to be due, or provides for the payment of more than what is due under the decree, then so far the consideration fails, for such an agreement being void is not capable of being the foundation of any legal right.

[701] This distinction between the subject-matter of the two sections may not have been prominently brought out in some of the reported cases, but that it exists seems clear to me on a careful consideration of the language.

In the present case, the promissory note of 9th December 1889, provided for payment of more than what was due under the decree. Therefore it was void. I would answer both the questions in the affirmative.

**B. Tyabji, J.** :—I concur and have nothing to add.

Attorneys for the Plaintiff :—Messrs. *Matubhai and Jamietram.*

Attorneys for the Defendant :—Mr. *Balkrishna V. N. Kirtikar.*

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**NOTES.**

[This was followed in (1902) 27 Bom., 96; (1904) P.R., 88; see also (1900) 25 Bom., 252; (1907) 9 Bom. L. R., 295; (1903) 28 Bom., 62; (1907) 31 Bom., 552; (1913) 38 Bom., 219: 15 Bom. L. R., 1129.

It was dissented from in (1903) 25 All., 317; (1908) P.R., 23.

The C.P.C., 1908, O. 21, r. 2, sub-rule (3) enacts, "A payment or adjustment *which* has *not* been certified *or recorded* as aforesaid shall not be recognized by any Court *executing the decree*."]

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[22 Bom. 701]

ORIGINAL CIVIL.

*The 12th April, 1898.*

PRESENT:

MR. JUSTICE STRACHEY.

Sorabji Cursetji Sett............Plaintiff

*versus*

Rattonji Dossabhoy Karani............Defendant.*

*Jurisdiction— Letters Patent, 1865, Cl. 12— Suit for land—Foreclosure suit—Transfer of Property Act (IV of 1882), Sec. 85— Parties to suit—Practice—Procedure.*

A suit for foreclosure is not a suit for land within the meaning of clause 12 of the Letters Patent, 1865, and the High Court of Bombay on its original side has jurisdiction to entertain such suits, although the property in question is situate outside the town and island of Bombay.

*Holkar* v. *Dadabhai C. Ashburner*, I. L. R., 14 Bom., 353, followed.

In a suit for foreclosure by a puisne mortgagee, the prior mortgagee should be made a party to the suit under section 85 of the Transfer of Property Act (IV of 1882). In a suit where a prior mortgagee was not a party, the Court at the hearing of the suit ordered that he should then be made a party.

*Mata Din* v. *Kasim Husain*, I. L. R., 13 All. 432, followed.

SUIT for foreclosure. The defendant resided at Salsette, outside the jurisdiction of the High Court, and the mortgaged properties were all situate outside the jurisdiction.

[702] There were two mortgages in question, and both were executed in Bombay. By the first, dated the 18th September 1894, the defendant mortgaged to the plaintiff three properties situated at Vesava in the island of

* Suit, No. 40 of 1898.

Salsette for Rs. 8,750. By subsequent indentures, also executed in Bombay, the said lands were further charged with large sums.

On the 22nd June 1897, the defendant executed in Bombay another mortgage of two other properties, also situate at Vesava, and it was provided that the whole of the money due to the plaintiff should be repayable to the plaintiff on the 1st July 1897. One of the last-mentioned properties was already subject to a mortgage in favour of one Jivraj Ludha for Rs. 6,300. Jivraj Ludha was not made a party to this suit. The plaintiff was in possession of the properties comprised in the mortgage.

The sum alleged to be due to the plaintiff on foot of the above mortgages at date of suit was Rs. 41,286-12-0 with interest from the 17th January 1898. The plaintiff prayed for a decree for this amount, and, in default of payment, for foreclosure.

The suit came on for hearing as a short cause. On behalf of the defendant it was contended (1) that the Court had no jurisdiction, the suit being a "suit for land" situate outside the jurisdiction; (2) that, having regard to section 85 of the Transfer of Property Act (IV of 1882), the suit should be dismissed, Jivraj Ludha not having been made a party.

*Scott*, for the Plaintiff:—The question as to jurisdiction in cases of foreclosure is concluded by authority—*Holkar* v. *Dadabhai C. Ashburner*, I. L. R., 14 Bom., 353. That was a decree of the Court of Appeal, and it has been followed by several unreported cases: Suit No. 114 of 1894; Suit No. 371 of 1894; Suit No. 481 of 1897. In *Kessowji Damodar* v. *Khimji Jairam*, Suit No. 291 of 1893 (unreported), FARRAN, J., granted foreclosure of land in Zanzibar, the defendant residing in Cutch; but the mortgage having been executed in Bombay, a preliminary issue as to jurisdiction was raised in that case and decided in the plaintiff's favour on the 19th March 1894.

As to the question of parties, Jivraj Ludha is not a necessary party, as he is not a person interested in the mortgaged property. [703] The property mortgaged to the present plaintiff was the equity of redemption in the property on which Jivraj Ludha had a mortgage, but Jivraj Ludha was not interested in the equity of redemption. Therefore, the rule laid down in section 85 of the Transfer of Property Act does not apply. He cited Fisher on Mortgages, p. 801.

*Branson*, for Defendant:—Under the words of clause 12 of the Letters Patent, it is clear that this Court has no jurisdiction. A suit for foreclosure is a suit for land. It is not a suit *in personam*. The later decisions in effect overrule *Paget* v. *Ede*, L. R, 18 Eq., 118: see *Heath* v. *Pugh*, 6 Q. B. D., 345, at p. 359; *Harlock* v. *Ashberry*, 19 Ch. D., 539; *Bibee Jaun* v. *Meerza Mahommed*, 1 Ind. Jur. (N. S.), 40; *Sreemutty Lalmoney* v. *Juddoonauth*, 1 Ind. Jur. (N. S.), 319; *In the matter of petition of S. J. Leslie*, 9 Beng. L. R., 171; *Juggodumba* v. *Puddomoney*, 15 Beng. L. R., 318; *Sreenath* v. *Cally Doss*, I. L. R., 5 Cal., 82; *Land Mortgage Bank* v. *Sudurudeen*, I. L. R., 19 Cal., 358; *Prem Chand* v. *Mokhoda*, I. L. R., 17 Cal., 699; *Jairam* v. *Atmaram*, I. L. R., 4 Bom., 482; *Vithalrao* v. *Vaghoji*, I. L. R., 17 Bom., 570.

Further, the suit should be dismissed having regard to section 85 of the Transfer of Property Act, inasmuch as Jivraj Ludha has not been made a party. See Shephard on the Transfer of Property Act, p. 284; *Ghulam Kadir* v. *Mustakim*, I. L. R., 18 All., 109; *Balmakund* v. *Sangari*, I. L. R., 19 All., 379 at p. 384.

**Strachey, J.**:—This is a suit for foreclosure of certain mortgages of land situate at Vesava, outside the local limits of the ordinary original jurisdiction of the High Court. The defendant resides at the same place. It is not alleged

that he carries on business or personally works for gain within the local limits. All the mortgages were executed in Bombay. The plaintiff is in possession of the lands comprised in the mortgages. Upon the admission of the plaint, leave was granted under clause 12 of the Letters Patent. The suit is a short cause, and no written statement has been filed; but Mr. Branson on behalf of the de-[704]fendant contends that the suit is a "suit for land" situate outside the local limits of the Court's original jurisdiction, and that, therefore, the Court has, under clause 12, no jurisdiction to entertain it.

The question is whether a suit for foreclosure is a "suit for land" within the meaning of the clause. The expression is a wide one, and, in the absence of authority upon the point, I should have had great difficulty in holding that it does not include a suit for foreclosure. The High Court of Calcutta has held, upon the construction of the corresponding clause of its Letters Patent, that suits for foreclosure or sale, suits for redemption, suits by a purchaser for specific performance of a contract for sale of land, and, generally, suits for the purpose of establishing title to or acquiring possession of or control over land, are "suits for land"—*Land Mortgage Bank* v. *Sudurudeen Ahmed*, I. L. R., 19 Cal., 358; *Kanti Chunder Pal Chaudhry* v. *Kissory Mohun Roy*, I. L. R., 19 Cal., 361, *note*; *In the matter of the petition of Leslie*, 9 Beng. L. R., 171; *Bibee Jaun* v. *Meerza Mahommed*, 1 Ind. Jur. (N. S.), 40; *Sreemutty Lalmoney Dossee* v. *Juddoonauth Shaw*, 1 Ind. Jur. (N. S.), 319; *The Delhi and London Bank* v. *Wordie*, I. L. R., 1 Cal., 249: *Kellie* v. *Fraser*, I. L. R., 2 Cal., 445; and *Sreenath Roy* v. *Cally Doss Ghose*, I. L. R., 5 Cal., 82. But in this Court a more restricted meaning of the expression "suits for land" has been adopted. In *Holkar* v. *Dadabhai Cursetji Ashburner*, I. L R., 14 Bom., 353, SARGENT, C. J., and SCOTT, J., held that the Court had jurisdiction under clause 12 to try a suit for specific performance of an agreement made in Bombay, but relating to land situate outside the original jurisdiction, and to order a mortgage-debt to be realized by sale of the land. In that case, as in the present, the defendant did not reside or carry on business or personally work for gain in Bombay. The judgment cites with approval the decision in *Yenkoba B. Kasar* v. *Rambhaji*, 9 Bom. H. C. Rep., 12, in which GIBBS and MELVILL, JJ., held that a suit for the recovery of a mortgage-debt by sale of the mortgaged property was not a "suit for land" within the meaning of section 5 of Act VIII of 1859, the Civil Procedure Code then in force, and that a suit for land was a suit which asked for delivery of the land to the plaintiff.

[705] At first I had some doubt whether the decision of SARGENT, C. J., and SCOTT, J., was binding upon me in this case, as that was not a suit for foreclosure. But when the *ratio decidendi* is examined, I think that it does bind me. It proceeds in part upon *Paget* v. *Ede*, L. R., 18 Eq., 118, which was a foreclosure suit, and in effect it holds that, in using the expression "suits for land," the framers of clause 12 of the Letters Patent had in view the doctrines of the Court of Chancery in reference to suits relating to land situate out of England, and intended to exclude from the Court's jurisdiction only such suits relating to land as, if brought in England, the Courts would have refused to entertain on the ground that the land was situate abroad. Now the rule in England, as stated in Dicey's *Conflict of Laws*, is that the Courts have no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of, land situate out of England, or for the recovery of damages for trespass to such land. To this rule there is an exception, namely, that the Courts have jurisdiction to entertain an action against a person who is in England respecting land situate out of England on the ground of a contract or an equity between the parties with reference to such land. The

principle of the distinction is that while the Court will not give judgments concerning foreign land which it cannot render effective, still, where, from a person's presence in England, the Court has jurisdiction over him, it will, acting *in personam* and not *in rem*, compel him to give effect to obligations which he has incurred with regard to the land. The judgment in *Holkar* v. *Dadabhai Cursetji Ashburner*, I. L. R., 14 Bom., 353, applies this distinction to the expression "suits for land" in clause 12 of the Letters Patent, and holds that the Court has jurisdiction to entertain a suit for specific performance of a contract relating to land, or for a sale of mortgaged property, situate outside the local limits, on the ground that such suits are among those which a Court of equity in England will entertain; that the High Courts in India have all the powers of a Court of equity in England for enforcing their decrees *in personam*; and that, had it been intended to exclude suits *in personam* as well as suits *in rem* from the jurisdiction of the High Courts, the framers of the Letters Patent, [706] who were presumably English lawyers, would have employed different language. The only difference between that case and the present is that there the Court was dealing with one kind of suit *in personam* while I am dealing with another. Both suits for specific performance of contracts relating to land and suits for foreclosure are given by Mr. Dicey as instances of the action of the Courts in England *in personam*, and the authority cited in connection with foreclosure (and assumed to be still good law, notwithstanding the observations in *Heath* v. *Pugh*, 6 Q. B. D., 345: affirmed in *Pugh* v. *Heath*, 7 App. Cas., 235, on which Mr. Branson's argument was largely based), is *Paget* v. *Ede*, L. R., 18 Eq., 118, on which SARGENT, C. J., and SCOTT, J., rely. In *In re Hawthorne*, 23 Ch.D., 743, decided in 1883, two years after *Heath* v. *Pugh*, Mr. Justice KAY referred to *Baget* v. *Ede* as an auhority. I think, therefore, that the decision in *Holkar* v. *Dadabhai Cursetji Ashburner*, I. L. R., 14 Bom., 353, governs the present case, and I need not consider whether, apart from authority, I should think it justifiable to import the doctrines of the Court of Chancery regarding land situate out of England into clause 12 of the Letters Patent, especially in cases where the defendant does not reside, though the cause of action wholly or in part, arises, within the local limits of the Court's ordinary original jurisdiction. If the question were *res integra*, it would be necessary to consider in connection with it not only *Heath* v. *Pugh*, but the effect of a foreclosure decree under sections 86 and 87 of the Transfer of Property Act, 1882, and Nos. 109 and 129 of the fourth Schedule of the Code of Civil Procedure. There is a later (unreported) decision more directly in point, the case of *Kessowji Damodar* v. *Khimji Jairam* decided by the present Chief Justice in 1894. That was a suit for foreclosure of a mortgage of property situate in Zanzibar. The defendant resided and carried on business in Cutch. The mortgage was executed in Bombay. A preliminary issue was argued raising the question of jurisdiction, and, on the 19th March 1894, FARRAN, J., held that the Court had jurisdiction to entertain the suit, which accordingly was heard and decided on the 24th November 1894. Following these decisions, I must [707] hold that this is not a "suit for land" within the meaning of clause 12 of the Letters Patent, and that I have jurisdiction to entertain it.

Another point raised by Mr. Branson is that the plaint shows that one of the properties to which the suit relates is subject to a prior mortgage in favour of one Jivraj Ludha, and that under section 85 of the Transfer of Property Act, 1882, the prior mortgagee ought to have been joined as a party to the suit. On the other hand, Mr. Scott contended that the expression in section 85 "the property comprised in a mortgage" would include an equity of redemption, and that as the first mortgagee had no interest in

the equity of redemption which alone is comprised in the mortgage so far as regards the property in question, the section does not apply. The whole question was very fully considered by a Full Bench of the Allahabad High Court in *Mata Din Kasodhan* v. *Kazim Husain*, I. L. R., 13 All., 432, and I see no reason to dissent from the opinion of the majority that in a suit by a puisne mortgagee a prior mortgagee must be joined as a party. The question then is what should now be done. I see no reason why the first mortgagee should not now be joined. In *Kessowji Damodar* v. *Khimji*, unreported, FARRAN, J., ordered that the assignee of a mortgagee should be made a party, after the hearing of the preliminary issue to which I have referred. I, therefore, direct that Jivraj Ludha be now made a party to this suit.

Attorneys for Plaintiff :—Messrs. *Pestonji, Rustim and Kama.*

Attorneys for Defendant :—Messrs. *King and Cama.*

**NOTES.**

[As regards the meaning of '*suit for land*', see also (1903) 27 Mad., 157 ; (1909) 33 Mad., 131 (maintenance to be charged on land) ; (1904) 29 Bom., 249 ; (1908) 11 O. C., 164.]

## [708] CRIMINAL REFERENCE.

*The 2nd July, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Rangu.*

*Municipality —Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 84, as amended by Bombay Act II of 1884—Arrears of rent—Penalty in addition to arrears of rent cannot be imposed.*

Section 84 † of the Bombay District Municipal Act (Bom. Act VI of 1873) allows penalties to be imposed in addition to arrears of cesses or taxes, but it does not provide for the imposition of a penalty in addition to the arrears of rents.

REFERENCE under section 438 of the Code of Criminal Procedure (Act X of 1882) by J. F. Muir, District Magistrate of Dharwar.

The reference was in the following terms :—

"I have the honour to enclose proceedings in case No. 4 of 1896 of the Court of Azam Ramrao Vyasrao Desai, Special Magistrate, Third Class, Dharwar Town.

* Criminal Reference, No. 45 of 1896.

† Section 84 of Bombay Act VI of 1873, as amended by Bombay Act II of 1884, provides as follows :—

"Every prosecution under this Act or under the bye-laws made in accordance with the provisions of this Act may be instituted before any Magistrate whether the said Magistrate may be a Municipal Commissioner or not,

and every fine or penalty imposed under or by virtue of this Act or any bye-law made in pursuance thereof,

as also, upon information laid by order of the Municipality, all arrears of cesses or other taxes and such penalties, in addition to the said arrears, not exceeding in any case one-fourth of the amount of the said arrears, as shall be adjudged by the said Magistrate,

and all arrears of stallage and other rents and fees and all expenses,

may be recovered by a summary proceeding before such Magistrate in the manner provided by the Code of Criminal Procedure.

"2. In this case the Magistrate proceeded against the accused for default in paying within the specified time Rs. 1-12-0 charged as rent by the Dharwar Municipality for a shop in the market.

"3. The Magistrate ordered the rent (Rs. 1-12-0) and a penalty of annas 4 to be recovered from the accused.

"4. The rent and the penalty have been paid.

[709] "5. I called for the papers on a scrutiny of criminal return No. IV.

"6. On going through the papers I am of opinion that the rent charged by the municipality comes under the word 'rents' in clause 4 of section 84, Bombay District Municipal Act (VI of 1873). No provision for penalty for non-payment of these rents is attached thereto. The penalty inflicted appears thus to me to be illegal.

"7. I recommend that the order of the Magistrate, so far as it relates to the levy of the penalty, be quashed and the amount ordered to be refunded."

The reference came on for final hearing and disposal before a Division Bench (PARSONS and RANADE, JJ.).

There was no appearance for the Accused or for the Municipality.

*Per* CURIAM:—Section 84 of the Bombay District Municipal Act allows penalties to be imposed in addition to the arrears of cesses or other taxes, but it does not provide for the imposition of a penalty in addition to the arrears of rent. We, therefore, reverse so much of the Magistrate's order as imposes a penalty of annas four.

*Order varied.*

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[ 22 Bom. 709 ]

## CRIMINAL REFERENCE.

*The 23rd July, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Jagu Santram.*

*Municipality—Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 84†—Contract to collect a tax levied by a Municipality—Money due under such contract not recoverable under the section.*

A person who had obtained a contract to collect a certain tax imposed by a District Municipality having failed to pay over the money due under the contract at the stipulated time was convicted by a Magistrate under section 84 of the Bombay District Municipal Act (Bom. Act VI of 1873) and ordered to pay it to the municipality with interest, and also to pay a fine, and Court-fee charges.

*Held*, reversing the order, that the section did not apply.

[710] REFERENCE under section 438 of the Code of Criminal Procedure (Act X of 1882) by H. T. Ommanney, District Magistrate, Poona.

* Criminal Reference, No. 69 of 1896.

† See *ante* p. 708.

The reference was in the following terms :—

" There is a bye-law of the Jejuri Municipality directing the levy of 6 pies on every sheep killed. Instead of collecting this tax directly through paid servants the municipality gave a contract of it to accused No. 1, Jagu, for Rs. 130 for the year 1895-96. The amount was to be paid, under the contract, in three instalments of Rs. 44, 43 and 43 on prescribed dates, and it was agreed also that Jagu should pay interest on overdue instalments. He failed to pay on the settled date (25th November 1895) the second instalment of Rs. 43. The municipality, therefore, sent him to the Third Class Magistrate of taluka Purandhar for recovery of the amount of Rs. 43 together with interest due.

" The Third Class Magistrate convicted Jagu on the 20th March 1896, and passed the following order :—

" I, therefore, order that the accused should pay the amount as follows :—

| | Rs. | a. | p. |
|---|---|---|---|
| Principal (arrears) ... ... ... ... | 43 | 0 | 0 |
| Interest ... ... ... ... ... | 6 | 7 | 2 |
| Court-fee expenses ... ... ... ... | 1 | 0 | 0 |
| Fine ... ... ... ... ... ... | 0 | 12 | 0 |
| Total ... | 51 | 3 | 2 |

under section 84 of the Municipal Act of 1873.

" The conviction and sentence appear to the District Magistrate to be illegal. The amount of the contract cannot be said to be either a 'cess,' or 'tax,' or 'rents,' or 'fees' mentioned in section 84 of the Act, and as such would not be recoverable under that section. Much less could interest be included within the terms quoted above.

" In these circumstances the District Magistrate recommends that the conviction and sentence be reversed, and the amounts paid by the accused ordered to be refunded."

**[711]** The reference came on for hearing before a Division Bench (PARSONS and RANADE, J.J.).

There was no appearance for either party.

*Per* CURIAM :—As pointed out by the District Magistrate, the sums that may be due under the contract in the present case do not come within any of the matters provided for by section 84 of the Bombay District Municipal Act. We, therefore, reverse the order of the Magistrate.

*Order reversed.*

**NOTES.**

[ See also (1903) 26 Mad., 475 ; (1907) 31 Mad., 522 as regards notice ; and (1903) P.R., 23 Cr. as regards mode of realisation.]

[ 22 Bom. 711 ]

# CRIMINAL REVISION.

*The 6th August, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

## In re Samsudin.*

***Practice—Procedure—Complaint of offences under sections 182 and 500 of the Penal Code (Act XLV of 1860)—Necessary sanction not obtained—Withdrawal of complaint—Discharge of accused—Fresh complaint lodged on same charges—Effect of previous discharge of accused—Criminal Procedure Code (Act X of 1882), Secs. 248, 253 and 403.***

A complaint was lodged against the accused, charging him with offences under sections 182 and 500 of the Penal Code (Act XLV of 1860) The complainant's solicitor, finding that no sanction had been obtained as required by section 195 of the Criminal Procedure Code (Act X of 1882) for proceeding with the charge under section 182, applied to the Magistrate for leave to withdraw the complaint, which the Magistrate granted, adding to his order the words " accused is discharged."

The complainant having subsequently obtained the requisite sanction filed a fresh complaint on the same charges. It was objected on behalf of the accused that the accused had been acquitted under section 248 of the Criminal Procedure Code (Act X of 1882) and that further proceedings were now barred under section 403. The Magistrate allowed the objection and stopped the proceedings. On application to the High Court.

*Held* that the order of the Magistrate should be reversed and the complaint investigated. The order stopping the proceedings would be legal only if the accused had been acquitted by a Court of competent jurisdiction, which was not the case, as the Magistrate could not take cognizance of the charge under section [712] 182 of the Penal Code (Act XLV of 1860) without a sanction having been previously obtained.

As to the charge under section 500 of the Penal Code (Act XLV of 1860) the proper procedure in respect of it was that prescribed for warrant cases. The only legal order that could be made in such a case was an order of discharge under section 253 of the Criminal Procedure Code (Act X of 1882) and not of acquittal, and it was an order of discharge that was actually made.

APPLICATION for revision under section 439 of the Code of Criminal Procedure (Act X of 1882).

The applicant lodged a complaint against one Ebrahim Dadoo and others in the Court of the Fourth Presidency Magistrate, Khan Bahadur P. H. Dastur, charging the accused with giving false information to a public servant in order to cause him to use his lawful power to the injury of the complainant, and also with defamation, offences punishable under sections 182 and 500, respectively, of the Indian Penal Code (Act XLV of 1860).

On the 21st April 1896, the complainant's solicitor, finding that the complainant had not obtained sanction to prosecute under section 182 of the Penal Code, as required by section 195 of the Criminal Procedure Code (Act X of 1882), applied to the Magistrate to be allowed to withdraw the complaint. Thereupon the Magistrate passed the following order :—" As there is no sanction, prosecution withdraws the charge. Accused is discharged."

* Criminal Revision, No. 115 of 1896.

The complainant having subsequently obtained the requisite sanction filed a fresh complaint against the accused on the same charges.

It was contended on behalf of the accused that as the complainant had withdrawn the case on the previous occasion, and the accused had been acquitted under section 248 of the Code of Criminal Procedure, the present proceedings were barred under section 403 of that Code.

The Magistrate allowed this objection, and on the 29th April 1896, ordered the proceedings to be stopped.'

The complainant thereupon moved the High Court, under its Revisional Jurisdiction, to set aside the Magistrate's order.

*Daphtary and Ferreira* for Complainant.

*M. K. Lalkaka* (with *R. M. Paymaster*) for Accused.

**[713]** *Per* CURIAM:—It appears in this case that a complaint was made to the Magistrate against the accused of offences under sections 182 and 500 of the Penal Code. On the 21st April 1896, when the accused appeared before the Magistrate, the Magistrate passed the following order:—"As there is no sanction, prosecution withdraws the charge. Accused is discharged."

Sanction having been obtained, a fresh complaint was lodged against the accused of the same offences. The Magistrate on the 29th April ordered that proceedings be stopped, considering apparently that they could not be taken by reason of the provisions of section 403 of the Criminal Procedure Code.

This order would be legal only if the accused had been acquitted by a Court of competent jurisdiction. Clearly in this case they have not. In the first place, by reason of there being no sanction, the Court on the 21st April could not take cognizance of the offence under section 182, and could not, therefore, acquit the accused of that offence. The offence mentioned in section 500 of the Penal Code is not a summons case. The procedure, therefore, in the investigation of this complaint was that prescribed for warrant cases. Although the Magistrate says now that he passed the order under section 248 of the Criminal Procedure Code, the only legal order he could have passed was under section 253 of the Code (see *Rajnarain* v. *Lala Tamoli*, I. L. R., 11 Cal., 91); and the wording of the order shows that he did so pass it, for he did not acquit the accused but discharged them.

There having been thus no acquittal of the accused of the offences charged, the present complaint must be inquired into. We reverse the order of the Magistrate staying proceedings and direct him to investigate the complaint.

*Order reversed.*

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**NOTES.**

[As regards the necessity to set aside the order, see also (1902) 27 Bom., 84; (1907) 31 Mad., 543; (1905) 29 Mad., 126; (1906) 29 All., 7; (1901) 28 Cal., 652; (1902) 29 Cal., 726; (1911) P. R., 10 F. B.]

## [714] CRIMINAL REVISION.

*The 6th August, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Sulemanji Gulam Husen.*

*Criminal Procedure Code (Act X of 1882), Sec. 133—Excavations near a public place—Magistrate's power to order the excavations to be fenced, and not to be filled up.*

Under section 133 of the Criminal Procedure Code (Act X of 1882) a Magistrate has no power to order excavations adjacent to a public way or any public place to be filled up; he can only order them to be fenced.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

The applicant was the owner of a piece of land at Godhra.

On the 20th April 1896, the District Magistrate issued a notice to the applicant in the following terms :—

"You were directed, under section 133 of the Criminal Procedure Code, to fill in the excavations made by you for taking out earth for the bricks that are being manufactured by you in Survey No. 189 within the limits of Godhra, and to bring them up to the level of the adjacent road, and to make the land one whole level, and to take such steps as would not allow water to be accumulated therein, and likewise take such steps as would not leave the possibility of any accident happening; or, in the alternative, to appear before me to show cause why the said order should not be brought into force. Upon looking into the statement made by you, &c. &c. it appears that the order already passed is just and proper. The said order is, therefore, confirmed."

The applicant moved the High Court under its revisional jurisdiction to set aside the above order.

*Gokaldas K. Parekh* for the Applicant.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

*Per* CURIAM :—The District Magistrate issued an order, purporting to be made under section 133 of the Criminal Procedure Code (Act X of 1882) requiring the applicant "to fill in the excavations made by him for taking out earth for the bricks that were being manufactured by him in Survey No. 189 within the limits of Godhra, and to bring them up to the level of the adjacent road, and to make the land one whole level, and to take such steps [715] as would not allow water to accumulate therein, and likewise take such steps as would not leave the possibility of any accident happening." It is objected, on behalf of the applicant, that this order is illegal, and we think that the objection is a good one. Section 133 allows a Magistrate to order excavations adjacent to a way which is or may be lawfully used by the public or to any public place to be fenced. Under that section, therefore, if it be assumed that the excavations are adjacent to such a way or public place, the Magistrate could only order them to be fenced; he could not order the applicant to fill them up. We reverse the order.

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* Criminal Revision, No. 166 of 1896.

[22 Bom. 715]

## CRIMINAL REVISION.

*The 10th August, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

### *In re* Hukumpuribava Gosavi.*

*Police—District Police Act (Bom. Act IV of 1890), Sec. 48, Cl. (a)*† *Construction—Procession—Order as to conduct of procession.*

A District Superintendent of Police issued a notification to the following effect:—"No member of any sect can be permitted to proceed naked to the *tirth* to bathe, nor while there to bathe naked, nor to pass the streets naked on any account. If any one does this, he will be dealt with according to law."

*Held* that this notification was not illegal or *ultra vires*. It was not any order or command as to costume, but merely a warning to the people that an indecent exposure of the person was an offence under the law, and would be dealt with as such.

APPLICATION for revision under section 435 of the Code of Criminal Procedure (Act X of 1882).

Towards the close of 1895, on the occasion of the *Sinhast* festival at Trimbak, the District Superintendent of Police at Nasik issued a proclamation to the following effect:—

[716] "No member of any sect can be permitted to proceed naked to the *tirth* to bathe, nor while there to bathe naked, nor to pass the streets naked on any account. If any one does this, he will be dealt with according to law."

The applicants, who were *Gosavis* of Trimbak, applied to the District Magistrate of Nasik to set aside the above proclamation.

The District Magistrate having declined to interfere, the applicants applied to the High Court under its revisional jurisdiction.

*Daji Abaji Khare* for Applicants.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

*Per* CURIAM:—Clause (*a*) of section 48 of the Bombay District Police Act (Bom. Act IV of 1890) gives a District Superintendent of Police power to "make rules for, and direct, the conduct of assemblies and processions and moving crowds or assemblages on or along the streets, and prescribe, in the case of processions, the routes by which, the order in which, and the times at which the same may pass." We construe the word "conduct" to mean the act or method of leading, guiding or managing, the guidance or management, and not to mean the mode of action or behaviour of an assembly, and, therefore, we cannot hold that the clause gives a power to direct what costume shall be worn or not worn by the members of a procession. At the same time we do not consider that the District Superintendent has in the present case made any order as to costume. What is said in the order is this,—"No member of any sect can be permitted to proceed naked to the *tirth* to bathe, nor while there to bathe naked, nor to

* Criminal Revision, No. 136 of 1896.

† The Bombay District Police Act (Bombay Act IV of 1890), section 48:—

"(1) The District Superintendent or an Assistant Superintendent may, subject to any rule or order which may at any time be legally made by any Magistrate or other authority duly empowered in this behalf—

"(*a*) make rules for and direct the conduct of assemblies and processions and moving crowds or assemblages on or along the streets, and prescribe, in the case of processions, the routes by which, the order in which, and the times at which the same may pass."

pass the streets naked on any account," and in the Marathi the words are added that "if any one does this, he will be dealt with according to law." We look upon this not as an order or command, but as a piece of advice or warning to the people, telling them in what light the authorities will view certain acts. If the District Superintendent had said, "No nuisance or offence will be permitted," that clearly would not have been an order not to commit those acts. So it is not an order to say that one particular form of alleged nuisance or offence, namely, walking and bathing naked, will not be permitted. Wilful and indecent exposure of the person, is itself an offence punishable under clause (*o*) of section 61. If **[717]** therefore, any one in the procession should commit this act, he would be liable to arrest and punishment under that clause. The proclamation, we think, directs attention to this fact. It does not prohibit the act, so as to make the commission of it punishable as a breach of the order, but it says such an act will not be permitted, and that if it is done, the perpetrator will be proceeded against according to law; that is, that proceedings will be taken against him on the ground that he has committed an offence by reason of the commission of the act itself. In those proceedings the question whether the act is or is not an offence will have to be considered and determined. On this view of the case we decline to interfere.

**[22 Bom. 717]**

## CRIMINAL REFERENCE.

*The 24th September, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Bastoo Dumaji.*

*Criminal Procedure Code (Act X of 1882), Sec. 545—Compensation—Award of compensation illegal where no fine is inflicted.*

Where an accused is discharged and no fine is imposed, no order for payment of compensation can be legally passed under section 545 of the Criminal Procedure Code (Act X of 1882).

THIS was a reference under section 438 of the Code of Criminal Procedure (Act X of 1882) by R. E. Candy, District Magistrate, Thana.

The material portion of the reference was as follows:—

"The accused was committed by the Bassein Police to the Court of the Third Class Magistrate for trial under section 379 of the Indian Penal Code in respect of palm leaves cut and removed by the accused from palm trees standing on Government land and farmed out to one Ramchandra Anant.

"The Magistrate found the accused not guilty of the charge on the ground of absence of dishonest intention in him in cutting and removing the leaves worth Rs. 2, and passed an order of discharge under section 253 of the Code of Criminal Procedure.

**[718]** "In this order of discharge the Magistrate directed the accused Bastoo to pay Rs. 2 to the complainant as compensation for the loss of the palm leaves. This order is presumed to have been passed under section 545, Criminal

* Criminal Reference No. 95 of 1896.

Procedure Code, though the Magistrate has not quoted the section. The Magistrate cannot, I hold, legally pass such order when the accused is discharged. Such order can only be given on conviction of the accused, as the amount of compensation is laid down by section 545, to be paid from the amount of fine recovered. If no fine is imposed, I believe that no compensation could be awarded."

The reference was heard by a Division Bench (PARSONS and RANADE, JJ.) There was no appearance for the Crown or for the Accused.

*Per* CURIAM :—As no fine was imposed in this case, an order for payment of compensation could not legally be passed under section 545 of the Criminal Procedure Code. We reverse the order.

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[22 Bom. 718]

## APPELLATE CIVIL.

*The 17th March, 1897.*

PRESENT :

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Chandarsang Versabhai and others............(Original Defendants Nos. 1 to 3) Appellants

*versus*

Khimâbhai Raghabhai and others............(Original Plaintiffs) Respondents.*

*Practice—Procedure—Right of appeal—Death of one of several appellants pending appeal—Death of one of several respondents pending appeal—Civil Procedure Code (Act XIV of 1882), Secs. 366, 368, 544 and 582.*

Any plaintiff or defendant has a right to appeal without the concurrence of any of the parties to the suit. The mere fact of the death of one of several appellants cannot affect the right of the other appellants to proceed with the appeal if they choose to do so.

One of several appellants (defendants) died after appeal filed, but before the hearing. An application to have the name of his heir entered on the record as an appellant was rejected as too late. One of the respondents (plaintiffs) also died pending the hearing of the appeal, and an application to enter the name of his heir as respondent was rejected for the same reason. When the appeal came on for hearing it was dismissed as defective for want of parties.

[719] *Held*, that the proper course for the appeal Court was to order that the appeal had abated so far as the deceased appellant (defendant) was concerned and to proceed with the hearing so far as the remaining appellants were concerned.

*Held*, also with reference to the death of the respondent (plaintiff), that the appeal Court ought to have proceeded under the provisions of section 368 of the Civil Procedure Code (Act XIV of 1882), and to have either declared that the appeal had abated as to him and proceeded against the rest of the respondents under section 544 of the Civil Procedure Code, or else to have directed that the legal representatives of the deceased respondent should be placed upon the record.

SECOND APPEAL from the decision of E. H. Leggatt, Assistant Judge of Ahmedabad, confirming the decree of the Subordinate Judge of Dhandhuka.

* Second Appeal, No. 533 of 1896.

Suit for possession of land. The defendants Nos. 1 to 4 were in possession of certain land (Survey Nos. 10, 11 and 12), defendant No. 5 being their tenant. The plaintiffs, who were nine in number, claimed the eastern portion of this land and filed this suit to recover it, alleging that the defendants had unlawfully taken possession of it.

The Subordinate Judge found that the land claimed belonged to the plaintiffs and that the defendants had removed the boundary marks and taken possession of it, and he passed a decree for the plaintiffs.

The defendants appealed, but pending the appeal one of them (Harisang) died, and an application to have the name of his heir entered on the record as an appellant was rejected by the District Judge as too late.

One of the respondents (plaintiff No. 3) also died pending the appeal, and an application to have the name of his heir placed on the record as respondent was also rejected by the District Judge as barred by limitation.

When the appeal came on for hearing it was dismissed by the Assistant Judge on the ground that, "the land being held in common, the appeal is, therefore, obviously defective for want of parties."

The defendants preferred a second appeal.

*Sitanath G. Ajinkya*, for the Appellants (Original Defendants Nos 1 to 3): —The Judge was wrong in dismissing our appeal [720] without going into the merits of the case. Under sections 366 and 368 of the Civil Procedure Code (Act XIV of 1882) the appeal would abate with respect only to those persons whose representatives were not brought on the record. Section 371 provides that the Court may, after passing the order of abatement, pass an order for the restoration of the appeal to the file. Under section 544 the Judge could, in the absence of the representatives of the deceased, have proceeded to hear the appeal and dispose of it on the merits. The suit was for recovery of land and not for partition. When the suit is for recovery of possession, the Court can proceed to decide it with respect to the survivors on the record.

*Govardhanram M. Tripathi*, for the Respondents (Original Plaintiffs).

**Tyabji, J.**:—This suit was originally filed by nine plaintiffs against five defendants. The plaintiffs sought to recover possession of certain land, alleging that they were the owners of the eastern portion of Survey Nos. 10, 11 and 12, and that the defendants Nos. 1 to 4 were the owners of the western portions of the same survey numbers. The defendant No. 5 was alleged to be a tenant of the first four defendants.

The plaintiffs' case was that the defendants took unlawful possession of three-fourths of a bigha of their land out of survey Nos. 11 and 12, and of one-fourth of a bigha of their land out of Survey No. 10. The plaintiffs accordingly prayed for possession of the lands so alleged to have been unlawfully taken possession of by the defendants. The Subordinate Judge held that the land in dispute belonged to the plaintiffs, and that the defendants had removed the boundary marks and taken possession of the plaintiffs' land, and he accordingly passed a decree in favour of plaintiffs. Against this decree the defendants appealed. Before, however, the appeal could be heard, one of the appellants, *viz.*, the fourth defendant Harisang Kanubhai, died, and an application to the District Judge to have the name of the heir of Harisang entered as an appellant was rejected as time-barred. One of the respondents, *viz.*, the third plaintiff Samatsang Bhagubhai, also died before the hearing of the appeal, and an application to have the name of his heir entered as [721] a respondent was also rejected as time-barred. When the appeal came on for hearing, it was dismissed by the Assistant Judge on the ground that, "the land being held in common, the appeal is, therefore, obviously defective for want of parties."

We think that the learned Judge was wrong in dismissing the appeal. We take it to be quite clear that any plaintiff or defendant has a right to appeal without the concurrence of any of the other parties to the suit. In this case the proper course for the learned Judge was to have proceeded under the provisions of sections 366, 368 and 582 of the Civil Procedure Code. The cases of *Balkrishna* v. *The Municipality of Mahad*, I. L. R., 10 Bom., 32; *Nundun Lall* v. *Lloyd*, 22 Cal. W. R., Civ. R., 74; and *Bindu Bashini Dasi* v. *Peari Mohun Bose*, I. L. R., 20 Cal., 107, which have been cited to us, seem to us to have no application. Those cases merely decide that one individual co-sharer cannot maintain a suit for recovering any part of the joint land, or the whole of the joint land, without bringing the other co-sharers before the Court, as the suit would be defective in their absence. Here the suit was properly framed, and all the parties interested in the subject-matter were before the Court. The decree having been passed against the defendants, it was open to any one of them to appeal against it, and if the ground of appeal was common to all the defendants, it was open to the Lower Appellate Court to deal with the appeal under section 544 of the Civil Procedure Code. The mere fact of the death of one of the appellants cannot affect the right of the other appellants to proceed with the appeal if they choose to do so. As regards the appellants, therefore, the proper course for the Lower Appellate Court was to order that the appeal had abated so far as Harisang Kanubhai was concerned, and to have proceeded with the hearing of the appeal so far as the remaining appellants were concerned. So far as the death of the respondent Samatsang is concerned, the Lower Appellate Court ought to have proceeded under the provisions of section 368 of the Civil Procedure Code, and to have either declared that the appeal had abated as to him and proceeded against the rest of the respondents, under section 544 of the Civil Procedure Code, or else to have directed that the [722] legal representatives of Samatsang should be placed upon the record.

Under any circumstances we think that the order dismissing the appeal was wrong, and we must set it aside and remand the case to the Lower Appellate Court to dispose of the appeal in the light of the observations contained in this judgment. The costs of this appeal to be dealt with by the Lower Appellate Court at the time of passing the final decree.

*Order set aside and case remanded.*

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**NOTES.**

[This was followed in (1901) 26 Bom., 203; (1907) 34 Cal., 1020; (1902) 25 All., 284; (1903) 27 Bom., 284; (1902) 25 All., 27. See also (1900) 22 All., 430; (1900) 23 All., 22; (1907) 11 C. W. N., 504 : 5 C. L. J., 393.]

[22 Bom. 722]

# APPELLATE CIVIL.

*The 30th March, 1897.**

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE PARSONS.

Trimbak Bapuji Patvardhan............(Original Decree-holder and Applicant) Appellant

*versus*

Kashinath Vidyadhar Gosavi............(Original Judgment-debtor and Opponent) Respondent.

*Limitation Act (XV of 1877), Sec. 19 and Sch. II, Art. 179 (4)—Decree—Execution—Payment of* bhatta *for the issue of the sale proclamation—Step in aid of execution—Payment of process fee—Limitation—Payment of part of the judgment-debt—Acknowledgment of liability by judgment-debtor's pleader.*

To satisfy the requirements of article 179 (4) of Schedule II of the Limitation Act (XV of 1877), there must be an application to the proper Court, and time runs from the date of the application and not of the order made upon it. The application need not, however, necessarily be in writing; where the law does not require a writing, an oral application satisfies its requirements. Where an order made in aid of execution is of such a nature that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application had been made for it.

*Quære*:—Whether the payment of *bhatta* is sufficient proof of an application to the Court to take the step in respect of which the *bhatta* is paid. Mere payment of a process-fee under circumstances from which no application can be inferred does not satisfy the requirements of the article.

The payment of part of the judgment-debt by the judgment-debtor, with the acknowledgment of liability by his pleader, is sufficient, under the provisions of section 19 of the Limitation Act (XV of 1877) to give a fresh period of limitation

[723] SECOND APPEAL from the decision of John FitzMaurice, District Judge of Thana, reversing the order of Rao Saheb N. M. Samant, Subordinate Judge of Alibag.

Appeal from an order rejecting an application for execution of decree.

On 6th January 1896, the appellant (plaintiff) applied for execution of a decree obtained by him against the respondent (defendant). The application was resisted by the defendant on the ground that it was barred by limitation under article 179 of the Limitation Act (XV of 1877).

It appeared that on the 10th August 1892, he had made an application for execution by the attachment and sale of certain immoveable property of the defendants. Proceedings were taken on that application, and on the 17th January 1893, an order for sale was made by the Court, and on the 19th January 1893, the plaintiff paid *bhatta* for the issue of the proclamation sale.

On the 14th March 1893, the defendant applied for a stay of the sale for two months, as he was trying to raise money to satisfy the decree privately, and on the 6th June 1893, the plaintiff asked permission to withdraw his *darkhast*, as he said defendant had paid him Rs. 100 and had promised to pay the rest On the 24th June 1893, the Court made an order allowing the withdrawal.

* Second Appeal No. 801 of 1896.

The Subordinate Judge granted the present application. He held that the payment of *bhatta* by the plaintiff on the 19th January 1893, was a step in aid of execution and that, therefore, the application was not barred by limitation. The District Judge, however, on appeal reversed the order and dismissed the appellant's application as barred by limitation.

The plaintiff preferred a second appeal.

*Sadashiv R. Bakhle*, for the Appellant (Original Plaintiff, Decree-holder and Applicant) :—The payment of the *bhatta* for issuing the proclamation of sale was a step in aid of execution. The present application was made within three years from that date and was, therefore, in time—*Norendra* v. *Bhupendra*, I. L. R., 23 Cal., 374, at p. 387 ; *Bhoma Motiram* v. *Kamaji*, P. J., 1884, p. 311 ; *Radha Prosad* v. [724] *Sunder Lall*, I. L. R., 9 Cal., 644. It is not necessary that the application contemplated by article 179(4) of the Limitation Act should be in writing. An oral application would be quite sufficient—*Vellaya* v. *Jaganatha*, I. L. R., 7 Mad., 307; *Ali Muhammad* v. *Gur Prasad*, I.L.R., 5 All., 344 ; *Maneklal* v. *Nasia*, I. L. R., 15 Bom., 405 ; *Keshavlal* v. *Pitamberdas*, I. L. R., 19 Bom., 261. Such an application must be presumed from the fact of payment, for Courts cannot be supposed to take any steps wihout being moved by a party —*Bapuchand* v. *Mugutrao*, P. J., 1896, p. 427 ; *Vellaya* v. *Jaganatha*, I. L. R., 7 Mad., 307.

Further, the present application was within time under section 19 of the Limitation Act (XV of 1877). The defendant admitted his liability under the decree on the 14th March 1893, and by his subsequently paying Rs. 100 in June 1893.

*Narayan G. Chandavarkar*, for the Respondent (Original Defendant, Judgment-debtor and Opponent) :—The time to be counted is from the date of the previous application. From that date the present application is clearly barred. The payment of *bhatta* or process-fee is not a step in aid of execution—*Dwarkanath* v. *Anandrao*, I. L. R., 20 Bom., 179. No presumption can be made that there was an application. Article 179 of the Limitation Act requires an application and it must be shown that some application was made. In *Ambica* v. *Surdhari*, I. L. R., 10 Cal., 851, there was an express oral application. It was for the plaintiff to prove that such application was made, and he has failed to do so.

As to the alleged acknowledgment of the defendant, such an acknowledgment must be signed by the party. The application by the judgment-creditor for withdrawing the *darkhast*, and stating that he had received Rs. 100, is not sufficient. We submit that no acknowledgment, as such, is proved in the case.

**Farran, C. J.** :—This is a second appeal from the decree of the District Court of Thana rejecting, on appeal, the *darkhast* of the plaintiff for execution of the decree in the suit. The material dates as stated to us by the pleader for the appellant and assented to by the pleader for the respondent are as follow :—

[725] On the 10th August 1892, the plaintiff by *darkhast* applied to the Court for the attachment and sale of certain immoveable property of the judgment-debtor. It is not suggested that this application was not in time. On the 23rd August an order was made for attachment of the property. After this the matter was referred to the Nazir, who made a report, which was considered on the 12th September following. A summons to the defendant to attend was issued on the 16th of September. After some postponements, the matter came on before the Court on the 21st November, when some evidence was taken. On the 2nd December a notice was issued to the mortgagee, and on the 17th January 1893, an order for sale was made by the Court, and on the

19th of the same month the plaintiff paid the *bhatta* for the issue of the sale proclamation.

On the 14th March the defendant presented an application, asking that the sale be stayed for two months, as he was trying to raise money to satisfy the decree privately, and on the 6th June the plaintiff asked to be allowed to withdraw his *darkhast*, as he said defendant had paid him Rs. 100, and had promised to pay the rest, but wanted time for that purpose. The order of the Court allowing its withdrawal is dated the 24th day of June 1893.

The present application for execution was made on the 6th January 1896. The Subordinate Judge treated the payment of *bhatta* on the 19th January 1893, as a step taken in aid of execution and allowed the plaintiff's application as having been made within three years of that date. The District Judge dismissed the application as time-barred.

In considering the time within which the execution of a decree or order must be sought under article 179 (4) of the schedule to the Limitation Act, it is necessary to bear in mind the exact provisions of the article. It allows a period of three years from "(4) the date of applying in accordance with law to the proper Court for execution, or to take some steps in aid of execution, of the decree or order." To satisfy its requirements there must be an application to the proper Court, and time runs from the date of the application and not of the order made upon it—*Fakir* [726] *Muhammad* v. *Ghulam Husain*, I. L. R., 1 All., 580. The application, moreover, must be to the proper Court in accordance with law for the execution, or to take some steps in aid of execution of the decree or order. The application need not, however, necessarily be in writing; *where the law does not require a writing*, an oral application satisfies its requirements—*Dharanamma* v. *Subba*, I. L R., 7 Mad, 306; *Ali Muhammad* v. *Gur Prasad*, I. L. R., 5 All., 344; *Maneklal* v. *Nasia*, I. L. R., 15 Bom., 405; *Keshavlal* v. *Pitamberdas*, I L. R., 19 Bom., 261. And where an order made in aid of execution is of such a nature as that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application has been made for it—*Bapuchand* v. *Mugutrao*, P. J 1896, p. 427. Whether the payment of *bhatta* is sufficient proof of an application to the Court to take the step in respect of which the *bhatta* is paid, is doubtful according to the reported cases. The mere payment of a process-fee under circumstances from which no application can be inferred does not, of course, satisfy the requirements of the article 179 (4)—*Dwarkanath* v. *Anandrao*, I. L. R, 20 Bom., 179 In *Ambica* v. *Surdhari*, I. L. R., 10 Cal., 851, there appears to have been an oral application to issue the proclamation, but there is nothing to show this in *Norendra* v. *Bhupendra*, I. L. R., 23 Cal., at p. 387. In *Bhoma Motiram* v. *Kamaji*, P. J., 1884, p. 311, the Court appears to have presumed an application from the payment of the process fee. A similar presumption was regarded as permissible in *Vellaya* v. *Jaganatha*, I. L. R., 7 Mad., 307, while in *Radha Prosad* v. *Sundar Lall*, I. L R., 9 Cal., 644, the mere payment of *nilami* fees was regarded in itself as sufficient to give a fresh starting point for limitation, but all the words of the clause are not noticed in the reported judgment, as observed by JARDINE, J., in *Dwarkanath* v. *Anandrao* (*supra*).

We do not, however, consider it necessary to decide whether in the present case we could have presumed an application to issue a sale proclamation when the plaintiff paid the *bhatta* fees on the 19th January 1893, or whether the case is not within the [727] ruling in *Dwarkanath* v. *Anandrao* (*supra*). Nor do we consider it necessary to consider whether an application should not be presumed under the circumstances from the order of the 17th January 1893,

as we are clearly of opinion that the payment of the Rs. 100 with the acknowledgment of liability by the defendant's pleader, when he asked for time, is quite sufficient, under the provisions of section 19 of the Limitation Act, to take the subsequent application out of purview of the statute. The decisions upon this point are, we believe, uniform—*Venkatrav Bapu* v. *Bijesing*, I. L. R., 10 Bom., 108; *Muhammad* v. *Payag Sahu*, I. L. R., 16 All., 228; *Tores Mahomed* v. *Mahomed Mabood*, I. L. R., 9 Cal., 730; *Norendra* v. *Bhupendra*, I. L. R., 23 Cal., at p. 387.

We set aside the decree of the District Judge, and restore that of the Subordinate Judge, with costs in both Courts of appeal upon the present respondent.

NOTES.

[1. Exp. III to sec. 19, Limitation Act, 1908, settles the question whether its provisions extend to applications for execution. This is in accordance with the decisions in (1898) 22 Bom. 1001; (1908) 32 Bom. 296; (1904) 8 C. W. N., 470; (1903) 5 N. L. R, 8.

2. An oral application may suffice as a step in aid:—(1901) 25 Bom., 689; (1900) 22 All. 359; (1913) 23 I. C. 533 (Mad.) But an application, presumable or actual is necessary:—*ibid*; (1908) All. 179; (1911) 17 C. L. J. 422; (1909) 13 C.W.N., 533.]

[22 Bom. 727]

## APPELLATE CIVIL.

*The 31st March, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Dungarsi Dipchand............(Original Plaintiff) Applicant

*versus*

Ujamsi Velsi and another............(Original Defendants) Opponents.*

*Award—Decree—Consent decree—Application by creditor of defendant to be made a party to suit—Objection by creditor to filing award—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Sec. 484.*

The plaintiff applied to file an award and for a decree in terms thereof, to which the defendant consented. *K*, a creditor of the defendant, thereupon applied to be made a party to the suit and objected to the filing of the award and to the decree, alleging that the award was fraudulent and fictitious and had been made in order to save the defendant's property from his creditors. The Subordinate Judge made *K* a party to the suit and refused the plaintiff's application. On application to the High Court,

*Held*, that *K* ought not to have been made a party to the suit. His remedy was to apply under section 484 of the Civil Procedure Code (Act XIV of 1882) for an attachment before judgment of the defendant's property.

[728] *Held*, also, that the Judge was bound to file the award, the defendant having raised no objection to it and no illegality appearing on the face of it.

APPLICATION under the extraordinary jurisdiction of the High Court, (section 622 of the Civil Procedure Code Act XIV of 1882), against the order of Rao Saheb Tribhovandas Lakshmidas, Subordinate Judge of Dhandhuka and Gogha, in the Ahmedabad District.

The plaintiff applied to the Subordinate Judge to file an award and to pass a decree in terms thereof. The award in question directed the defendant to pay the plaintiff Rs. 2,372. The defendant admitted the award and consented to the decree.

One Keshavlal Vundravan, however, applied to be made a party to the proceedings and contended that the plaintiff's application should be rejected on

* Application, No. 254 of 1896 under the Extraordinary Jurisdiction.

the ground that the award was fictitious and fraudulent and was made merely for the purpose of saving the defendant's property from his creditors and to defeat the execution of certain decrees which he (Keshavlal) and others expected to obtain in suits which they had filed against the defendant.

The Subordinate Judge granted Keshavlal's application and made him a party-defendant to the suit. He rejected the plaintiff's application and refused to file the award, or to pass a decree in its terms.

The plaintiff applied to the High Court under its extraordinary jurisdiction and obtained a rule calling on the defendants to show cause why the order of the Judge should not be set aside.

*Ghanasham N. Nadkarni*, appeared for the Applicant (Plaintiff) in support of the rule.

*Sitanath G. Ajinkya*, appeared for the Opponent (Defendant No. 2) to show cause.

**Farran, C. J.** :—We think that it is clear that the defendant No. 2 ought not to have been made a party to the attachment proceedings or allowed to contest the award. He had no *locus standi* whatever. If he thought that the award proceedings were a device on the part of the defendant Ujamsi to protect his property from his creditors, including the defendant No. 2, and that [729] the defendant Ujamsi was about to allow his property to be attached for that purpose in pursuance of a fraudulent decree, his remedy was to apply under section 484 for an attachment before judgment of defendant No. 1's property. That course is still open to him. As the defendant No. 1 raised no objection to the award, the Subordinate Judge was bound to file it, no illegality appearing on its face. We must direct the Subordinate Judge now to do so. The award would not have prejudiced the defendant No. 2 if he had not intervened in the suit. This order will also be without prejudice to his rights. Rule absolute.

*Rule made absolute.*

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[ 22 Bom. 729 ]

## APPELLATE CIVIL.

*The 31st March, 1897.*

PRESENT :

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE TYABJI.

Mahomed Nathubhai. ..........(Original Plaintiff) Applicant

*versus*

Husen and others............(Original Defendants) Opponents.*

*Jurisdiction—Small Cause Court—Subscription for building a temple—Person receiving such subscriptions—Trustee—Practice—Civil Procedure Code (Act XIV of 1882), Sec. 30.*

**A person collecting and receiving subscriptions for the purpose of building a temple, in pursuance of a resolution come to at a meeting of the community, holds them in the capacity**

* Application, No. 23 of 1897, under the Extraordinary Jurisdiction.

of a trustee, and a suit in respect thereof should be filed, under section 30 of the Civil Procedure Code (Act XIV of 1882), in a Subordinate Judge's Court and not in a Small Cause Court.

APPLICATION under the extraordinary jurisdiction of the High Court, section 622 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued to recover Rs. 368-10-11 from the defendants, who were the heirs of one Kassum Gulab, under the following circumstances:—

At a meeting held in November 1889, by the Mahomedan Vepari (trading) panchayat of the Katpore market at Broach, it was resolved that a subscription be raised to build a *dehera* (temple) over the *dargah* of Pir Latifshah at Broach. The [730] subscriptions were to be collected by the said Kassum Gulab. Kassum Gulab accordingly collected subscriptions and continued recovering them until August 1892, when he died. The subscriptions in his hands at that date amounted to Rs. 368-10-11.

The panchayat employed the plaintiff to build the temple and in February 1895, he requested the defendants (sons of Kassum Gulab) to pay him the amount subscribed, but they failed to do so.

The panchayat thereupon authorized the plaintiff to file this suit against them.

The plaintiff accordingly presented the plaint in the Court of the Small Causes at Broach, but that Court held that the suit related to a trust, and that under article 18 of Schedule II of the Provincial Small Cause Courts Act (IX of 1887) it had no jurisdiction. It, therefore, returned the plaint for presentation to the proper Court.

The plaint was thereupon presented to the Court of the Subordinate Judge, who was of opinion that the suit was for money had and received, and that it should be brought in the Court of Small Causes. He, therefore, returned the plaint.

The plaintiff then applied to the High Court under its extraordinary jurisdiction.

*Purshotam P. Khare* for the Applicant (Plaintiff).

There was no appearance for the Opponents (Defendants).

**Farran, C. J.**:—We think that Kassum Gulab after receiving the subscriptions from the subscribers (who could not reclaim their subscriptions) held their amount in the capacity of a trustee for the community for the purpose of expending it upon the *dargah* and that the Subordinate Judge and not the Small Cause Court ought to have entertained the suit. We, therefore, direct that the Subordinate Judge do accept the plaint and dispose of the suit. The plaintiff should amend his plaint by suing (with the permission of the Court) on behalf of the community under section 30, Civil Procedure Code (Act XIV of 1882).

*Subordinate Judge directed to accept plaint.*

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## [731] APPELLATE CIVIL.

*The 10th June, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Ganpat Bhagvan............Decree-holder

*versus*

Mahadev Hari...........Defendant.*

*Execution—Arrest—Application of judgment-debtor to be declared insolvent—subsequent proceedings in execution against him—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Secs. 245B, 336—337A, 344 and 349.*

Ganpat Bhagvan obtained a money-decree against Mahadev and in execution applied for his arrest and imprisonment. Before the warrant of arrest was issued, but after Mahadev had appeared in Court in obedience to a notice under section 245B of the Civil Procedure Code (Act XIV of 1882), another judgment-creditor applied for execution of another decree against him. Thereupon Mahadev applied under section 344 of the Civil Procedure Code (Act XIV of 1882) to be declared an insolvent, and in his application mentioned Ganpat Bhagvan as one of his creditors (section 345). The Subordinate Judge referred to the High Court the question whether pending the inquiry into Mahadev's insolvency he could be arrested in execution of Ganpat Bhagvan's decree against him.

*Held*, that there was no provision in the Code to prevent the Court from issuing a warrant of arrest against him.

Where, however, such a judgment-debtor is brought before the Court under a warrant of arrest, or comes before it upon notice under section 245B, the Court has a discretionary power not to put the warrant in force under section 349 or not to issue it under section 336 (where the requisite notification has been published by the Local Government) if the applicant furnishes security for his appearance when called upon.

In such cases the Court can also act under section 337A of the Civil Procedure Code (Act XIV of 1882).

REFERENCE by Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Dhulia in the Khandesh District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

One Ganpat Bhagvan obtained a money decree against Mahadev Hari and applied for execution by arrest and imprisonment of the defendant. Before the warrant of arrest was issued, but after Mahadev had appeared in Court in obedience to a notice under section 245B of the Civil Procedure Code (Act XIV of 1882), another judgment-creditor applied for execution of another decree against him. Mahadev thereupon applied to be declared [732] an insolvent under section 344 of the Civil Procedure Code (Act XIV of 1882). In his application he inserted the name of Ganpat Bhagvan as one of his creditors. Pending inquiry into the said application, the Subordinate Judge referred the following question :—

"Whether the defendant can be arrested in execution of the decree of Ganpat Bhagvan pending an inquiry into the defendant's application for insolvency?"

The opinion of the Judge was in the negative.

*Mahadev V. Bhat* (*amicus curiæ*), for the decree-holder :—The mere fact that the judgment-debtor has inserted the name of the decree-holder in his

* Civil Reference, No. 6 of 1897.

application to be declared an insolvent, and that his application is pending, does not take away the decree-holder's right of having the judgment-debtor arrested and imprisoned in execution of his decree. Chapter XIX of the Code deals with arrest and imprisonment of judgment-debtors. There is no section in it which exempts a judgment-debtor from arrest and imprisonment on the ground that an application for insolvency in other execution proceedings is pending.

There is nothing to show that the conditions laid down in section 336 or section 337A of the Code were satisfied in the present case. The Court, therefore, cannot exercise the discretion vested in it by those sections in favour of the judgment-debtor.

*Ramdatt V. Desai* (*amicus curiæ*) for the Judgment-debtor:—A judgment-debtor, who has been arrested and brought before the Court under section 336 of the Civil Procedure Code, may declare his intention to apply to be declared an insolvent. He may do this as often as he is brought before the Court in execution of decrees against him. Where he has done so in one execution proceeding it would be absurd to arrest and to bring him again before the Court in another similar proceeding where the name of the creditor, who has caused his arrest, has been inserted in the application for insolvency. It is true there is no provision in the Civil Procedure Code forbidding a Court from issuing warrants of arrest or notices to show cause why execution should not issue in as many execution proceedings as there may be decrees, but the judgment-debtor so arrested or brought before [733] the Court has merely to repeat his application to be declared an insolvent, and the Court must release him from arrest.

The insertion of the name of the judgment-creditor in the list of creditors given with the application for insolvency, is equivalent to an application for insolvency in each case, and Ganpat Bhagvan's name having been included in the application, the defendant cannot be subsequently arrested at his instance.

**Farran, C. J.**:—There is no section in the Code which prevents the Court issuing a warrant of arrest or a notice under section 245B of the Civil Procedure Code (Act XIV of 1882) against a judgment-debtor who has in other execution proceedings made an application under section 344 to be declared an insolvent pending the inquiry into such application. Where, however, such judgment-debtor is brought before the Court under a warrant of arrest, or comes before it upon notice under section 245B, the Court has a discretionary power not to put the warrant in force under section 349 or not to issue it under section 336 (where the requisite notification has been published by the Local Government) if the applicant furnishes security for his appearance when called upon. The Court can also act in such cases under section 337A

*Order accordingly*.

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**NOTES.**

[ See likewise (1905) 9 O. C., 42.]

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[ 22 Bom 733 ]
## APPELLATE CIVIL.

*The 14th June, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Dagdu and others............(Original Plaintiffs) Appellants
*versus*
Kalu............(Original Defendant) Respondent.*

*Adverse possession continuous—Temporary interruption of possession—Wrongful possession given by Court to a third person—Restoration of possession to defendant.*

In a suit brought to recover possession of certain land the defendant pleaded limitation. He had held possession of the land adversely to the plaintiff from 1881 up to the date of suit (2nd October 1895), with the exception of a period of three years (*viz.*, 4th April 1892 to 9th April 1895) during which he was dispossessed under a decree of a Civil Court of First Instance obtained against him by a third person, which being reversed in appeal he was restored to possession on the said 9th April 1895.

[734] *Held* that the present suit was barred by limitation. The wrongful possession given by the Court to a third person did not (after possession had been restored to the defendant) prevent the statute from running during its continuance against the plaintiff and in favour of the defendant.

SECOND APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge (A. P.) of Khandesh at Dhulia.

Suit to recover possession of land. The suit was brought on the 2nd October 1895. The plaintiffs were originally the owners, but had been out of possession since 1881, and during all that time the defendant had been in adverse possession with the exception of a period of three years, *viz.*, from 4th April 1892 to 9th April 1895. During that period he had been dispossessed by one Barsu, who, alleging that the plaintiff had given him the land in question, had sued to recover it from the defendant, and having obtained a decree on the 30th January 1892, was in execution put into possession on the 4th April 1892. That decree was confirmed, in appeal, on 8th November 1892, but on second appeal the High Court on the 13th September 1894, reversed it, and in execution of the High Court's decree the defendant was reinstated in possession on the 9th April 1895.

The defendant contended that the claim was barred by limitation.

The parties having admitted the findings of the Court in the former suit, and desired the Court to try the issue of limitation only, the Subordinate Judge found that the suit was not time-barred, and awarded the claim.

On appeal by the defendant the Judge reversed the decree and dismissed the suit. The following is an extract from his judgment:—

"It is contended that the present suit is barred by time. Under article 142† of the Limitation Act (XV of 1877) time began to run from the date of dispossession or discontinu-

* Second Appeal, No. 904 of 1896.

† [ Art. 142:—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. | Twelve years. | The date of the dispossession or discontinuance.] |

ance, and under article 144 it began to run from the date when defendant's possession became adverse to the plaintiffs. *It is clear, therefore, the present suit has been brought more than twelve years after the commencement of defendant's possession in 1881.* The only ground *on which it is attempted to show that the suit is within time is that from 4th April 1892,* to 9th April 1895, the plaintiffs' donee had been in possession, and during that period the plaintiffs could not have sued. This is, no doubt, a strong point, but neither the [735] lower Court nor the respondent's pleader has been able to cite any authority to support it. I cannot agree with the Court below in holding that the possession of the donee was equivalent to plaintiffs' possession. The donee had been in possession under his own title and adversely to the plaintiffs. Suppose the donee had continued in possession for more than twelve years, could the plaintiffs have sued to set aside the gift and recover possession on the ground that possession of the donee was simply permissive? I answer this question in the negative. The plaintiffs, therefore, cannot claim the benefit of the possession of their donee. The donee was put in possession by order of Court, but that order was declared erroneous and was set aside by the High Court. The reversal of a decree of a lower Court by the appellate Court has the effect to relegate the parties to the position in which they were at the date of the commencement of the suit. The decrees of the lower Courts in favour of the donee having been set aside by the High Court, the defendant was relegated to his position at the date of the donee's suit. The defendant can successfully sue the donee for mesne profits for the period during which the donee had been in possession under the erroneous decrees of the Courts below. It seems to me, therefore, that the possession of the donee was the possession of a person accountable in law to the defendant. In *Motee Sing* v. *Rajah Leelanund*, 11 Cal. W. R., 49, it was held that possession obtained by the plaintiff himself under an order which was subsequently reversed was not enough to save his claim from the bar of limitation. I, therefore, hold that the suit is barred by time."

The plaintiffs preferred a second appeal.

*Daji A. Khare* for the Appellants (Plaintiffs).

*Ghanasham N. Nadkarni* for the Respondent (Defendant).

**Farran, C. J.**:—We are of opinion that the Subordinate Judge, First Class, A. P., in this case has come to a correct decision, and that his decree should be confirmed. The claim of the plaintiffs to recover possession of the land in suit is, we think, time-barred. The plaintiffs have admittedly been out of possession of the land since 1881, and the defendant has been in adverse possession of it from that time until the date of suit, the 2nd October 1895, with the exception of a period during which he was ousted from possession by a third person who wrongly alleged that he was the donee of the plaintiffs. Under that allegation the alleged donee obtained possession of the land under the decree of a Court of First Instance in April 1892, but that decree was (after having been confirmed by the Lower Appellate Court) reversed by the High Court and the land was, as the result of the reversal, restored by the Court to the defendant on 9th April 1895. The reversal of the decree [736] by the High Court relegated the parties to the position which they held at the commencement of the suit. The erroneous action of the Court of First Instance cannot, we think, prejudice the defendant, or put him in a worse position than he would have occupied, had the erroneous decree not been made. As remarked by the lower Court, the defendant could have sued the interloper for mesne profits during the time he was in possession under the erroneous decrees of the lower Courts. There was no abandonment of possession here by the defendant as in *Agency Company* v. *Short*, 13 App. Ca., 793. The defendant was all along asserting his claim of right to the land and its possession, though for a short time he was improperly deprived of the latter.

If the law is correctly laid down by KAY, L. J., in *Willis* v. *Earl Howe*, (1893) 2 Ch. 545 at p. 553, it would cover the present case: "A continuous

adverse possession for the statutory period, though by a succession of persons not claiming under one another, does," (says that learned Judge) "in my opinion, bar the true owner," but we prefer to rest our decision upon the ground taken by the Lower Appellate Court that the wrongful possession given by the Court to a third person did not, (after possession had been restored to the defendant), during its continuance, prevent the statute from running against the plaintiffs, and in favour of the defendant. If we assume that the wrongful possession was obtained at the instance of the plaintiffs, the effect would not, we think, be different. Our view is supported by the case of *Motee Singh* v. *Rajah Leelanund*, 11 Cal. W. R., 49, cited by the lower Court.

Decree confirmed with costs.

*Decree confirmed.*

NOTES.

[See also (1904) 28 Mad., 338 where, so far as plaintiff was concerned, he was out of possession for the statutory period and was therefore held to have been barred.]

## [737] APPELLATE CIVIL.

*The 15th June, 1897.*
PRESENT:
MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Narbheram............(Original Opponent) Appellant
*versus*
The Collector of Broach............(Original Applicant) Respondent.*

Bhag—*Bhagdari Act* (*Bom. Act V of 1862*), *Sec.* 2—*Sale of a portion of a* bhag *in execution of a decree—Process for sale—Collector's right to get the process quashed.*

The appellant was the mortgagee of a portion of a *bhag* under a mortgage dated 1880, and in a suit brought upon the mortgage obtained a decree for sale of the mortgaged property. An attachment was issued and an order for sale was made. Thereupon the Collector applied, under section 2 of Bombay Act V of 1862, to set aside the attachment and order for sale.

*Held*, that the mortgage of a portion of a *bhag* was unlawful under section 3 of the Act, and a process having been issued for sale of such portion, the Collector was entitled to have it quashed.

*Ranchoddas* v. *Ranchoddas*, I. L. R., 1 Bom., 581, distinguished.

SECOND APPEAL from the decision of C. Fawcett, Assistant Judge, F. P., of Broach.

One Hargovan Parshotum was the owner of a *bhag* in the village of Asta.

In 1873 he sold a *gabhan* (or building site), which was appurtenant to his *bhag*, to one Bhagvan, and in 1880 he mortgaged the remaining portion of the *bhag* to one Narbheram Sadaram.

In 1888 Narbheram sued upon the mortgage and he having died, his heirs obtained a decree for sale of the mortgaged property, and in execution the property was attached and ordered to be sold.

Thereupon the Collector intervened (in 1891) and applied to the Court, under section 2 of Bombay Act V of 1862, to set aside the attachment and

* Second Appeal, No. 124 of 1897.

order for sale, on the ground that the property attached was only a portion of a *bhag* and did not include the *gabhan* which was appurtenant to it.

The execution creditors contended that the *gabhan* in question was no part of the *bhag*; that the judgment-debtor had no title to the *gabhan*; that the whole of his interest in the *bhag* was attached, and that the attachment was not illegal.

[738] The Subordinate Judge of Anklesvar found that the *gabhan* was part of Hargovan's ancestral *bhag*; that he had sold the *gabhan* in 1873 in contravention of the provisions of Bombay Act V of 1862; and that as the *gabhan* was not included in the property attached, the attachment was illegal. He, therefore, set aside the attachment and order for sale, and his decision was confirmed, on appeal, by the Assistant Judge of Broach.

The decree-holders thereupon preferred a second appeal to the High Court.

*Manekshah Jehangirshah*, for Appellants.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for Respondent.

**Parsons, J.**:—The appellant sought to have a portion of a *bhag* sold in execution of a decree on his mortgage. At the instance of the Collector taken under section 2 of the Bhagdari Act (Bom. Act V of 1862) the Court below set aside the process for sale.

It is argued before us that the lower Court was wrong, (1) because the Act does not apply to a sale under a mortgage, (2) because the mortgage was of the whole interest of the mortgagor in the *bhag*. We think that neither of these arguments is sound.

In support of the first point, *Ranchoddas* v. *Ranchoddas*, I. L. R., 1 Bom., 581, is cited. No doubt there is a remark in that decision that the words "attachment or sale by the process of any Civil Court" in section 1 were intended to prevent attachment and sale under simple money decrees, and not to prevent the sale of mortgaged property in satisfaction of the mortgage-debt. But the Court there was dealing with a mortgage made before the Act was promulgated, and the remark must be confined to such. The words of section 2 of the Act are very wide, and section 3 declares that it shall not be lawful to mortgage any portion of a *bhag*. Under section 3, therefore, the mortgage in the present case was unlawful, and as there had been a process issued for the sale of a portion of a *bhag*, the Collector under section 2 was entitled to move the Court to get it quashed.

[739] As to the second point. The mortgage may be of the whole interest of the mortgagor, but we do not see how this can possibly render it legal. The object of the Act is to keep a *bhag* intact, and with that object it forbids the mortgaging of any portion of any *bhag*. The mortgagor in the present case was, it is said, at one time the owner of the whole *bhag*, but he sold a part of it to one Bhagvan in 1873 and he mortgaged the rest to the appellant in 1880. Both of these transactions were illegal under the Act, and the fact of the earlier transaction cannot possibly be held to validate the latter. The true and only test to apply to the case is to see whether what the appellant seeks now to have sold is a portion of a *bhag* other than a recognised sub-division of such *bhag*. Both the lower Courts find as a fact that it is, and, therefore, their decision on the law is correct. We confirm the decree with costs.

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[22 Bom 739]

## CRIMINAL REVISION.

*The 12th November, 1896.**

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Manockji Dadabhai

*versus*

The Bombay Tramway Company.*

*Tramways Act (Bom. Act I of 1874), Sec. 24—"Regulating the travelling"—Meaning of the words—Regulation made under the section for regulating the conduct of the Company's servants—Illegality of such regulation.*

The words "regulating the travelling" in section 24 of the Bombay Tramways Act (Bom. Act I of 1874) mean laying down rules as to how persons shall travel, that is to say, rules for the conduct and behaviour of the persons who travel, and cannot be held to include rules for the conduct of the Company's servants, prescribing what they shall do, or what they shall not do, in the matter, for instance, of issuing tickets.

Section 24 of Bombay Act I of 1874 authorises the Bombay Tramway Company to make regulations "for regulating the travelling in or upon any carriage belonging to them." Under this section the Company made the following regulation:—

"Any conductor who shall neglect to issue a ticket to a passenger, or shall issue to such passenger a ticket bearing a number other than one of the numbers contained in such books, or shall issue a ticket of a lower denomination than the amount of the fare, or non-consecutive in number, or a ticket other than the ticket provided by the Company for the journey to be travelled,—shall for every such offence be liable to a penalty not exceeding Rs 25."

*Held*, that the regulation was *ultra vires*.

[740] APPLICATION under section 439 of the Code of Criminal Procedure (Act X of 1882).

The accused was a tramway conductor in the service of the Bombay Tramway Company.

He was prosecuted by the Company for omitting to issue a half-anna ticket to a passenger after receipt of the fare, as he was bound to do under bye-law 6 framed by the Company under section 24 of the Bombay Tramways Act (Bom. Act I of 1874), which authorises the Company to make regulations "for regulating the travelling in or upon any carriage belonging to them."

The bye-law was as follows:—

"Every person travelling on the tramway will, on payment of his fare, be furnished with a ticket specifying the amount of fare, and shall when required show his ticket to any servant of the Tramway Company.

"Each tramway car shall be in charge of a conductor, and each conductor will be furnished with books, each containing tickets consecutively numbered. Any conductor who shall neglect to issue a ticket to a passenger or shall issue to such passenger a ticket bearing a number other than one of the numbers contained in such books, or shall issue a ticket of a lower denomination than the amount of the fare or non-consecutive in number, or a ticket other than the ticket provided by the Company for the journey to be travelled, shall for every such offence be liable to a penalty not exceeding Rs. 25."

The accused was convicted under the above bye-law and sentenced to pay a fine of Rs. 5 by Khan Bahadur P. H. Dastur, Acting Third Presidency Magistrate.

* Criminal Revision, No. 215 of 1896.

The accused thereupon moved the High Court under its revisional jurisdiction to set aside the conviction and sentence.

*R. B. Paymaster* and *Dhanjibhai Jehangir*, for the Accused.

*Lang*, Advocate-General, (with Messrs. *Roughton and Byrne*), for Complainant.

**Parsons, J.** :—The applicant has been convicted of the offence of failing to issue an half-anna ticket to a passenger on the Bombay Tramway on receipt of the fare, as he was bound to do under bye-law 6 framed under section 24 of the Bombay Act I of 1874 (The Bombay Tramways Act). The bye-law is as follows :—

"Each tramway car shall be in charge of a conductor, and each conductor will be furnished with books, each containing tickets consecutively numbered. Any conductor who shall neglect to issue a ticket to a passenger, or shall issue [741] to such passenger a ticket bearing a number other than one of the numbers contained in such books, or shall issue a ticket of a lower denomination than the amount of the fare or non-consecutive in number, or a ticket other than the ticket provided by the Company for the journey to be travelled, shall, for every such offence, be liable to a penalty not exceeding Rs. 25."

The point is, whether this is a bye-law that could legally be made under the said section 24, which allows the grantees to make regulations for regulating the travelling in or upon any carriage belonging to them. It is argued by the Advocate-General, for the prosecution, that as the payment of fares and the taking of tickets are essentials of travelling, a regulation as to the issue and grant of the tickets is a regulation of the travelling. We cannot, however, agree with the argument. Sections 16 to 18 of the Act provide for the payment of fares, and give the grantees the power to regulate the place and manner of payment. It may be a preliminary of travelling that a person shall take a ticket, but it is not an essential of travelling that he shall have a ticket, still less a ticket of a consecutive number or of a particular colour. We think the words "regulating the travelling" can only mean laying down rules as to how persons shall travel, that is to say, rules for the conduct and behaviour of the persons who travel, and cannot be held to include rules for the conduct of the Company's own servants, prescribing what they shall do or what they shall not do, in the matter, for instance, of the issue of tickets, which rules are only framed by the Company for their own protection against the possible fraud or dishonesty of their servants. We are confirmed in this opinion by the fact that an express clause to enable bye-laws to be made for regulating the conduct of railway servants was by Act IV of 1883 inserted in the Railway Act, 1879, and now forms part of the Railway Act, 1890.

We reverse the conviction and sentence.

**Ranade, J.** :—The question of law to be considered in this case is whether Rule 6 of the rules framed by the Tramway Company for the regulation of the duties of conductors falls within the scope of any of the clauses of section 24 of Bombay Act I of 1874. It was contended by the Advocate-General, who appeared on behalf of the Company, that the clause which permitted the [742] Company to make rules for the regulation of travelling, included a power to frame rules for the conduct of the Company's servants. I am unable to accept the correctness of this view. The words used in section 24 are similar to those used in the Railway Company's Act, section 47, clause (*g*) of Act IX of 1890, which section, however, contains a separate clause (*e*), empowering the Company to make rules for regulating the conduct of its own servants. It is quite clear from this that the words used in section 24 do not imply the power to make rules for the regulation of the conduct of the Company's servants. This becomes still more clear from the fact that section 8 in the old Railways

Act IV of 1879 contained a clause (*e*) similar in its import to the words used in section 24 of the Tramways Act, and that the Legislature deemed it necessary to pass a new Act IV of 1883 by which for the first time power was conferred on railway administration to make rules for regulating the conduct of railway servants. It accordingly appears clear that the words used in section 24, on which the Advocate-General relies, cannot be understood as conferring a power on the Tramway Company to frame rules for regulating the conduct of its servants in a way to make the negligent omission of the conductor to issue tickets to passengers an offence under the Tramways Act. The Company has the power to dismiss its servants for neglect of duty, but the negligence or omission cannot be dealt with as an offence criminally punishable. The rule is obviously *ultra vires*, and we must reverse the conviction and sentence passed in this case.

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[22 Bom. 742]

## CRIMINAL REVISION.

*The 19th November, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Nahalchand Motiram.*

*Police—Bombay District Police Act (Bom. Act VII of 1867), Sec. 33—"Booth"—Meaning of the word—Structure contemplated by the section must be constructed on a public road and must cause nuisance to the public—Construction.*

The accused had a house on each side of a public road. On the occasion of a wedding he put bamboos across the street from the top windows of one [743] house into the top windows of the other house, and laid a covering of cloth over the bamboos, thus making a canopy, or awning, over the street. It was at such a height that no obstruction or inconvenience whatever was caused to persons or animals passing along the street. The accused erected the structure without the permission of a Magistrate or Municipal Commission. For this act the accused was convicted by a Magistrate under section 33 of the Bombay District Police Act (Bom. Act VII of 1867)† and sentenced to pay a fine of Rs. 5.

*Held*, reversing the conviction and sentence, that the structure erected by the accused was not a "booth" within the meaning of section 33 of Bombay Act VII of 1867. The structure contemplated by the section must be on the road itself and cause some nuisance to the public. As no part of the structure in question touched the road, it could not be said to have been constructed on the road.

APPLICATION for revision under section 435 of the Code of Criminal Procedure (Act X of 1882).

The accused had a house on each side of a public street.

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* Criminal Revision, No. 206 of 1896.

† Section 33 of Bombay Act VII of 1867 provides as follows:—"Any person who on any public thoroughfare without the permission of a Magistrate or Municipal Commission constructs any booth, shed, stable, or the like . . . . shall be punishable . . . on conviction before a Magistrate, to the extent of fifty rupees' fine, &c."

In December 1895, he erected a *mandap*, or pendal, for the purpose of a wedding, by putting bamboos across the street from the top windows of one house into the top windows of the other house. He laid a covering of cloth over the bamboos so as to form a canopy or roof over the street. No part of the structure touched the road, and no obstruction or inconvenience was caused to any person or animal crossing or passing along the street.

The accused put up this structure without obtaining the permission of a Magistrate or Municipal Commission.

The accused was, therefore, convicted before a Magistrate under section 33 of the Bombay District Police Act (Bom. Act VII of 1867), and sentenced to pay a fine of Rs. 5.

The District Magistrate of Sholapur upheld this conviction and sentence, in appeal.

The accused thereupon moved the High Court under its revisional jurisdiction.

*G. S. Mulgavkar*, for Accused.

[744] Rao Saheb *V. J. Kirtikar*, Government Pleader, for the Crown.

*Per* CURIAM:—Section 33 of the Bombay District Police Act, 1867, says: "Any person who on any public thoroughfare . . . . . . . constructs any booth, shed, stable, or the like, &c. . . . . shall be punishable, &c." The accused in this case owned a house on each side of the street and he put bamboos across the street from the top windows of one into the top windows of the other house, and laid a covering of cloth over the bamboos, thus making a canopy, roof or awning over the street. The structure was at such a height that no obstruction or inconvenience whatever was caused to persons or animals passing along the street. It may be that the accused trespassed over the road and did an act to which the owners of the street might object—*Nagar Valab Narsi* v. *The Municipality of Dhandhuka*, I. L. R., 12 Bom., 490; but the point is, whether what the appellant erected was a booth, shed, stable or the like constructed on a public thoroughfare. In *Goldstraw* v. *Duckworth*, 5 Q. B. D., 275, the words "over or upon the pavement" in section 67 of the 5 Vict., C. 44, S. 2, were construed to mean "over or upon the pavement so as to obstruct the passage along it." It is remarkable that the word "on" only is used in section 33, and its use in this section, which deals with "public nuisances," would seem to imply that the structure complained of must be on the road itself and cause some nuisance. Since no part of the present structure touched the road, it is difficult to see how it can be said to have been constructed on that road. It was, in fact, supported by, and constructed on, the accused's own houses. As to its being a booth, for which only the Government Pleader has contended, we have to see what a booth really is. In Webster's Dictionary the word is said to mean "a house, or shed built of boards, boughs of trees or other light materials for temporary occupation." In Latham's Dictionary it is said to mean "a temporary house constructed with boards or boughs or canvas." The structure raised by the appellant does not fall within either of these definitions, and we do not think that it can be held to be a booth. The lower Courts [745] have not dealt with this point. The Magistrate calls the construction a *mandap*. The District Magistrate calls it a pendal

We think that the conviction cannot be supported, and we reverse it and the sentence.

[22 Bom. 745]

## CRIMINAL REVISION.

*The 26th November, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Queen-Empress

*versus*

Bai Vaju and others.*

*Gaming—Prevention of Gambling Act (Bombay Act IV of 1887), Secs. 4, 5 and 7—Proof of keeping or of gaming in a common gaming house—Presumption—Evidence.*

A number of persons were found by the police in a closed room in the upper story of a house, gambling with dice, and having cowries and money before them. They were convicted under Bombay Act IV of 1887.

*Held*, confirming the conviction, that under section 7 of the Act the facts found were evidence (until the contrary was shown) that the room was used as a common gaming house, and that the persons found therein were there present for the purpose of gaming.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

The accused, who were fourteen in number, were charged under sections 4 and 5 of Bombay Act IV of 1887,—accused No. 1 with keeping a common gaming house, and accused Nos. 2 to 14 with gaming in a common gaming house.

On the night of the 31st August 1896, all the accused except No. 1 were found by the police in a closed room on the upper story of a house, sitting in a circle with dice and *cowries* (shells), and money before them.

The house was attached to a Hindu temple, of which accused No. 1 was the *pujari* or ministrant.

Accused No. 1 was not in the house when the police appeared on the scene and arrested the other accused.

The accused were tried summarily under Chapter XXII of the Code of Criminal Procedure (Act X of 1882) by the First Class [746] Magistrate of Dhandhuka. He held that the house in question was a common gaming house, and that all the accused except two were guilty of the offences charged, and he sentenced them to pay fines varying from Rs. 10 to 40.

Against these convictions and sentences, the twelve accused applied to the High Court under its revisional jurisdiction.

*Nagindas Tulsidas* (with *Ganpat S. Rao*), for Accused

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

*Per* CURIAM:—No doubt, as held in Criminal Ruling No. 9 of 1896, in the absence of evidence that a house is used for profit or gain, it cannot be held to be a common gaming house as defined in the Bombay Prevention of Gambling Act, 1887, section 3. In the present case, thirteen persons were found in a room in the upper story of the house in question, sitting in a circle, gambling with dice, and having a quantity of *cowries* and money before them. Section 7 of the above quoted Act enacts that this shall be evidence, until the contrary is made to appear, that the room is used as a common gaming house,

* Criminal Revision, No. 260 of 1896.

and that the persons found therein were there present for the purpose of gaming. The criminal ruling, therefore, has no application to the facts of the present case, and we see no reason to interfere with the conviction of the applicants 2 to 12. Applicant 1 is convicted under section 4 of the Act. But she was not in the room, and the Magistrate does not record any finding that she is the owner or occupier of the house or room, but merely that her daughter was sitting outside the door, which was chained. In her case we reverse the conviction and sentence.

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[ 22 Bom. 746 ]

## APPELLATE CRIMINAL.

*The 3rd December, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Queen-Empress

*versus*

Ross.*

*Police—Bombay District Police Act (IV of 1890), Sec. 47—Right of the police to have free access to a place of public amusement or resort—Race-course enclosure.*

Races were held in a certain enclosed ground at Poona which belonged to the Military authorities, and was lent for the purpose to the Western India Turf [747] Club. The part of the ground to which the public were admitted, was fenced in by ropes, and soldiers were stationed at intervals to prevent any persons entering or leaving the enclosure otherwise than through the passages provided for the purpose. The inspector of police, who was present on duty in that capacity, contrary to the regulations prescribed by the stewards of the races crossed over the fencing ropes into the enclosure instead of going in by the regular entrance. This was reported to the honorary secretary of the club, who had general charge of the arrangements. He sent for the inspector, and after an interview with him ordered two soldiers, who were in attendance to keep order, to put him out of the enclosure. They accordingly did so, laying hands on him in the first instance, but immediately, at his request, letting him go and merely escorting him outside. He thereupon under section 353 of the Penal Code (Act XLV of 1860) charged the secretary of the club with using criminal force to a public servant in the exercise of his duty.

*Held*, that the offence had been committed. Under section 47 of the Police Act (Bom. Act IV of 1890) the police had a right of free access to the race-course.

APPEAL from the order of A. R. Bonus, Divisional Magistrate, First Class, Poona.

The accused (Captain Ross) was the honorary secretary of the Western India Turf Club. At a race meeting held at Poona in August 1897, under the auspices of the club, on enclosed ground lent for the purpose by the Military authorities, Captain Ross caused Inspector Fleming, a police officer who had (as was alleged) infringed the regulations, to be removed from the racing enclosure.

Inspector Fleming thereupon charged Captain Ross with using criminal force to a public servant in the execution of his duty.

* Criminal Appeal, No. 352 of 1896.

The Magistrate found him guilty and under section 353 of the Penal Code (Act XLV of 1860) sentenced him to a fine of Rs. 51.

The facts of the case, and the points raised in defence, appear from the following extract from the judgment of the Magistrate:—

"This case has arisen out of an incident which occurred at the last Poona sky races meeting. There were four days' racing, the last day being August 11th. Police Inspector Fleming was the police officer on duty in immediate charge of the Civil Police, and on August 11th he came into the first enclosure over the ropes which were used to fence the enclosure, passing through the picket of soldiers who were stationed along the ropes to prevent people from entering, and (as some witnesses add) leaving the enclosure otherwise than by one of the regular entrances provided. This entry being reported to Captain Ross, who at that time was the honorary secretary of Western India Turf Club, under the [748] auspices of which club the race meeting was held, he sent for Inspector Fleming, and the interview between them ended in Captain Ross directing two soldiers of the Royal Irish Rifles to put Inspector Fleming outside the enclosure. The men took hold of Inspector Fleming, then let him go at his request, and escorted him outside the enclosure. These are the undisputed facts of the case, and on these facts a charge of using criminal force to a public servant in the execution of his duty has been framed against Captain Ross.

"The facts stated being admitted, or at any rate not disputed, the burden of proof that he is exculpated rests on Captain Ross; and to establish that exculpation the solicitor for the defence has raised several issues which it is the duty of the Court to consider and adjudicate upon. These issues are partly issues of law and partly issues of fact. They may be stated as follows:—

"(1) The race-course enclosure was not a place to which under section 47 of the Bombay District Police Act of 1890 the police had right of free access.

"(2) If it was, Inspector Fleming was bound to observe the rules and orders made by the stewards of the Western India Turf Club through their secretary and agent Captain Ross, one of which rules and orders was that no one was to be admitted to the enclosure over the ropes.

"(3) The race-course enclosure was not a place of public resort which, under section 51 of the Act mentioned, the police might enter without a warrant.

"(4) If it was, Inspector Fleming was bound by the rules and orders made by a person lawfully authorised—in this case Captain Ross as honorary secretary of the Western India Turf Club—one of which was the order already referred to . . . . . As regards the first issue, Mr. Burder has stated that he is not prepared to admit that the enclosure is a public place for the purposes of section 47 of Act IV of 1890 (Bombay). I do not see that on race days it can possibly be held not to be such a place as is contemplated by the section. It is a place to which, in this case, the public were invited by advertisement in a newspaper; it is, I hold, a place of public amusement. It may be the case, as stated by Mr. Burder, that the enclosure is a part of the ground under the control of the Military authorities, and by them handed over to the Western India Turf Club on certain conditions. That does not, I consider, exclude the enclosure from the operation of section 47 of Bombay Act IV of 1890 when the public are admitted thereto on payment of entrance money or otherwise. Lords' cricket ground in London is, I believe, the property of Marylebone Cricket Club; the Empire Theatre in London is the property of a limited company; Goodwood race-course is the private property of an individual as far as I know; but when these places are respectively used for cricket matches, theatrical performances or race meetings, they become places of public amusements, and if they were situated in the Bombay Presidency, I should consider them within the purview of section 47 of Act IV of 1890 (Bombay). That is my view as regards the race-course ground stand and enclosures managed by the Western India Turf Club.

[749] "The question of free access to the enclosure, may conveniently be considered in connection with the second issue. It is stated by Captain Ross that he informed Inspector Fleming that the whole of the side of enclosure where the ropes were, would be guarded by military picket, that he (Captain Ross) directed the picket to let no one pass except through

the gates, that Inspector Fleming was distinctly told that there would be no ingress or egress except through the gates (Exhibit 11). Inspector Fleming states that Captain Ross said that he was going to have soldiers to prevent people entering over the ropes and that Captain Ross may have said that no persons would be allowed to enter except by the gates (Exhibit 4). Several of the men who were on picket duty depose to having received orders not to allow any one to enter the enclosure over the ropes. That such orders were issued is, I think, proved; and it remains to be considered whether they were rules by which Inspector Fleming was bound, and whether they contravened the statutory right of Inspector Fleming to free access to the enclosure. I hold that Inspector Fleming was not bound by those rules and that they did contravene the right referred to. Section 47 of Act IV of 1890 speaks of rules and orders lawfully made. The District Superintendent of Police in his evidence states that he considers these rules and orders to be in this case the rules and orders made by the Western India Turf Club authorities for the regulation of the 'internal economy' of the enclosure. He considers that the orders as regards the non-entry of the public over the ropes were 'not legal;' and in answer to questions gives several other opinions about rules which either were or might be promulgated by the authority of the stewards of the Western India Turf Club. These views of Mr. Kennedy are hardly relevant, it being the Court's duty to decide on the matter. Mr. Little, Solicitor for the Crown, has urged that (a) Mr. Kennedy by the word 'legal' meant 'having the force of law'; (b) that the rules and orders referred to in section 47 refer to rules and orders made under section 39 of the Act,—leaving it to be inferred that as no rules and orders were issued by the District Magistrate in this instance, the police remained unfettered by any such rules or orders. I do not consider it necessary to discuss point (a), and I am not prepared to restrict the rules and orders mentioned in section 47 to those mentioned in section 39. I hold that 'rules and orders lawfully made' means rules and orders made under some express authorisation of law. I know of no law so authorising the stewards of the Western India Turf Club, and if it were intended that such a body when admitting the public to the premises controlled by them should be empowered to restrict the right of entry of the police to such premises, I consider that the Act would have said so in definite terms. If such a power be now conceded, the whole of section 51 of the Act is nullified. Suppose for instance that the inspector from outside the ropes had seen a man inside the enclosure pick a pocket and then try to sneak quietly away on the far side of the enclosure, would it be seriously contended that the inspector was by the stewards' rule precluded from crossing the ropes and taking the shortest way to the offender to effect his arrest. Hardly I imagine. But if the inspector [750] might cross the ropes in this particular instance in the exercise of his duty, he might also cross them for the purpose of exercising supervision and keeping order. No distinction in urgency can be recognised. I hold that Inspector Fleming had an absolute right to enter the enclosure by crossing the ropes, and that any rule or order to the contrary made by the stewards of the Western India Turf Club or their secretary was an illegal infringement of the right of free entry conferred by section 47 of the Act. The question which has been suggested, whether the erection of a high fence round the enclosure would obstruct the police, is beside the point; as a fence is not a rule or order, and if the police saw reason to climb over it in the execution of their duty, they would, I hold, be justified in doing so.

"Issue (3) can be disposed of at once for the reasons stated in connection with issue (1). I hold that on race days the enclosure is a place of public resort within the meaning of section 51. If it was not, it would be unnecessary to post a picket to prevent the public from entering without tickets.

"Issue (4) can also be briefly dismissed. I hold that a person 'lawfully authorised' means a person authorised by some express provision of law, and does not include the stewards or honorary secretary to the Western India Turf Club. My reasons for this opinion are set forth in the discussion of issue (2) . . . . . . . . . . . . . I find Captain Ross guilty of the charge framed against him. The question of sentence can be briefly disposed of. The offence was a very trifling one; in fact, almost technical. As between man and man, it would be sufficiently punished with a simple fine. But the question really at issue

is the right of the stewards of the Western India Turf Club to place restrictions on the powers claimed for the police on the authority of Act IV of 1890 (Bombay). That question is one to which I understand both sides desire a definite answer from a higher Court; and I, therefore, pass the lightest sentence which will allow of an appeal.

"The order of the Court is that Captain Ross do pay a fine of Rs. 51 (fifty-one) or, in default, suffer simple imprisonment for seven days."

From this decision Captain Ross appealed to the High Court.

*Macpherson* with Messrs. *Crawford, Burder & Co.* for the Appellant.

Rao Bahadur *V. J. Kirtikar*, Government Pleader for the Crown.

**Parsons, J.**:—This appeal has been very properly confined to, and argued upon, the purely legal question, namely, whether the police had a right to free access to the enclosed ground on which the Western India Turf Club held a race meeting on the 11th August last.

[751] The facts as set out by the magistrate in his judgment are that the public were invited by advertisements in the newspapers, &c., to the race meeting, and that the public generally were admitted to the enclosure on payment of varying amounts, and it is conceded that the meeting falls within the definition contained in section 47, Bombay Act IV of 1890.

The argument on behalf of the appellant is directed to show that under no section of the said Act was a right of free access given to the police to such a meeting under the circumstances of the present case. Sections 39 (*m*), 47, 51 and 53 of the Act were referred to as the only sections in the Act affording a possible justification of the claim for free access.

On the other side, sections 47 and 53 were relied on as giving that right. It is sufficient for the purposes of this decision to consider section 47. Sub-section 2 of that section gives the police free access to every public place of amusement, or to any assembly or meeting to which the public are invited, or which is open to the public for the purpose of giving effect to the provisions of sub-section (1) and to any direction made thereunder. In the present case, no directions were made. The Superintendent of Police says that he left the police arrangements to be made by Inspector Fleming. We must take it, therefore, that Inspector Fleming was in charge of the police arrangements, and that the duty which is clearly imposed on the police by this section, was entrusted to him. That duty, as expressed in the section itself, is "preventing serious disorder or breach of the law, or manifest and imminent danger to the persons assembled." It was argued for the appellant that until there was an apprehension of these things happening, the police would have no right of access, and that at a respectable race meeting there could be no such apprehension, and that, therefore, until the things happened there would be no right of access, but this argument loses sight of the use of the word "prevention." There is always a possibility, even among the most respectable persons at a race meeting, of some such thing happening, and where on payment of a fixed sum the public are admitted there is still more chance of such a possibility. If, in order to prevent such a possibility becoming a certainty,—in other words, if, in order to prevent these things hap- [752] pening,—the policeman in charge of the police arrangements should think it right to place police in various parts of the ground and himself go through these grounds to see that everything was going on satisfactorily, and that as far as he was concerned he had done his duty of prevention, he would clearly be acting within the powers given by this section. It is certainly not for this Court or for any Court to dictate to the police the precise amount of authority they shall exercise within the discretionary power given them by the law, or the precise time at which they shall commence to exercise that authority. The prevention of the things specified in the section

under discussion is left to them, and they are given the right of free access in order to effect that purpose. If the arguments for the appellant were correct, the Turf Club authorities could have ordered every policeman off the ground on the excuse that their services were not required at such a respectable and well-conducted meeting where there was no apprehension of any disorder or breach of the peace, or danger. It is, however, for the police authorities to determine the point, and having determined it in one way it was not within the power of the Turf Club to ignore the decision and to treat the police as trespassers. We think the conviction right, and we dismiss the appeal.

**Ranade, J.**:—I concur. Though the appeal was preferred under section 408, clause (*b*), the counsel for the appellant took no exception to the statement of facts as set forth in the judgment of the trying Magistrate, and the only point argued before us related to the question of law, whether or not the enclosure from which Inspector Fleming, the complainant, was removed forcibly by the orders of Captain Ross, was or was not a place where the Inspector had a right to remain in the performance of his duty as a police officer.

It was contended by Mr. Macpherson that the same general law applied to policemen as to private individuals, except so far as any express statute conferred on a police officer a particular authority to enter upon or remain on private property in the discharge of his duties. Only four sections (sections 39, 47, 51 and 53) of the Bombay Police Act, IV of 1890, were referred to in the course of the argument as conferring such special autho-[753]rity, but the counsel for the accused contended that Mr. Fleming was not protected by any of these sections in asserting his right to remain within the enclosure when asked to go out. Section 39 (1), clause *m*, did not, it was urged, apply, because it presupposes the existence of rules and regulations made in that behalf by the District Magistrate, which was not the case here. Section 47 empowers police officers above a certain rank to give directions in the matter of the admission of the public to places of public amusement, but it was urged that these directions have in view the prevention of disorder or breach of the law, or of imminent danger to the persons assembled, which occasions did not exist or arise in the present case. Further, section 51, clause 2, also permits a police officer to enter places of public resort; but this, it was urged, he could only do for the purposes specified in sub-section (1), which purposes are not alleged as justifications in the present case. Lastly, section 53 imposes a duty on police officers to keep order in places of public resort; but it was urged that the enclosure was not a place of public resort in the same sense in which the places specially mentioned in the section are places of public resort, and, therefore, the section did not apply.

The contentions on behalf of the appellant were thus either that the enclosure was not a place of public resort, or that there was no occasion for Inspector Fleming, as police officer, to remain within the place in the discharge of his duties, and that, therefore, his assertion of a right to stay within the enclosure when told to go out was unjustifiable, and his forcible expulsion was not an offence under section 353 of the Indian Penal Code. It appears to me, however, that the inspector had a full right, under sections 47 and 53, to be present within the enclosure, which must be held to be, for the purposes of the present inquiry, a place of public amusement or resort. It is admitted that the public were invited to the place by newspaper advertisements and every one who had obtained a ticket could go to the place. The levying of ticket fees could not make any difference. Wherever a large crowd of people assembles, and it becomes necessary to make arrangements for their entry and exit and proper accommodation, the police have a duty to

perform which they cannot forego. Though people going to a public theatre pay, [754] for the time being, for the seats they occupy, the theatre is none the less a place of public amusement and resort. In the present case, the services of the police were specially indented for by the appellant as secretary of the club, and the club had no power to limit their functions to the place outside the enclosure. It is true special arrangements were made by the club to provide for the services of soldiers who are called military police in the correspondence, but that circumstance did not lessen the responsibility of the civil police authorities to keep order and prevent breaches of the law. It was admitted that, if an occasion had arisen for the services of the civil police, they would have had a right to enter within the enclosure itself. If they could do so after disorder had broken out, it follows as a corollary that they had a right to remain within the enclosure to prevent such disorder or breach of law in anticipation. The fact appears to be that the stewards of the Turf Club admitted in the previous correspondence between the Secretary and the District Police Superintendent that Captain Ross had to a certain extent exceeded his authority in expelling the complainant from the enclosure in the way he did. The dispute would never have come before the Courts had Captain Ross expressed his regret more fully. There was a technical offence committed, and the Magistrate's decision of the point of law involved appears to me to be correct.

*Appeal dismissed.*

[ 22 Bom. 754 ]

## ORIGINAL CIVIL.

*The 22nd March, 1898.*

PRESENT :

MR. JUSTICE FULTON.

Bhojabhai Allarakhia and another ...........Plaintiffs

*versus*

Hayem Samuel...........Defendant.*

*Principal and agent—Liability of agent for rent—Honorary secretary to a school maintained by a foreign society—Contract Act (IX of 1872), Sec. 230—Ejectment—Notice to quit—Service of notice—Transfer of Property Act (IV of 1882), Sec. 106.*

The plaintiff sued the defendant to recover possession of a certain house in Bombay and for arrears of rent. The defendant pleaded that the house in [755] question was occupied by the Beni-Israel School of Bombay which was maintained by the Anglo-Jewish Association of London, that he was honorary secretary of the school, and as such, and not in his personal capacity, had hired the house, and that he had never paid the rent or expenses of the school out of his own pocket. He contended that he was not liable to be sued personally.

*Held*, that the defendant was liable for the rent. There was nothing to show that the contract for the house was made on the personal credit of any one except the defendant.

The notice to quit had been sent to the solicitors of the defendant. It was contended that this was not sufficient service under section 106 of the Transfer of Property Act (IV of 1882).

*Held*, that the service was sufficient.

* Suit No. 69 of 1898.

SUIT for possession of a house and for rent.

The plaint stated that on the 8th November 1897, the plaintiffs had purchased the house in question, the defendant being at the time a monthly tenant thereof. The defendant duly attorned to the plaintiffs.

On the 28th December 1897, the plaintiffs served a notice on the defendant to vacate on or before the 1st February 1898, but the defendant disregarded the notice and continued in occupation. The plaintiffs prayed for possession and for rent at the rate of Rs. 150 per month from the 8th November up to the 31st January 1898, and for compensation for use and occupation subsequently to that date at the rate of Rs. 200 a month.

In his written statement the defendant stated that he was the honorary secretary of the Beni-Israel School of Bombay, which occupied the house in question, and that the said school was in charge of the Anglo-Jewish Association of London, which, out of its funds, paid the rent and all the expenses of the school; that in hiring the said premises he had acted as honorary secretary and not in his personal capacity; and that he had never paid the rent or expenses of the school out of his own pocket. He submitted that he was not liable to be sued personally for the said rent.

He also alleged that the notice to quit had not been served upon him as required by section 106 of the Transfer of Property Act (IV of 1882) and that the notice was, therefore, not a legal notice, and he brought into Court Rs. 565, being the rent due at [756] Rs. 150 per month which he contended was all the plaintiff could claim.

At the hearing the following issues were raised:—

(1) Whether defendant is personally liable to the plaintiffs and whether the plaintiffs have any cause of action against him personally?

(2) Whether defendant received legal notice to quit?

(3) Whether, having regard to the payment into Court, plaintiffs are entitled to any and what relief against the defendant?

*Inverarity*, for the Plaintiffs:—The defendant, if merely an agent of the London Association, is an agent of a foreign principal, and as such liable. The plaintiffs had no notice that he was merely an agent. The notice to quit was served upon his solicitors, and that is sufficient under section 106 of the Transfer of Property Act (IV of 1882).

*Lowndes*, for Defendant:— The plaintiffs had full notice that the defendant was merely an agent. The Bombay Branch of the London Association is liable and not the defendant. As to service of notice, section 106 of the Transfer of Property Act (IV of 1882) is clear.

The following authorities were cited:—As to the liability of an agent, *Dutton* v. *Marsh*, L. R., 6 Q. B., 361, *In re New Fleming Spinning and Weaving Co.*, I. L. R., 4 Bom., 275; *Farhall* v. *Farhall*, L. R., 7 Ch., 123; *Burls* v. *Smith*, 7 Bing., 705; Storey on Agency, Sec. 285, Daly's Law of Clubs and Voluntary Associations. As to service of notice, *Papillon* v. *Brunton*, 5 H. & N., 518; *Prior* v. *Ongley*, 10 C. B., 25; *Jogendro Chunder* v. *Dwarknath Karmokar*, I. L. R., 15 Cal., 681.

**Fulton, J**:—On the first issue I find in the affirmative. Assuming that the former owner when he let the premises to the defendant knew that the latter was the honorary secretary and treasurer of a school committee (which is very possibly the case) still there is nothing to show that the contract was made on the personal credit of any one except the defendant. A fluctuating body like the committee of a society or school cannot contract, though the individuals composing it may do so. Here [757] it is not alleged that

any single individual was named as having authorized the amount, and to this day we do not know who were the members of the committee in question and in what way (if at all) they signified their assent to the tenancy accepted by the defendant. *Primâ facie*, looking to the forms of receipt which the defendant accepted, I should say he contracted in his own name, but whether he did so or not, the case seems to fall under section 230 of the Contract Act, no principal being disclosed. Mr. Lowndes argued that a decision on this issue against the defendant would render precarious the position of honorary secretaries of charitable institutions in general. I do not think that is the case. If secretaries of voluntary societies make contracts without disclosing the names of the persons under whose authority they are acting, they of course render themselves liable for the performance of the contracts they have made, but in practice no real difficulty usually occurs; for the committees of the institutions concerned would, as a rule, naturally feel bound, in honour, to indemnify their officers, and would, in so far as they had authorized the contract, be equally bound to them in law.

On the second issue it appears to me that the notice to quit sent to Messrs. Craigie, Lynch and Owen is sufficient. Either the case falls under section 106 of the Transfer of Property Act, or it does not. If there is no custom taking the case out of the section it is quite clear, from the defendant's evidence, that the notice was delivered to him more than fifteen days before the end of January. It was sent to his solicitors, who handed it over to his brother, who in turn passed it on to him within a few days. There can, I think, be no doubt that the notice was in the defendant's hands before the 15th January, and if so, the wording of section 106 was complied with. The notice was delivered to the defendant personally. I am asked to say that it was not delivered to the defendant personally, because it was not placed in his hands by the plaintiffs or their agent. But I could not so decide without adding words to the section, which does not determine by whom delivery must be made. So long as the notice is delivered by some one to the defendant, the literal terms of the section are complied with and also, I think, [758] its intention, which is simply to secure due notice to the tenants, I cannot see what difference it makes whether a notice is given, in the first instance, to the solicitors and by him conveyed through a relative or servant to the tenant, or whether it is given direct to the tenant by the lessor in the first instance. In both cases it is either eventually or directly delivered to the tenant personally and that is all that the language or the spirit of the section requires. To accept the argument put forward for the defence it seems to me that I should have to alter the wording of the section, and that in doing so I should clearly be defeating its intention.

On the other hand, if, as seems very probable, the case does not fall under section 106 owing to the existence of a local custom requiring a month's notice in the case of bungalows and houses of which the rent is paid monthly, it seems equally clear that the notice of the 28th December was sufficient. It was given to Messrs. Craigie, Lynch and Owen, who did not disclaim authority to act for the defendant, and who caused it to be conveyed to the defendant. They had a few days before written to the plaintiff on the subject, and as a matter of fact they did communicate the notice to the defendant, though possibly not till after 1st January. In these circumstances, then, there is, I think, a presumption that they had authority to receive the notice (see *Prior* v. *Ongley*) 10 C. B., 25, and consequently the question whether they actually sent it on in time to the defendant, does not arise—*Tanham* v. *Nicholson*, L. R., 5 H. L., 661.

I pass a decree for plaintiffs in terms of paragraphs 1 and 2 of the prayer of plaint and for compensation at the rate of Rs. 150 per month for the use

and occupation of premises from the 1st February to the day of receiving possession. I do not think it proved that at the present time plaintiffs could have got a higher rent than what they were receiving from defendant. Defendant to pay costs of this suit.

Attorneys for the Plaintiffs:—Messrs. *Framji and Dinshaw.*

Attorneys for the Defendant:—Messrs. *Ardesir, Hormasji and Dinsha.*

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## [759] CRIMINAL REFERENCE.

*The 10th December, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Queen-Empress
*versus*
Kalu Dosan.*

*Criminal Procedure Code (Act X of 1882), Sec. 412—Appeal from a conviction by a Magistrate, other than a Presidency Magistrate, where accused pleads guilty—Appeal.*

The accused pleaded guilty to a charge of kidnapping from lawful custody, and was thereupon convicted by a Magistrate of the First Class and sentenced to four months' rigorous imprisonment and a fine of Rs. 20. The accused appealed and in appeal denied that he had committed the offence. The Sessions Judge was of opinion that, as the accused had pleaded guilty at the trial, he had no power to deal with the appeal, except as regards the amount of punishment awarded. He, therefore, referred the case to the High Court.

*Held*, that the Sessions Judge was competent to deal with the whole appeal. Section 412 of the Criminal Procedure Code (Act X of 1882) had no application. That section provides for convictions by Courts of Session or Presidency Magistrates only, and the exception is not only as to the extent but also as to the legality of the sentence.

REFERENCE under section 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged with the offence of kidnapping from lawful guardianship under section 363 of the Indian Penal Code (Act XLV of 1860).

The accused pleaded guilty, and was convicted on his own plea by the First Class Magistrate of Ahmedabad and sentenced to rigorous imprisonment for four months and to pay a fine of Rs. 20.

The accused then appealed to the Sessions Judge, and in appeal denied that he had committed the offence.

The Sessions Judge was of opinion that the conviction was illegal; but as the accused had pleaded guilty at the trial, he held that he had no power to deal with the appeal except as regards the amount of the punishment awarded.

He, therefore, referred the case to the High Court under section 438 of the Code of Criminal Procedure (Act X of 1882).

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* Criminal Reference, No. 131 of 1896.

[760] The reference came on for hearing before a Division Bench (PARSONS and RANADE, JJ.).

There was no appearance for the Crown or for the Accused.

*Per* CURIAM :—We return the appeal to the Sessions Judge for him to dispose according to law. We do not understand what he means by saying that he cannot deal with the appeal except as regards the amount of punishment. Section 412 of the Criminal Procedure Code provides for convictions by Courts of Session or Presidency Magistrates only, and the exception is not only as to the extent but as to the legality of the sentence.

*Case remanded.*

NOTES.

[The words ' *or Magistrate of the First Class* ' have been inserted in sec. 412, Criminal Procedure Code, 1898.]

[ 22 Bom. 760 ]

CRIMINAL REVISION.

*The 10th December, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Queen-Empress

*versus*

Hanma.*

*Criminal law—Practice—Procedure—Sentence—Enhancement of sentence—Power of appellate Court—Conviction and sentence on two separate charges—Retention of sentence where conviction on one of the charges is reversed.*

Where an accused person is convicted and sentenced on two separate charges, the appellate Court has no power, in appeal, to maintain the whole sentence when it reverses the conviction on one of the charges, as to do so is, in effect, to enhance the sentence.

THE accused was convicted by the Second Class Magistrate of Belgi of the offences of theft and mischief by killing, &c., cattle under sections 379 and 429 of the Indian Penal Code (Act XLV of 1860) and sentenced to one month's rigorous imprisonment for each offence.

On appeal, the District Magistrate of Bijapur convicted the accused of the offence of mischief only under section 429 of the Indian Penal Code, but upheld the whole sentence of two months' rigorous imprisonment.

The High Court sent for the record of the case under section 435 of the Code of Criminal Procedure (Act X of 1882).

[761] *Per* CURIAM :—In this case we do not interfere, as the sentence has expired, but we would point out to the Lower Appellate Court that it had no power to maintain the whole sentence when it reversed the conviction on one of the charges, such a maintenance being an enhancement of the sentence (see Criminal Ruling No. 41 of 1892).

NOTES.

[This was followed in (1906) 30 Mad., 48.]

* Criminal Review, No. 315 of 1896.

[22 Bom. 761]

# APPELLATE CIVIL.

*The 24th June, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Anandrao Babaji Barve............(Original Plaintiff) Appellant

*versus*

Durgabai and others............(Original Defendants) Respondents.*

*Transfer of Property Act (IV of 1882), Sec. 135—Assignment of mortgage by mortgagee—Suit by assignee—Payment into Court by defendants (representatives of mortgagor) of price paid to the assignor (mortgagee) without admitting the mortgage or assignment—Interest—Payment in grain*—Damdupat.

In a suit by the assignee of a mortgage to recover the amount due on it, the defendants (who were representatives of the mortgagor) without admitting the mortgage, or that anything was due under it, paid into Court the amount which the plaintiff had paid for the assignment with interest and expenses, but said that they did not admit the assignment to the plaintiff or the assignor's right to the mortgage, but that they were willing that the amount should be paid to the plaintiff if he proved that he was the person entitled to recover the mortgage-debt.

*Held*, that the plaintiff was entitled to recover the whole amount legally due on the mortgage, and that section 135 of the Transfer of Property Act (IV of 1882) did not apply. Payment into Court under such circumstances was only a conditional tender and such a conditional tender is not a payment under the section.

*Held*, also, that the rule of *damdupat* applied to the mortgage, the advance having been in cash, although the interest was to be paid in grain.

SECOND APPEAL from the decision of J. Fitzmaurice, District Judge of Thana, varying the decree of Rao Saheb G. V. Saraiya, Subordinate Judge of Bassein.

Suit by the plaintiff as assignee of a mortgage. The mortgage had been executed on the 12th January 1880, by Balkrishna N. Vartak and Narayan Balkrishna Vartak to one Parashram Sadashiv, whose grandson Balkrishna assigned it to the plaintiff. The deed provided (*inter alia*) that twenty maunds of paddy [762] should be delivered annually to the mortgagee as interest on the sum lent. The plaintiff alleged that no part of the debt had been paid, and now sued the defendants, who were the heirs of the mortgagors, to recover Rs. 250 as principal and Rs. 490 as interest.

The defendants did not admit the mortgage or the assignment, or that anything was due. They pleaded that they had no notice of the assignment as required by sections 131—133 of the Transfer of Property Act (IV of 1882), and they alleged that the only consideration paid by the plaintiff for the assignment was Rs. 200. They accordingly paid that sum into Court together with Rs. 3-6-0 as interest and Rs. 3-10-0 as expenses, in all Rs. 207, which they submitted was what the plaintiff was entitled to in case he should prove his right under the mortgage, having regard to section 135 of the Transfer of Property Act (IV of 1882).

The Subordinate Judge passed a decree for the plaintiff for Rs. 670, holding that the plaintiff was entitled to the full amount of the mortgage-debt

* Second Appeal, No. 624 of 1896.

and not merely to the sum which he had paid for the assignment. He also held that the rule of *damdupat* was not applicable to the case, as the interest was to be paid in grain and not in cash.'

On appeal, the Judge varied the decree and awarded only Rs. 207 to the plaintiff, holding that section 135 applied and that payment of that sum into Court was sufficient under the section.

The plaintiff preferred a second appeal.

*N. G. Chandavarkar*, for Appellant:—The plaintiff is entitled to the whole mortgage-debt which he purchased. Section 135 does not apply to this case. That section applies only when an unconditional payment is made. Here the payment made by the defendants was not unconditional. It was not made to the buyer, but into Court, and the defendants contested the assignment and the plaintiff's right under the mortgage—*Vishnu* v. *Dagadu*, I. L. R., 19 Bom., 290; *Khoshdeb* v. *Satar Mondol*, I. L. R., 15 Cal., 436; *Grish Chandra* v. *Kashisauri*, I. L. R., 13 Cal., 145.

**[763]** *Ganesh K. Deshmukha*, for Respondents:—The payment into Court was sufficient, and section 135 applies. The payment was not conditional. The plaintiff, of course, had to show his right to recover the money. The execution of the mortgage was not contested. The defendants merely pleaded ignorance of the transaction. They had to protect themselves from liability to the mortgagee's heirs. The payment into Court was sufficient—*Debendra Nath* v. *Pulin Behary*, I. L. R., 23 Cal., 713.

**Farran, C. J.**:—Section 135 of the Transfer of Property Act has given rise to various different rulings in the High Courts. It is a sweeping and rather drastic section. It enables a person against whom an actionable claim exists, whether disputed or not, to free himself from his obligation for its fulfilment by paying to the assignee by purchase of the claim the price and incidental expenses of the sale with interest on the price from the day that the buyer paid it. The time within which an obligation when assigned can be thus got rid of, is not limited by the Act; and hence payment into Court after suit brought to recover the claim has been held to fulfil its conditions if made before the claim is made clear by evidence and is ready for judgment—*Muchiram* v. *Ishan Chunder*, I. L. R., 21 Cal., 568; and the definition of an actionable claim is so wide that it has been held to extend even to a registered mortgage claim—*Namdar Chaudhri* v. *Karam Raji*, I. L. R., 13 All., 315; *Muchiram* v. *Ishan Chunder*, I. L. R., 21 Cal., 568; *Russick Lall* v. *Romanath*, I. L. R., 21 Cal., 792; *Debendra Nath* v. *Pulin Behary*, I. L. R., 23 Cal., 713. The latter case is an authority for saying that an offer or tender of the price and expenses with interest is sufficient though not followed by a payment into Court.

The Madras and Allahabad High Courts have even held that the assignee of an actionable claim is not entitled to recover in any case more than he has paid for the claim with interest and expenses—*Nilakanta* v. *Krishnasami*, I. L. R, 13 Mad., 225; *Jani Begam* v. *Jahangir Khan*, I. L. R., 9 All., 476. These decisions, however, have not found favour with the Judges of the Calcutta High Court; and this Court, following their view, has ruled that the assignee-plaintiff is entitled to **[764]** recover the whole amount of the claim assigned to him, unless the defendant actively avails himself of the provisions of section 135 of the Transfer of Property Act. We feel no doubt as to the soundness of that decision.

The question here is, whether what the defendants have done is equivalent to payment. They have (without admitting the mortgage-debt upon which they are sued in their representative capacity, or that anything is due under it) brought into Court the amount which the plaintiff has paid for the assignment

of the mortgage, but say that they do not admit that the plaintiff's assignor was the person entitled to the mortgage, or the plaintiff's assignment, and are only willing that the amount should be paid to the plaintiff if he proves to the satisfaction of the Court that he is the person entitled to recover the mortgage-debt. This tender by payment into Court was, in fact, a conditional tender.

In our opinion, a conditional tender such as this does not amount to a payment within the meaning of section 135. Payment into Court, unless the plaintiff can take it out in satisfaction of his claim, is not payment at all. If the plaintiff had not shown that his assignor was the person entitled to the mortgage, his suit would have been dismissed with costs. The payment into Court did not shorten the trial in any respect except that it avoided the necessity of taking the mortgage account. It doubtless may in some instances occur that the obligee of an actionable claim does not know whether the assignee of the obligor of such claim has a good title to recover it or not. In such cases it may be difficult for the obligee to avail himself of the provisions of section 135, but we do not think that such a consideration should lead us to hold, as the District Judge has done, that a conditional tender in the shape of payment into Court, coupled with a condition as to its payment to the plaintiff, is equivalent to payment. The payment into Court in this case did not in the least shorten the trial. Issues were raised and the case was fought upon them, and it was only when the plaintiff obtained a certificate under Act VII of 1889, and proved his case, that a decree was passed in his favour.

**[766]** In the absence of a preamble it is difficult to determine what object the Legislature had in view in passing the section—what the mischief was which they sought to remedy. The word "payment" which they have used in the section cannot, as pointed out in *Debendra Nath* v. *Pulin Behary*, I. L. R., 23 Cal., 713, be read in its usual sense. To so read it would make the Act a dead letter. Under these circumstances one is perforce led to conjecture what the evil was which needed legislation of a somewhat novel and retrograde character to check it. If it was to put an obstacle in the way of assigning even undisputed registered mortgage claims and choses in action of every kind, the Madras rulings are without doubt best calculated to effect that purpose, but it is difficult to suppose that the Legislature had in view a purpose so opposed to modern ideas. If they desired to confer immunity upon debtors from paying the full amount of their debts, the same observation is applicable. If they intended to diminish litigation, the ruling that a strict tender before suit followed by unconditional payment into Court, or unconditional payment into Court where tender before suit is impossible, is necessary in order to bring the obligee within the terms of the section, best effectuates the object of the Legislature. If the suit is to go on notwithstanding the payment, litigation is not avoided. If the Legislature had in view the checking of the common Indian practice of buying up doubtful and disputed claims, the definition of actionable claim in section 130 is too wide and brings within the scope of the provision undisputed as well as disputed and doubtful choses in action.

We reverse the decree of the District Judge and restore that of the Subordinate Judge, but as we think that the rule of *damdupat* is applicable to this mortgage—the advance having been in cash though the interest was to be paid in grain – with the variation that the interest must be limited to the amount of the mortgage-debt, or Rs. 500 in all. There will be the usual decree for sale in default of payment of that sum with interest at 9 per cent. within six months of this date. Costs throughout in proportion.

*Decree reversed.*

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NOTES.

[Sec. 135 of the Transfer of Property Act, 1882, was abrogated by the T. P. A. Amendment Act, 1900.]

## [766] CRIMINAL REFERENCE.

*The 17th December, 1896.*
PRESENT:
MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Limbaji Tulsiram and others.*

*Municipal Act, Bombay (Bombay Act III of 1888) Sec. 472—Continuing offences—Punishment for such offences after a fresh conviction—Separate prosecution for continuing the offence—Practice—Procedure.*

A Presidency Magistrate, having convicted certain accused persons and fined them under section 471 of the City of Bombay Municipal Act (Bombay Act III of 1888), proceeded in the same order, purporting to act under the provisions of section 472, to fine them so much per day in case they continued the offence.

*Held* that the latter order was illegal under section 472 of the Act. The section requires a separate prosecution for a distinct offence, a prosecution in which a charge must be laid for a specific contravention for a specific number of days, and for which charge, if proved, the Magistrate is to impose a daily fine of an amount which is left to his discretion to determine.

THIS was a reference under section 432 of the Code of Criminal Procedure (Act X of 1882) by W. R. Hamilton, Presidency Magistrate.

The reference was in the following terms:—

"In Municipal Case No. 883 of 1896, the Magistrate, Mr. Webb, who was acting for me, fined one Limbaji Tulsiram on the 8th September 1896, for an offence under section 257 of the Municipal Act (III of 1888). The order is 'Fined Rs. 5 and Re. 1 per diem until work completed.'

"The municipality has now made a demand for payment of the daily penalty which they say amounts to Rs. 2, the work being completed on the morning of the 11th September.

"I have the honour to refer the legal question for the favour of the opinion of the High Court, whether I can enforce the payment of this daily penalty.

* * * * * * *

"I have, therefore, the honour to refer the question, which I have put above, for the consideration of the High Court. I do so more particularly, as Mr. Webb has inflicted a daily penalty in a large number of municipal cases, and it is necessary to decide whether I can enforce the payment of such fines."

The High Court sent for the record and proceedings in all the cases referred to by the Magistrate.

[767] The reference came on for final hearing and disposal before a Divisional Bench (PARSONS and RANADE, JJ.).

There was no appearance for either party.

*Per* CURIAM:—The Presidency Magistrate in these cases, having convicted the several accused persons and fined them under the provisions of section 471 of the City of Bombay Municipal Act, 1888, proceeded in the same order, purporting to act under the provisions of section 472, to fine them so much a

* Criminal Reference, No. 127 of 1896.

day in case they continued the offence. We think the latter order illegal. The section (472) provides that "Whoever after having been convicted of contravening any provision of any of the sections * * * hereinbelow in this section mentioned * * * * continues to contravene the said provision * * * shall be punished for each day that he continues so to offend." Clearly this necessitates a separate prosecution for a distinct offence,—a prosecution in which a charge must be laid for a specific contravention for a specific number of days, and for which charge, if proved, the Magistrate is to impose a daily fine of an amount which is left to him in his discretion to determine. The orders in the present cases are bad as being convictions and punishments for offences which the accused persons had not committed, and with which they were not and could not have been charged, at the time the sentences were passed. The effect of such orders would be to deprive the accused persons of the opportunity to deny the commission of the offence or plead extenuating circumstances, and to take away from the Magistrate, who might have afterwards to levy the fine, the discretionary power vested in him by law to determine the amount that should be inflicted after investigation of the case.

We reverse the orders in all the cases under revision.

**NOTES.**

[ See also (1897) 22 Bom., 841 ; (1910) 37 Cal., 671 ; (1902) 24 All., 309.]

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## [768] APPELLATE CRIMINAL.

*The 17th December, 1896.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Queen-Empress
*versus*
Khandusingh. *

*Penal Code (Act XLV of 1860), Secs. 463 and 471—Using as genuine a false document.*

The accused applied to the Superintendent of Police at Poona for employment in the Police force. In support of his application he presented two certificates which he knew to be false. One of these certificates was a wholly fabricated document, whilst the other was altered by several additions made subsequently to the issue of the certificate.

*Held*, that the accused was guilty of offences under sections 463 and 471 of the Indian Penal Code (Act XLV of 1860).

APPEAL from the conviction and sentence recorded by G. C. Whitworth Sessions Judge of Poona

The accused was charged, under section 471 of the Indian Penal Code (Act XLV of 1860), with using as genuine two certificates purporting to be signed by a public servant in his official capacity which he knew to be forged.

The accused was for three years a sapper in the corps of Bombay Sappers and Miners. He obtained his discharge from the corps on the 24th August 1896. On the 4th September 1896, he applied to the Police Superintendent of

* Criminal Appeal, No. 346 of 1896.

Poona for employment in the police force. He represented that he had been havildar-major in the Sappers and Miners for nearly four years.

In support of his application he produced two certificates, one purporting to be a certificate signed by Major O'Sullivan, Commanding the Sappers and Miners, and the other a discharge certificate partly in print and partly in manuscript, and signed by the same officer.

Of these, the first certificate was a wholly fabricated document, whilst the discharge certificate was altered by the addition of the word "havildar" after "sapper" in two places, and also by the addition of the figure "9" representing nine months, after the entry "3 years", which expressed the accused person's period of service. These alterations were made subsequently to the issue of the certificate.

**[769]** The accused was convicted by the Sessions Judge of the offences charged, and sentenced to one year's rigorous imprisonment under sections 466 and 471 of the Indian Penal Code.

Against this conviction and sentence the accused appealed to the High Court.

There was no appearance for the Crown or for the Accused.

*Per* CURIAM:—This case is clearly distinguishable from *Jan Mahomed* v. *Queen-Empress*, I. L. R., 10 Cal., 584, where the intention was to produce a false belief that the accused was entitled to a certain dignity only. Neither is it similar to *Imperatrix* v. *Haradhan*, I. L. R., 19 Cal., 380, where the intention was to be permitted to sit for a certain examination.

In the present case, the document was falsely made and used by the accused with the object of obtaining a situation in the police force at Poona. It was thus made and used with the intent to cause a person to enter into an express contract for service, that is, to engage the accused as a police officer. The act, therefore, of the accused comes within the terms of section 463 of the Indian Penal Code and is indeed the precise illustration (*k*) given in the Code under section 464.

The act of using such a document is punishable under section 471. This is in accordance with the decision of the Calcutta High Court in the case of *Abdul Hamid* v. *Empress*, I. L. R., 13 Cal., 349, and of this Court in the case of *Queen-Empress* v. *Vithal Narayan* referred to with approval in the case of *Queen-Empress* v. *Ganesh Khanderao*, I. L. R., 13 Bom., 506, and reported as a note to that case. In the case of *Queen-Empress* v. *Soshi Bhushan*, I. L. R., 15 All., 210, that decision was agreed with.

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[22 Bom. 769]

CRIMINAL REFERENCE.

The 28th January, 1897.

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE RANADE.

Queen-Empress
*versus*
Babaji.*

*Forest Act (VII of 1878), Sec. 78—Refusal to serve as member of a* panch—*Indian Penal Code (Act XLV of 1860), Sec. 187.*

A person was convicted under section 187 of the Indian Penal Code for refusing, when called on by a forest guard, to serve as one of a *panch* for [770] the purpose of drawing up a *panchnama* with reference to certain wood alleged to have been illegally cut in a reserved forest,

*Held*, that the conviction was illegal. The accused was not shown to be one of the persons contemplated by the first three paragraphs of section 78† of the Indian Forest Act (VII of 1878), nor was the purpose for which he was called upon to give his assistance, one of the purposes mentioned in clauses (*a*) *to* (*d*) of the section. He was, therefore, not legally bound to assist the forest guard.

REFERENCE under section 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was called on by a forest guard to serve as a member of a *panch* appointed for the purpose of drawing up a *panchnama* with reference to certain wood alleged to have been illegally cut in the reserved forest at Dhuwalwadi. The accused declined to attend.

Thereupon the forest guard filed a complaint against the accused, under section 187 of the Indian Penal Code (Act XLV of 1860), with having intentionally omitted to assist a public servant in the execution of his public duty when bound by law to give such assistance. Upon this charge the accused was convicted by the [771] Second Class Magistrate of Koregaon and sentenced to a fine of Rs. 5.

The District Magistrate of Satara, being of opinion that the conviction was illegal, referred the case to the High Court, observing as follows:—

"The accused in the present case is not shown to be a person contemplated in the provisions of the first three paragraphs of section 78 of Act VII of 1878, and the purpose for which

* Criminal Reference, No. 2 of 1897.

† Act VII of 1878, section 78:—

"78. Every person who exercises any right in a reserved or protected forest, or who is permitted to take any forest produce, or to cut and remove timber, or to pasture cattle in such forest, and

every person who is employed by any such person in such forest, and

every person in any village contiguous to such forest who is employed by the Government, or who receives emoluments from the Government for services to be performed to the community,

shall be bound to furnish without unnecessary delay to the nearest forest officer or police officer any information he may possess respecting the commission of, or intention to commit, any forest offence, and shall assist any forest officer or police officer demanding his aid—

(*a*) in extinguishing any fire occuring in such forest:

(*b*) in preventing any fire which may occur in the vicinity of such forest from spreading to such forest;

(*c*) in preventing the commission in such forest of any forest offence; and

(*d*) when there is reason to believe that any such offence has been committed in such forest, in discovering and arresting the offender.

he was called upon to give his assistance is also not one of the purposes mentioned in clauses (a) to (d) of the same section of the Indian Forest Act Consequently, it is clear tht though the guard was a public servant the accused was not legally bound to assist him, and then even admitting that he intentionally omitted to give assistance, he cannot be convicted under section 187 of the Indian Penal Code."

The reference came on for hearing before a Division Bench (JARDINE and RANADE, JJ.).

There was no appearance for either party.

*Per* CURIAM:—For the reasons given by the District Magistrate, we set aside the conviction and the sentence passed upon the accused, and direct the return of the fine.

*Conviction set aside.*

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[22 Bom. 771]

## APPELLATE CIVIL.

*The 29th June, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Nandram............(Original Opponent) Appellant

*versus*

Babaji and another............(Original Petitioners) Respondents.*

*Mortgage—Redemption—Decree for redemption within six months—Expiration of six months without payment—Application after expiration of six months to extend the time for redemption—Practice—Procedure—Transfer of Property Act (IV of 1882), proviso to section 93.*

In redemption suits the original decree (passed under section 92 of the Transfer of Property Act, IV of 1882) is only in the nature of a decree nisi, and the order passed under section 93 is in the nature of a decree absolute.

Under the proviso to section 93 of that Act, an application to extend the time for redemption fixed by the original decree may be made at any time before the decree absolute is made.

[772] SECOND APPEAL from the decision of W. H. Crowe, District Judge of Poona, confirming the order passed by Rao Saheb S. M. Kale, Subordinate Judge of Baramati

On the 27th January 1896, the plaintiffs (respondents) obtained a decree for redemption on payment to the defendant (opponent) of the mortgage-debt within six months and ordering that, in default of payment within that period, their right to redeem should be extinguished.

On the 30th July 1896, *i.e.*, after the six months had expired, but before the final order under section 93 of the Transfer of Property Act (IV of 1882) was made, the plaintiffs (respondents) applied for an extension of one month for payment of the mortgage-debt.

The opponent (defendant) resisted the application, contending (*inter alia*) that the plaintiffs ought to have paid the amount in the time ordered by the decree, and that not having done so their right to redeem was extinguished;

* Second Appeal, No. 337 of 1897.

that the Court could not extend the time; that he being in possession had now become the owner of the property under the terms of the decree and was no longer the mortgagee and could not be deprived of the property.

The Subordinate Judge granted the application.

On appeal by the defendant (opponent) the Judge confirmed the order.

The defendant appealed to the High Court.

*Vasudev G. Bhandarkar*, for the Appellant (Opponent):—The order extending the time was in contravention of the decree. If an extension was required, it ought to have been applied for before the six months had expired. Under this decree the plaintiffs were absolutely debarred of their right to redeem on the expiration of six months.

*Balaji A. Bhagvat*, for the Respondents (Plaintiffs):—The proviso to section 93 of the Transfer of Property Act (IV of 1882) does not require that the application should be made within the time mentioned in the decree. If good cause is shown, the time may be extended—*Kanara Kurup* v. *Govinda Kurup* I. L. R., 16 Mad., 214. It [773] is for the mortgagee to get the order made absolute under section 93. Until that is done, the time for payment may be extended. The Court has a discretion to extend time under section 93.

**Farran, C. J.**:—On the best consideration which we can give to this question, we think that the Court has power to give effect to the proviso to section 93 if the application for postponement is made at any time before the final decree—the decree absolute—is made. This construction of the section is clearly permissible, and it is, we think, the most reasonable and equitable one to adopt. Our ruling is also in accordance with the practice of the Court of Chancery in England.

The cases upon this subject will be found collected in Seton on Decrees, (4th Ed.), Part IV, Ch. XXV, section 4; and in *Pateh* v. *Ward*, L. R., 3 Ch, 203, BOLT, L. J., at p. 212 says: "I think it useful to refer to the distinction in practice between asking for an enlargement of time for redeeming a mortgage before the day arrives, and asking to open a foreclosure after the order for foreclosure has been made absolute. * * * I think it will be found that there is a clear distinction between the two classes of cases—that slight circumstances will induce the Court to enlarge the time before the day arrives, but that after the order for foreclosure has been made absolute, it must be shown that the person who seeks to set it aside, or to have it disregarded, fully intended and was prepared to pay the money on the day, but was estopped by some accident from complying with the exigencies of the order."

To return to the section which we are considering. The original decree is, we think, only in the nature of a decree *nisi* as was held with regard to foreclosure decrees in *Poresh Nath* v. *Ramjodu*, I. L. R., 16 Cal., 246, and the order passed under section 93 is in the nature of a decree absolute. See *Ajudhia Pershad* v. *Baldeo Singh*, I. L. R., 21 Cal., 818. Order confirmed with costs.

*Order confirmed.*

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**NOTES.**

[1. Until the decree absolute there is time for carrying out the decree:—(1908) 33 Bom., 293; (1903) 28 Bom., 102; (1901) 26 Bom., 121; (1900) 25 Bom., 101: (1902) 25 Mad., 244; (1902) 25 Mad., 300; (1908) 36 Cal., 122; (1909) 8 I. C., 592 (Burma); (1910) 8 I. C., 961 (Burma); (1905) 2 N.L.R., 137; (1903) 16 C.P.L.R., 111; (1904) 1 A.L.J., 300; (1914) 25 I.C., 752 (Nagpur).

2. Sec. 148 of the C.P.C., 1908 enables the Court to enlarge the period originally fixed or granted, even though it may have expired.]

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## [774] APPELLATE CIVIL.

*The 5th July, 1897.*

PRESENT:

MR. JUSTICE PARSONS, AND MR. JUSTICE RANADE.

Bai Bapi............(Original Plaintiff) Appellant

*versus*

Jamnadas Hathisang and another..........(Original Defendants) Respondents.*

*Will—Construction of will—Bequest to a person with a direction that it should be used in good works* (sara kam)—*Direction void as being vague and indefinite—Indian Succession Act (X of 1865), Sec. 125.*

A testator left a legacy to his wife in the following terms:—

"Rs. 2,000 to be credited in our shop in the name of my wife Bai Bapi. Interest at 6 per cent. to be paid to her every year. If in her lifetime she demands the money to use in a good work (*sara kam*), it should be given to her, but if she has not taken it in her lifetime, Jamnadas and Bhagubhai are to dispose of it according to their own pleasure after death."

*Held*, that this was not a bequest for good works (*sara kam*), but a bequest to the testator's wife, with a direction to use it in good works (*sara kam*), and as that direction was void for uncertainty she was entitled to the money as if the will had contained no such direction.

SECOND APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad.

The plaintiff sued to recover Rs. 2,000 together with interest thereon under the will of her deceased husband. The will provided (*inter alia*) as follows:—

"Rs. 2,000. This amount should be credited in the shop of Bhagubhai Hathisang in the name of my wife Bai Bapi. Its interest should be calculated at 6 per cent. per annum which should be paid to her every year But if in her lifetime she demands it for use in a good work (*sara kam*) it should be paid to her. But if she has not withdrawn the money in her lifetime, the said Jamnadas and Bhagubhai Hathisang should after her death use the money according to their wishes"

The testator appointed Jamnadas and Bhagubhai Hathisang his executors and also residuary legatees.

The defendants Jamnadas and Bhagubhai Hathisang pleaded that the plaintiff had no absolute right to the sum of Rs. 2,000, that they were willing to pay it to the plaintiff for the purpose of spending it in any good work, but not in order that she might give it away to her brother's son, as she intended to do.

[775] The Subordinate Judge awarded the plaintiff's claim, holding that she was absolutely entitled to the legacy

On appeal, the District Judge reversed the Subordinate Judge's decree and rejected the plaintiff's claim on the following grounds:—

"The present appeal turns on the interpretation to be put on the portion of the will leaving the legacy. That portion of the will must, I think, be interpreted as making a specific legacy to his wife of Rs. 2,000. But she can only obtain the money on the condition that she spends it on *sara kam*. Much argument has been wasted over the proper meaning to be attached to these words. It appears to me that the meaning is quite as vague as that to be attached to the words *dharm* or *dharmada*; and I am, therefore, of opinion that following the ruling in *Devshankar* v. *Motiram*, (I. L. R. 18 Bom., 136) the bequest in favour of *sara kam* is invalid by reason of uncertainty. Such being the case, I am of opinion that the plaintiff can only claim to recover interest on the sum of Rs. 2,000 during her life-time, and at her death the capital sum goes to the residuary legatees."

* Second Appeal, No. 876 of 1896.

Against this decision the plaintiff preferred a second appeal to the High Court.

*Ganpat Sadashiv Rao* for Appellant:—The bequest is not in favour of *sara kam* (or good works) but to the plaintiff personally. It is not conditional but absolute. It is no doubt coupled with a direction that the plaintiff should be paid the whole sum of money deposited in her name if she required it for a good object. But that direction does not render the legacy void for uncertainty: The money is bequeathed absolutely, and the direction to apply it in a particular manner is inconsistent with the absolute gift and cannot be given effect to—section 125 of the Indian Succession Act; see also Jarman on Wills, p. 854. The direction is, moreover, vague and uncertain, and, therefore, void.

*G. M. Tripathi* for Respondents:—The legacy to the plaintiff is not an absolute unconditional gift. It was clearly the intention of the testator that his wife should enjoy the income of the fund deposited with the defendant's firm, and that the *corpus* should be paid to her only if it was required for some good work. The gift was thus a conditional gift, and unless the condition is fulfilled, the gift cannot take effect. The plaintiff does not state for what purpose she wants the money. She does not specify any [776] good work for which the money is required. She is not, therefore, entitled to claim the *corpus*. Sections 118 to 123 of Act X of 1865 apply.

**Parsons, J.**:—The plaintiff in this case is the widow and the defendants are the executors of one Hathisang, who by his will left the plaintiff a legacy of Rs. 2,000 in these terms:—"Rs. 2,000 to be credited in our shop in the name of my wife Bapi. Interest at 6 per cent. to be paid to her every year. If in her lifetime, she demands the money to use in a good work (*sara kam*) it should be given to her, but if she has not taken it in her lifetime, Jamnadas and Bhagubhai are to dispose of it according to their own pleasure after death." The plaintiff sues now for the money, as the defendants (Jamnadas and Bhagubhai) refuse to pay it to her. They say that she does not want it for a good work. The Subordinate Judge awarded the claim, holding that the expression "*sara kam*" was so vague and indefinite that the condition was invalid. The District Judge by some strange process of reasoning dismissed the claim, because he thought that the bequest in favour of *sara kam* was invalid by reason of uncertainty. There was, however, no bequest in favour of *sara kam*, the bequest was to the plaintiff, there was a direction only in favour of *sara kam*, and if that direction is void then the plaintiff is entitled to the money. In our opinion, the direction is void. It is nowhere expressed in the will what "*sara kam*" is, or who is to decide whether the purpose for which the plaintiff asks the money is *sara kam* or not. The defendants as residuary legatees would naturally say that nothing was *sara kam*. The whole thing is so vague and indefinite that it cannot be given effect to. The case seems to us to come within the class of cases provided for by section 125 of the Succession Act, X of 1865, and the plaintiff is entitled, in our opinion, to the money as if the will had contained no such direction.

The amount due at date of suit is agreed to by both Courts, and we reverse the decree of the Lower Appellate Court and restore that of the Subordinate Judge. We award the plaintiff interest on the amount decreed at 6 per cent. from date of that decree to payment. Costs throughout on the defendants. The defendants can pay the costs out of the estate.

[777] **Ranade, J**:—The principal contention in this appeal relates to the proper construction of the will, Exhibit 32, so far as it concerns the legacy left therein to the appellant. This portion of the will has been translated in the judgment of the Lower Appellate Court. It directs that Rs. 2,000 should be credited in respondents' shop in the name of the appellant, and interest

should be paid to her every year at 6 per cent., and if appellant in her lifetime demands the money for any good works, the principal sum should be paid to her. If she does not withdraw the money in her life-time, the respondents should, after appellant's death, use the money according to their pleasure. The Court of First Instance held that the expression "*for good works*" was so vague that the condition was invalid on the ground of its indefiniteness, and as the appellant was allowed full liberty to withdraw the whole sum, she was entitled to the money absolutely. In appeal, the District Judge held that the legacy was a conditional legacy, and that the condition about good works was not valid for reasons of uncertainty, and that the appellant could only recover the interest of the money, and not the principal. We feel satisfied that the construction placed by the District Judge upon the terms of the will cannot be supported. The bequest clearly falls within the class of bequests with directions as to application or enjoyment, and the principal intention of the testator was to bequeath absolutely Rs. 2,000 for the benefit of the appellant, who was his wife, and this gift was meant by him as a provision for her. The will shows clearly that this portion of his estate was clearly separated by the testator from his other estate, and it was only on the default of the appellant to spend the money herself, that it was to become a part of the estate in the hands of the executors. The case thus falls clearly within the analogy of bequests referred to in section 125 of Act X of 1865, and not of section 127. There was no condition precedent in this case such as is contemplated in sections 121 or 123. The mention of good works was not intended to limit the absolute right of appellant to the money. It was only a direction, and not a condition precedent. The same direction is contained in respect of another sum of Rs. 300 bequeathed to the respondents. The lower Court of appeal was certainly in error in thinking that this case fell within the class [779] of uncertain gifts referred to in *Devshankar* v. *Motiram*, I. L. R., 18 Bom., 136. The bequest was not in favour of good works, but of the appellant, who was expected to spend the money on good works.

The fact that the respondents have paid a large sum to the appellant under the terms of the will, both by way of interest and principal, without raising any objection on the grounds now urged by them, is also an additional reason for holding that they understood the gift to be absolute. In their written statement they expressed their readiness to make over the money under certain guarantees to the appellant. On the whole, we must decide this issue in appellant's favour, and against the respondents.

The only other point that now remains for consideration has reference to the cross objections put in by the respondents as regards the details of the payments made by them. There is no serious contest on that point, and we see no reason for disturbing the decision of the Court of First Instance on that head. We reverse the decree of the lower Court, and restore that of the Court of First Instance.

*Decree reversed.*

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**NOTES.**

[ In (1902) 4 Bom. L. R., 893 the bequest to trustees for charities and good works was held to be void ; (1907) P. R., 75 (*ibid.*) See also (1903) 31 Cal., 166.]

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[22 Bom. 778]

# APPELLATE CIVIL.

*The 12th July, 1897.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Nassarvanji............Applicant

*versus*

Kharsedji Dhunjishah and another..... ......Opponents*

*Civil Procedure Code (Act XIV of 1882), Sec. 25—Transfer of execution proceedings—Insolvency—Opposing creditor—Opposing creditor's right to apply for transfer of insolvency proceedings.*

The power of transfer given by section 25 of the Code of Civil Procedure (Act XIV of 1882) extends to execution proceedings as well as to suits.

An application to be declared an insolvent under the Civil Procedure Code (Act XIV of 1882) is a proceeding in execution, and as such can be made the subject of an order under section 25 of the Code.

A creditor who has received notice of an insolvency petition, and whose name is entered on the record of the execution proceedings as an opposing creditor, is a [779] "party" within the meaning of section 25 of the Code of Civil Procedure (Act XIV of 1882), and may apply for a transfer of the proceedings under the section.

THIS was an application to the High Court under section 25 of the Civil Procedure Code (Act XIV of 1882) for the transfer of certain execution proceedings.

A decree having been passed against one Kharsedji Dhunjishah (opponent No. 1) in the Presidency Small Cause Court at Bombay it was transferred for execution to the Court of the First Class Subordinate Judge at Dhulia, and in execution thereof he was arrested at Dhulia on the 11th December 1896.

He thereupon applied to the Subordinate Judge at Dhulia to be declared an insolvent under the provisions of the Civil Procedure Code (Act XIV of 1882).

Notices of this application having been issued to his creditors, the applicant Nassarvanji Sorabji, who was one of them, made the present application to the High Court for the transfer of the execution proceedings, including the insolvency application, from the Subordinate Judge's Court at Dhulia to the Court of the Subordinate Judge at Poona.

The grounds on which this application was made were (1) that Kharsedji was a resident of Poona, (2) that most of his creditors who had claims against him to the extent of nearly Rs. 39,000, were also residents of Poona, (3) that the whole of his immoveable property was situate in Poona, (4) that he had fraudulently assigned this property to his relations with the object of delaying and defeating his creditors, and (5) that the attendance of witnesses, &c., relating to this fraudulent transfer could not be procured at Dhulia without much trouble and expense.

The High Court issued a rule *nisi* to the decree-holder (opponent No. 2) and judgment-debtor (Kharsedji Dhunjishah, opponent No. 1) calling upon them to show cause why the execution proceedings should not be transferred as prayed for.

*S. V. Bhandarkar*, for Kharsedji Dhunjishah, the judgment-debtor (opponent No. 1), showed cause:—The Court has no power to transfer execution proceedings. Section 25 of the Code of Civil Procedure applies only to the

* Civil Application, No. 95 of 1897.

transfer of "suits." The section does not give the power to transfer execution proceedings. [780] which are treated throughout the Code as distinct from suits. Section 647 of the Code as amended by Act VI of 1892 does not apply to applications for execution of decrees. The Legislature has made no provision for transfer of execution proceedings from one Court to another—*Kishori Mohun Sett* v. *Gul Mohamed*, I. L. R., 15 Cal., 177.

*V. G. Bhandarkar* for the Decree-holder (Opponent No. 2):—We also object to the transfer. Assuming that section 25 applies to execution proceedings, the applicant has no right to move for a transfer of this case. He is not a party to the execution proceedings; he is neither the decree-holder nor the judgment-debtor. He is, therefore, not a 'party' within the meaning of the term as used in the section.

*Manekshah Jehangirshah*, for the Applicant, *contra*:—Section 25 of the Civil Procedure Code, clearly extends to execution proceedings, as such proceedings are but a continuation of the proceedings in the original suit. Section 647 of the Code as amended expressly says so. That being the case, this Court has the power to transfer the present case. The point is, moreover, covered by authority—*Balaji Ranchoddas*, I. L. R., 5 Bom, 680; *Krishna* v *Bhau*, I. L. R., 18 Bom., 61. *Gaya Parshad* v. *Bhup Singh*, I. L. R., 1 All., 180. As to the applicant's right to move the Court under section 25 of the Code, he is already served with a notice of the insolvency application, and his name is entered on the record as an opposing creditor. He is, therefore, a party within the meaning of the section.

**Parsons, J.**: – In execution of a decree of the Bombay Court of Small Causes transferred to the Court of the First Class Subordinate Judge at Dhulia the judgment-debtor was arrested by order of the latter Court. Thereupon he applied to it to be declared an insolvent.

The applicant, who is one of the creditors on whom notice was served, has now moved this Court to transfer the whole of the execution proceedings including the insolvency application, to the Court of the First Class Subordinate Judge at Poona. Very good cause has been shown for the transfer: for instance, creditors of the judgment-debtor to the amount of some 30,000 rupees [781] reside at Poona and Sholapur, the whole of the immoveable property of the judgment-debtor which he is charged with having fraudulently disposed of is at Poona, and all the evidence relating to the charge *pro* and *con* is at Poona. The judgment-debtor has a residence both at Dhulia and at Poona, the judgment-creditor lives in Bombay, so that it is as easy, if not easier, for him to go to Poona as to Dhulia, and his debt is only a small amount, some 275 rupees. The opponents' objection to the transfer is based merely on the fact that they have spent some money at Dhulia in engaging pleaders which they will have to spend over again at Poona. The applicant, however, has offered to pay this back to them.

Everything, therefore, being in favour of the transfer and nothing against it, the only point is whether this Court has jurisdiction to make it. In my opinion it has. An application to be declared an insolvent under the Civil Procedure Code is a proceeding in execution; it is, therefore, a proceeding in a suit and as such can be made the subject of an order under section 25 of the Code of Civil Procedure. This has always been so ruled by this Court. See *Balaji Ranchoddas*, I. L. R., 5 Bom., 680; *Krishna Velji* v. *Bhau Mansaram*, I. L. R., 18 Bom., 61.

We make the rule absolute and transfer to the Court of the First Class Subordinate Judge at Poona the execution proceedings and the application of insolvency made therein.

The additional costs incurred at Dhulia by the parties to the decree in engaging pleaders, &c., are to be taxed and paid by the present applicant. All other costs will be costs in the proceedings.

**Ranade, J.** :—There can be little doubt that, quite apart from the allegations of collusion which are not satisfactorily proved, the balance of convenience is decidedly in favour of the transfer of execution proceedings from Dhulia to Poona, as applied for. The Poona creditors of the judgment-debtor represent bebts amounting to 40,000 rupees, and the property said to have been fraudulently conveyed by him to his near relations is also at Poona. It is not shown that the Bombay creditor, who seeks execution of the Small Cause Court's decree for a small sum by [782] the arrest of the judgment-debtor in Dhulia, will be seriously prejudiced by the transfer of the proceedings to Poona, where the judgment-debtor had previously applied without success to be declared an insolvent.

The point of law involved in the matter is of some complexity. Though the Calcutta High Court has all along held that section 25 relates only to the transfer of suits, and that it has no application to execution proceedings—*Kishori Mohun Sett* v. *Gul Mohamed*, I. L. R., 15 Cal., 177 ; *Kedarnath Mahata* v. *Bungshee Dhur Roy*, 17 W. R., 45,—this Court as well as the Allahabad High Court have not followed this view—*Balaji Ranchoddas*, I. L. R., 5 Bom., 680 ; *Krishna* v. *Bhau*, I L. R., 18 Bom., 61 ; *Gaya Parshad* v. *Bhup Singh*, I. L. R., 1 All., 189. It has always been held by these Courts that under the combined effect of section 25 and section 647, execution proceedings may be transferred for sufficient cause from one Court to another. The Madras High Court would seem also to be in favour of the more liberal interpretation—*Muttalagiri* v. *Muttayyar*, I. L. R., 6 Mad., 357. Moreover, the ruling in *Kedarnath Mahata* v. *Bungshee Dhur Roy*, 17 W. R., 45, in which the Calcutta High Court first decided this point in the negative, was passed on section 6 of Act VIII of 185', which has been considerably modified by the Code of 1882. Finally, that Court appears to have adhered to its previous decision chiefly as a rule of practice—*Kishori Mohun Sett* v. *Gul Mohamed*, I. L. R., 15 Cal., 177, —and does not appear to have considered the effect of the larger powers conferred by section 13 of the Letters Patent. We must, therefore, in this matter follow the previous decisions of this and the Allahabad Court, and hold that the power of transfer extends to execution proceedings as well as to suits.

It was, however, contended that the applicant before us is not a party within the meaning of that word as used in section 25 of the Code. This objection seems, however, to have little force. The applicant has received notice, and his name is on the record of the execution proceedings as an opposing creditor. In the second Bombay case referred to above, the transfer was effected [783] on the application of the judgment-creditor in a Small Cause Court decree, who desired to share in the proceeds of the execution taken out by another creditor under a decree in the First Class Subordinate Judge's Court. Moreover, section 25 permits transfer upon the application of parties, as well as of the Court's own motion without such application. We must, therefore, overrule this objection and grant the application.

*Application granted.*

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**NOTES.**

[The words '*suit, appeal or other proceeding*' were substituted in sec. 24, C.P.C., 1908.]

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[22 Bom. 783]

## APPELLATE CIVIL.

*The 13th July, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Gurshidawa............(Original Plaintiff) Appellant

*versus*

Gangaya and others............(Original Defendants) Respondents.*

*Civil Procedure Code (Act XIV of 1882), Sec. 315—Court-sale—Sale of property in execution in which judgment-debtor has no interest—Suit by purchaser to recover purchase-money paid at sale—Limitation—Accrual of the cause of action.*

Under section 315 of the Civil Procedure Code (Act XIV of 1882), a suit will lie to recover purchase-money paid at a Court sale for property to which it is found that the judgment-debtor has no title. The cause of action in such a case does not accrue till the purchaser is deprived of the property which was sold to him.

SECOND APPEAL from the decision of T. Hamilton, District Judge of Dharwar, reversing the decree of Rao Bahadur K. B. Marathe, First Class Subordinate Judge.

The plaintiff sued to recover the amount paid by him for certain land at a Court sale, it having been held that the judgment-debtor had no interest therein.

The circumstances which led to the suit were as follows:—The plaintiff bought the land in question at a sale held in execution of a decree obtained against defendant No. 3, and was duly put into possession.

One Vasistha thereupon sued for the land, alleging that it belonged to him and not to the judgment-debtor (defendant No 3). He obtained a decree on the 15th October 1887, the Court holding [784] that the judgment-debtor (defendant No. 3) had no interest in the property. The plaintiff was accordingly dispossessed on 20th February 1891. On the 2nd February 1894, he filed this suit to recover the purchase-money which he had paid.

The defendants contended that the plaintiff had been in possession for three or four years, and that his purchase-money had been paid off out of the profits of the land.

The Subordinate Judge allowed the claim.

On appeal by defendants, the Judge reversed the decree and dismissed the suit. The following is an extract from his judgment:—

"The first question is whether the suit was in time.

"I hold that it was not. The Subordinate Judge held it to be in time, on the ground of its having been instituted within three years of the date of plaintiff's dispossession in pursuance of the decision of the High Court.

"I am of opinion that limitation began to run from the date of the decree of the lower Court, where it was held that the judgment-debtor had no saleable interest in the land, and that the period is (6) six years. * * *

"The decree of the original Court is dated 15th October 1887, and the present suit is of the year 1894. Hence I hold that the suit is time-barred."

The plaintiff preferred a second appeal.

* Second Appeal, No. 884 of 1896.

*Manekshah J. Taleyarkhan*, for the Appellant (Plaintiff):—The plaintiff's cause of action arose when he was dispossessed. The suit is brought within three years of the date and is in time.

*Daji A. Khare*, for the Respondents (Defendants):—We contend that the plaintiff's remedy was in the execution proceedings. No separate suit lies to recover the purchase-money.

[FARRAN, C. J., referred to *Munna Singh* v. *Gajadhar Singh*, I. L. R., 5 All., 577.]

As to limitation, the plaintiff's cause of action arose when it was found that the judgment-debtor had no saleable interest in the property.

**Farran, C. J.**:—The decree of the District Judge must in this case be reversed. The suit was filed, under section 315 of the Civil Procedure Code, to recover from the defendants the purchase-money which the plaintiff paid at a Court sale for property to which it was found that the judgment-debtor had no title. That **[786]** such a suit will lie, was decided by the Full Bench at Allahabad in *Munna Singh* v. *Gajadhar Singh* and we see no reason to dissent from the views there expressed.

The District Judge has dismissed the suit on the ground that it was barred by the law of limitation, taking the cause of action to arise on the date when it was found by the decree that the judgment-debtor had no saleable interest in the property, but the words of the section are "when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold *and* the purchaser is for that reason deprived of it." The cause of action under this clause of the section does not, in our opinion, accrue till the purchaser is deprived of property which was sold to him. The double event must occur before he can sue: (1) the property must be found not to have belonged to the judgment-debtor, and (2) the purchaser must be deprived of it. Till the latter event occurs, the cause of action is not complete. The Subordinate Judge has not awarded interest, because the purchaser has received the mesne profits, and the latter and the interest nearly balance one another. That, we think, was a correct course to adopt.

The decree of the District Judge must be reversed and that of Subordinate Judge restored, with costs throughout on defendants.

*Decree reversed.*

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**NOTES.**

[See also (1913) 15 Bom. L.R., 41; (1902) 7 C.W.N., 105; (1906) 3 A. L. J., 819, (1911) 14 O. C., 74.]

[22 Bom. 785]

APPELLATE CIVIL.

*The 14th July, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS AND MR. JUSTICE CANDY.

Vohra Mahamadali Lukmanji............Plaintiff

*versus*

Ramchandra Anant............Defendant.*

*Stamp—Stamp Act (I of 1879), Sec. 3, Cl. (9), Sch. I, Arts. 5 and 21; Sch. II, Art. 2—Interest in land—Agreement to sell standing trees.*

A document bearing a stamp of one rupee stated (*inter alia*) "I have sold to you the standing trees of the two villages for Rs. 1,601 on conditions that those young trees, whose trunks do not exceed two feet in circumference, should not be cut by you, and that I will give you written information to cut the trees of the [786] said villages when you shall have to cut the trees and remove them within two years, &c."

*Held*, that the document was sufficiently stamped.

REFERENCE by Rao Saheb Chunilal Harilal Vakil, Subordinate Judge of Godhra, in the Ahmedabad District, under section 49 of the Indian Stamp Act (I of 1879).

In Suit No. 371 of 1896 filed in the Court of the Subordinate Judge of Godhra, the plaintiff tendered in evidence a Gujarati document written on an impressed stamp paper of one rupee. The following is the translation of the document:—

"Dated the Aso Sud 2nd, Samvat 1942, corresponding with 11th October 1893, A.D. To Vohra Mahamadali Lukmanji, resident of Godhra, writer (to this bond). I, Rajeshri Ramchandra Anant, resident of the same village, write that we have inami villages Govindi and Kanku Thamla, in the Godhra Taluka, of Shri Vithal Mandir (temple), that we (I) have sold to you my half share of the standing mahuda trees of the said two villages for Rs. 1,601, sixteen hundred and one, British currency, on conditions that—1, there is inami land of Rajeshri Krishnarao Govind in Kanku Thamla, you have no right on the trees of that land; 2, those young (mahuda) trees in the said two villages, whose trunks do not exceed two feet in circumference at one foot height from the surface of the earth, should not be cut by you; 3, I have received one-fourth of the abovementioned purchase-money, deducting this, the remaining money should be paid when we (I) give you pass books, and you shall have to pay also the price of the pass books; 4, we (I) will give you written information to cut the trees of the said villages when you shall have to cut the trees and remove them within two years (from that date); or if by reasonable cause you cannot remove them within that period, you can get six months' more time by our permission.

"On the above conditions we (I) have sold my half share of the mahuda trees of the said villages, and for that I have written this deed of contract of our (my) own free will and good sense. This I admit."

The Subordinate Judge doubted whether a rupee stamp was sufficient for the document: he, therefore, referred the following questions for decision:—

"1. Whether the document in question is exempted under article 2, clause (*a*), of the second schedule of the Stamp Act?

"2. If not, is it sufficiently stamped?

"3. If it is not sufficiently stamped, what stamp should it bear?"

* Civil Reference, No. 8 of 1897.

[787] The opinion of the Subordinate Judge on the above questions was (1) that the document was not exempted under article 2, clause (a), of the second schedule of the Stamp Act; (2) that it was not sufficiently stamped; and (3) that it should bear a stamp of twenty rupees.

The reference being called on for hearing, the following **judgments** were recorded :—

**Farran, C. J.** :—The document in this case is not one which in my opinion needs to be stamped as a conveyance under section 3, clause (9), and article (21) of Schedule I of the Indian Stamp Act. Whether it be taken as a sale of trees when cut by the purchaser, in which case it would be a memorandum relating to the sale of "goods and merchandize," or an agreement to allow the contractor to cut and remove the trees on certain conditions, it is, in my opinion, sufficiently stamped either under article (2) of Schedule II or under article (5) of Schedule I of the same Act. The expression "goods and merchandize" is not an equivalent for moveable property, but is borrowed from the English Stamp Act, the language of which is again taken from that of the Statute of Frauds. The cases upon the distinction (often a fine one) between the sale of goods and merchandize in the shape of trees and other produce of land to be cut and removed and a contract for an interest in land will be found collected in Benjamin on Sales, Book I, Part II, Chap 2. It is unnecessary for me, I think, to decide in this judgment under which category the document in question falls, as in either view it is sufficiently stamped.

I would answer the second question in the affimative and give no answer to the other questions, as it is unnecessary for us to answer them.

**Parsons. J.** :—I concur in the above answer to the questions.

**Candy, J.** :—It would seem, from the general proposition stated at p. 121 of the 4th edition of Benjamin on Sales, that the agreement in question would, in England, have been taken as coming within the 4th section of the Statute of Frauds, as being a contract or sale of lands......or any interest in or concerning them. Though the ownership of the trees may not at once have been transferred, the agreement vested an interest in them in the purchaser before [788] severance. He had under the contract a right to enter on the land and within the space of two years cut such trees as within that period attained a certain size. The intention was that the trees should remain in the land for the benefit of the purchaser, and derive benefit from so remaining. Thus part of the subject-matter of the contract was an interest in land.

But though possibly there was here a contract for the sale of an interest in land within the meaning of section 4 of the Statute of Frauds, and though the subject-matter of the agreement may be within the definition of immoveable property in section 2 (5) of the General Clauses Act, 1868, it does not follow that the document in question is a "conveyance" or anything more than an agreement for sale. Under section 3 of the Transfer of Property Act, immoveable property does not include standing timber; and by section 4 the chapters and sections of the Act, which relate to contracts, shall be taken as part of the Indian Contract Act, 1872.

Here there was no sale of ascertained moveable property. There was a contract or agreement by which the purchaser was to be at liberty to cut and take such trees as might within two years attain a certain size. Such trees as he did not cut before the expiration of the period, remained the property of the vendor. In my opinion, the document was not a "conveyance," but an agreement for sale, and it is sufficiently stamped. I concur in answering the second question in the affirmative.

*Order accordingly.*

[22 Bom. 788]

## APPELLATE CIVIL.

*The 19th July, 1897.*

PRESENT:

MR. JUSTICE PARSONS, AND MR. JUSTICE RANADE.

Mahadev............(Original Plaintiff) Appellant

*versus*

Mahadu.. .........(Original Defendant) Respondent.*

*Dekkhan Agriculturists' Relief Act (XVII of 1879), Secs. 44 and 56—Agreement executed before a village conciliator—Agreement evidencing an intention to create a mortgage—Admissibility and validity of such agreement—Evidence.*

On the 1st December 1891, defendant executed before a village conciliator a *kabulayat* to the following effect:—

[789] "I admit Rs. 460 are due from me to the plaintiff (under a mortgage.) I also owe him Rs. 485 under a consent decree and Rs. 489 as a fresh advance, in all Rs. 1,434. I agree to pay on this sum interest at 13 annas per cent per mensem. For the same I give in mortgage the property mentioned in the said decree, and also my house at Junnar. I will repay the said money in four years. If I fail, the property should be sold, and the money should be recovered therefrom; should the sale-proceeds fall short, I will personally pay the deficiency. I have already put the plaintiff in possession of the property herein mentioned. . . . ."

The village conciliator forwarded this *kabulayat* to the Subordinate Judge under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), but the Subordinate Judge refused to file it.

Thereupon the plaintiff brought the present suit for recovery of the mortgage-debt by sale of the property, or, in the alternative, for an order directing the defendant to execute a mortgage in terms of the *kabulayat*, and for a personal decree against the defendant for the amount due.

*Held*, that the *kabulayat* did not of itself create a mortgage, but only evidenced the intention of the parties to create one. It did not, therefore, fall under section 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and was admissible in evidence to prove the contract entered into.

*Held*, also, that the plaintiff was entitled to a decree directing the defendant to execute a mortgage in terms of the *kabulayat*.

SECOND APPEAL from the decision of Rao Bahadur N. G. Phadake, Joint First Class Subordinate Judge, A. P., of Poona.

The plaintiff and defendant had money dealings with each other.

On the 1st December 1891, the parties appeared before the village conciliator of Junnar, and a *kabulayat* was passed by the defendant as follows:—

"I admit Rs. 460 are due from me to the plaintiff (under a mortgage). I also owe to the plaintiff Rs. 485 under a consent decree No. 103 of 1890, and Rs. 489 as a fresh advance, in all Rs. 1,434. On this sum I agree to pay 13 annas per cent. per mensem as interest. For the same I give in mortgage the property mentioned in the said decree and also my own house, which is situate in the town of Junnar. I will repay the said money in four years. Should I fail to repay the money in time, the undermentioned property should be sold, and this money together with interest thereon should be recovered therefrom.

*Second Appeal, No. 57 of 1897.

Should the sale-[790] proceeds fall short, I will personally pay the deficit amicably * * * * *

"The said house and lands together with their appurtenances, being the property mentioned in the previous decree, are in the possession of the plaintiff with whom they are to continue. Moreover, I have given into the possession of the plaintiff the house which is newly given in mortgage now. As to the aforesaid money in cash which I ask for, the plaintiff has this day paid the same in cash to me. I have taken and received the same. To this the plaintiff has agreed."

The village conciliator, before whom the above *kabulayat* was executed, forwarded it to the Subordinate Judge under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). But the Subordinate Judge under the orders of the Special Judge refused to file it.

Thereupon the plaintiff brought the present suit, praying for a declaration that the property was mortgaged to him and to recover the debt due with interest by sale of the property, or from the defendant personally, or, in the alternative, for the execution by the defendant of a proper mortgage-deed in terms of the *kabulayat*.

The Subordinate Judge awarded the plaintiff's claim against the defendant personally, holding that the plaintiff was not entitled to the other reliefs, as the agreement sued upon was a mortgage, or an agreement to mortgage, which not being registered under section 56 of Act XVII of 1879 could not be enforced.

This decision was upheld, on appeal, by the District Court.

The plaintiff thereupon preferred a second appeal to the High Court.

*N. G. Chandavarkar*, for Appellant:—The *kabulayat* sued upon is not a mortgage. It only evidences an intention to create a mortgage. It does not, therefore, fall under section 56 of Act XVII of 1879. It is admissible to show the contract entered into by the parties. The plaintiff is, therefore, entitled to the relief he seeks, namely, that the defendant should execute a mortgage in terms of the *kabulayat*.

[791] There was no appearance for the Respondent.

**Parsons**, J.:—The appellant sued for one of three reliefs: (1) for a declaration that certain property was held by him in mortgage and for recovery of the mortgage-debt, Rs. 949, by sale of that property; or (2) for an order directing the defendant to execute in his favour a mortgage of the property for the sum of Rs 949; or (3) for a personal decree against defendant for Rs. 949. Both the lower Courts concurred in granting the third relief only. They considered the document on which the appellant rested his claim valueless either as a mortgage or as an agreement to mortgage. Inasmuch as the document was not executed in the manner required by section 56 of the Dekkhan Agriculturists' Relief Act, the Judge of the Court below was right in holding that the relationship of mortgagor and mortgagee had not been proved to exist between the parties. The ground, however, for holding that the claim to specific relief could not be granted, is not sound.

The facts are these. In 1891 the parties went before a conciliator and came to an agreement finally disposing of the dispute between them. The defendant admitted that he owed the plaintiff 460 rupees on a mortgage and 485 rupees on a decree, and he took a further present advance of Rs. 489 in cash, making Rs. 1,434 in all due by him to the plaintiff. On this he agreed to pay interest at 13 annas per cent. per month. He then goes on to say thus:—"For the same I give in mortgage the property mentioned in the said decree

and also my own house which is situate in the town of Junnar. (His Lordship read the rest of the *kabulayat* as above set forth and continued :—)

He signed this agreement and so did the plaintiff. The conciliator duly forwarded it to the Subordinate Judge, but that Judge acting, it appears, under the orders of the Special Judge, refused to file it. Hence the present suit. It seems to us to be clear that the plaintiff has the right to the relief which he asks for. Had the Subordinate Judge done what he should have done, *viz.*, filed the agreement, there would have been then a proper mortgage-deed drawn up. The fact that he did not, and that the plaintiff has had to bring a suit, cannot deprive the plaintiff [792] of the right he has under the agreement. The document which the parties signed before the conciliator when properly considered does not of itself create a mortgage. It merely evidences the intention of the parties to create one. It does not, therefore, fall within the terms of section 56 of the Dekkhan Agriculturists' Relief Act, and it is admissible in evidence to prove the intention of the parties and the contract they had agreed to. The agreement is a perfectly valid and a legitimate one, and, as such, can be enforced. Even if the document be considered as intended of itself to create the mortgage, and if owing to its not being executed in the manner required by law it did not create the intended interest, then apparently under the ruling in *Burjorji* v. *Muncherj*, I. L. R., 5 Bom., 143, the document would still be admissible to show the contract entered into for the mortgage, though not as the mortgage itself. In whichever way, therefore, the document is viewed, the plaintiff's right is clear to obtain the relief he asks.

We vary the decree of the Lower Appellate Court by substituting for the relief granted an order directing the defendant to execute the mortgage as asked in the plaint, and we order the defendant to pay the plaintiff's costs throughout.

**Ranade, J.** :—In this case both parties effected a *kabulayat* agreement, through the agency of a conciliator, on 1st December 1891. This settlement provided for a mortgage charge on certain lands in consideration of former debts due to, and fresh advances made by, the appellant-plaintiff to the respondent-defendant. The Junnar Court refused to file this *kabulayat* on the ground that it contravened the objects of the Dekkhan Agriculturists' Relief Act and the rules framed under it. The present suit was accordingly brought to secure a declaration of appellant's right as mortgagee, and to recover the debt due with interest from the property charged and from the respondent personally, or, in the alternative, to secure the execution, by defendant, of a proper mortgage-bond in the terms of the *kabulayat*.

Both the Courts below agreed in awarding appellant's claim against respondent personally, but they held that appellant was [793] not entitled to the other two reliefs claimed by him, namely, an order directing the recovery of the money by the sale of the property charged, or requiring the respondent to execute a new mortgage-bond. The only point for consideration is thus : Whether the appellant can properly claim either or both the reliefs mentioned above.

It is quite clear that under section 70 of the Dekkhan Agriculturists' Relief Act, no mortgage, lien, or charge can be validly created, in respect of the immoveable property of an agriculturist unless it is created by an instrument in writing, and no such instrument can be received in evidence unless it is registered under section 56 of the Act. Under the terms of the last section, the agreement or *kabulayat* of 1st December 1891, is not admissible in evidence, and it may also be doubted if the said agreement can even be regarded as an instrument in writing. It is thus plain that the appellant had no right to have it declared that he was a mortgagee of the property, and, as such, to recover his debt by the sale of the said property.

The third relief claimed by him stands, however, on a different footing. If the oral agreement between the parties, which was sought to be given effect to by the agreement, could be proved otherwise than by the evidence of that agreement, there appears to be no reason why this oral agreement should not be enforced by requiring the respondent to act up to it, and pass a mortgage-bond in appellant's favour. Such an oral agreement does not fall within the prohibition of either section 70 or 56 of that Act. It does not itself create a mortgage, lien, or charge, but only confers a right to obtain such a mortgage instrument in due form.

If the present case were only one of an executory contract, it might be open to question if specific performance should be permitted. The fact appears to be, however, that the appellant advanced a fresh loan of 489 rupees on the day of the *kabulayat*, and respondent admits the receipt of the same. The evidence of the conciliator proves the oral contract quite independently of respondent's admission. Such a case clearly falls within the scope of section 12 of the Specific Relief Act, and there was [794] thus a discretion in the Court which was not properly exercised when it refused to interfere on more or less technical grounds. In the present case, the mortgaged property was also made over into appellant's possession at the time that he advanced the fresh loan. We accordingly think that this portion of the relief prayed for may be very properly awarded in the present case.

We reverse the decree of the lower Court, and direct that respondent do pass a mortgage-bond in terms of the *kabulayat*, Exhibit 15, to the appellant. Respondent should pay appellant's costs throughout.

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[ 22 Bom. 794 ]

## APPELLATE CIVIL.

*The 20th July, 1897.*

PRESENT :

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Sambhu............(Original Plaintiff) Appellant

*versus*

Kamalrao Vithalrao Deshmukh............(Original Defendant) Respondent.*

*Land Revenue Code (Bom. Act V of 1879), Sec. 3, Cls. (16), (17); Secs. 71, 79, 85, 86 and 87—Deshmukhi vatan—Alienated land—Registered occupant—Superior holder.*

In 1892, Vithalrao, a deshmukhi vatandar, died leaving five sons—four by one wife, of whom Kamalrao was the eldest, and one son, Bhavanrao, by another wife. Kamalrao and Bhavanrao each claimed to be the eldest son of Vithalrao. On the 16th June 1893, the Collector of Satara in proceedings under section 71 of the Land Revenue Code (Bombay Act V of 1879) ordered Kamalrao's name to be registered in the revenue books in place of Vithalrao's. Prior to this, however, the plaintiff and other tenants paid Bhavanrao rents for 1892—94. Kamalrao then applied for and obtained from the Collector an order, under

* Second Appeal, No. 26 of 1897.

section 86 of the Code, rendering him assistance in recovering these rents. The plaintiff in August 1894, brought this suit to restrain Kamalrao from recovering the rents and to avoid the order for assistance. The Subordinate Judge granted the injunction, but the District Judge reversed that decision and dismissed the suit on the ground that Kamalrao was the registered occupant of the land and that the order for assistance was valid, and that payment of rent to Bhavanrao did not discharge the tenants. On appeal to the High Court,

*Held*, reversing the decree of the District Judge and restoring that of the Subordinate Judge, that the lands in question being alienated land, section 71 of the Land Revenue Code (Bom. Act V of 1879) did not apply, and Kamalrao was not a registered occupant under the Code. The lands passed on Vithalrao's [795] death to his five undivided sons, unless a custom of primogeniture existed in the family, and payment by the plaintiff to Bhavanrao, a co-landlord, was a valid discharge.

SECOND APPEAL from the decision of S. Tagore, District Judge of Satara, reversing the decree of Rao Saheb S. B. Gadgil, Acting Subordinate Judge of Islampur.

The plaintiff sued for an injunction restraining the defendant from collecting certain rents. One Vithalrao died in 1892, leaving five sons—four by one wife, of whom the defendant Kamalrao was the eldest, and one son, Bhavanrao, by another wife. There was a dispute between Kamalrao and Bhavanrao as to which of them was the eldest son of Vithalrao, and accordingly in January 1893, the Collector of Satara held proceedings under section 71 of the Land Revenue Code (Bombay Act V of 1879) to determine who was the heir of Vithalrao. In that month he made an *interim* order stating that Kamalrao had been administering the estate ; that Vithalrao had left a will dividing the property which he thought should take effect, and postponing his decision under section 71 until the 15th June 1893 added that if by that time the will was not brought into force, he would again hear argument and give his decision. Meantime Kamalrao should continue to administer the estate. In consequence of this *interim* order, the Mamlatdar in February 1893, told the tenants to pay their rents to Kamalrao.

On the 16th June 1893, the Collector without alluding to Vithalrao's will declared Kamalrao to be the principal of Vithalrao's heirs and ordered that his name should be registered in the revenue books.

Notwithstanding the above orders of the Collector and Mamlatdar, some of the tenants attorned to Bhavanrao and paid him rents for 1892—94. Kamalrao then applied to the Collector, under section 86 of the Land Revenue Code, for assistance in recovering those rents from the tenants.

The plaintiff, who was one of the tenants, thereupon brought this suit, praying for an injunction restraining Kamalrao from recovering these rents and to avoid the orders for assistance made under section 86 of the Revenue Code. He alleged that Kamalrao had no exclusive right to the rents ; that the land be-[796]longed to all the five brothers jointly ; and that he (the plaintiff) had paid the rent to Bhavanrao, and was, therefore, no longer liable.

The defendant Kamalrao contended that his name having been entered in the revenue books as representative vatandar he alone had the right to collect the rents, and that the plaintiff might recover from Bhavanrao the rents he had improperly paid him.

The Subordinate Judge granted the injunction, holding that the plaintiff having paid the rent to Bhavanrao was discharged. Bhavanrao was entitled to receive it, the land in question belonging not to the defendant Kamalrao exclusively, but to all five brothers.

The District Judge reversed the decree and dismissed the suit, holding that Kamalrao was the registered occupant of the land ; that the order for assistance

made in his favour under section 86 was valid; and that the payment of rent by the plaintiff to Bhavanrao did not discharge the plaintiff.

The plaintiff preferred a second appeal.

*Branson* with *Manekshah J. Talyarkhan*, for the Appellant (Plaintiff):—We paid rent to Bhavanrao, who is defendant's co-sharer, and such payment is a good discharge—*Krishnarav* v. *Manaji*, 11 Bom. H. C. Rep., 106. The defendant relied upon his right as the person recognized by the Collector. But recognition by the Collector is only for fiscal purposes. It cannot effect a change in the rights of the parties. Further, the Collector's order recognizing the defendant was *ultra vires*. The land in dispute is alienated land, and there is no provision, in the Land Revenue Code, applicable to the case of an alienated holding. Section 71 of the Code only applies to registered occupants. Section 3 (16) of the Code defines who is a registered occupant. Section 71 consequently cannot be applied to a holder of alienated lands.

*Macpherson* with *Balaji A. Bhagvat*, for the Respondent (Defendant):—The land in dispute is sheri land and, therefore, it cannot be said that it is an alienated holding. Next, we base our right on the recognition by the Collector. The Collector's recognition enables a person to apply for assistance under section 86. The [797] Collector has power under that section to make an arrangement pending a decision by a Civil Court. See Sathe's Land Revenue Code, p. 102. Kamalrao was managing the lands during Vithalrao's lifetime and the Collector has continued that arrangement. We submit that the arrangement would not act prejudicially to the plaintiff. If, notwithstanding the arrangement, he paid rent to Bhavanrao, he has himself to blame. The Collector's order is not *ultra vires*. Payment of rent is to be made through the village officers. Section 85 of the Land Revenue Code imposes a penalty for recovering rents directly from tenants.

**Candy, J.**:—The facts may be thus stated:—

The land in suit which the plaintiff held as a tenant or inferior holder from Vithalrao, the superior holder, is alienated land. It was urged, in second appeal, that the land is a "sheri thikan." This point was not taken in the lower Courts, and whether the land be "sheri" or not, and whether it was part of Vithalrao's private property as distinguished from his deshmukhi vatan land, the fact remains that the land is *alienated*.

Vithalrao died in 1892, leaving five sons—four by one wife, of whom Kamalrao (present defendant) is the eldest, and one son, Bhavanrao, by another wife. Kamalrao and Bhavanrao each claimed to be the eldest son of Vithalrao.

On the 20th January 1893, the Collector of Satara held what is termed a "proceeding under section 71 of the Land Revenue Code in the matter of determining the heir to the deceased Vithalrao Deshmukh of Kokrud."

Section 71 of the Land Revenue Code provides that "on the death of a registered occupant the Collector shall cause the name of his eldest son, or other person appearing to be his heir, or the principal of his heirs, to be registered in his stead, and the said heir shall thereafter be deemed the registered occupant." And by section 3 (16) of the Land Revenue Code, "occupant signifies a holder of *unalienated* land," and (17) "registered occupant" signifies a sole occupant or the eldest or principal of several joint occupants, whose name is authorizedly entered in the Government records as holding *unalienated* land. It is obvious, therefore, that section 71 was inapplicable as regards any private or [798] deshmukhi alienated land, belonging to Vithalrao, and on Vithalrao's death (unless the custom of primogeniture exists in the family) belonging to his five undivided sons.

In January 1893, the Collector wrote:—

"As a matter of fact the son Kamalrao carries on the administration of the estate, the son Bhavanrao having been separated from his father for ten years during which time he has been given Rs. 300 from the estate yearly. He also has a portion of the wada assigned to him. The father has left a will in which he has divided the whole of his estate of immoveable property, assigning to each son, his two widows, and daughter what lands they should enjoy. I am of opinion that the will should take effect, and I, therefore, order that I shall not pass a decision under section 71, Land Revenue Code, until the 15th June 1893. The son Kamalrao should continue to administer the estate as in his father's lifetime, and Bavanrao should receive his allowance as before. If by the 15th June the will is not brought into force, and no decree of a competent Court is promulgated, I shall proceed to hear once more the arguments of both parties and shall give a decision under section 71 of the Land Revenue Code."

As a consequence of this *interim* order of the Collector, in February 1893, the Mamlatdar told Vithalrao's tenants to pay their rents to Kamalrao. On the 16th June 1893, the Collector did not allude further to the alleged will or partition (of which there is no mention in the present suit), but proceeded to declare Kamalrao to be the principal of Vithalrao's heirs, because he was apparently the eldest and was selected by his father to manage the estate, and the Collector, therefore, ordered that the name of Kamalrao should be registered in the revenue accounts in the stead of Vithalrao.

As between Government and the heirs of Vithalrao for fiscal purposes this may be a perfectly valid order, but as between the tenants of Vithalrao and the five sons of Vithalrao who, in the absence of any custom of primogeniture, on Vithalrao's death became the landlords of the tenants, it can have no force. There is no allegation now that Bhavanrav was separated from his father, and it is obvious that Kamalrao's management for his father in his father's lifetime would have no effect after Vithalrao's death, unless it was the custom of the family for the eldest son to manage, or unless Vithalrao's sons consented that Kamalrao's management should continue. No such custom or consent is alleged in the present case. Notwithstanding the Collector's [799] and the Mamlatdar's orders certain of the tenants attorned to Bhavanrao and paid him their rents for 1892-93 and 1893-94. Kamalrao then applied under section 86 of the Land Revenue Code for assistance for the recovery of rent from those tenants. An order (the exact date of which has not been stated in this suit and it is immaterial) for rendering assistance was passed. Then the tenants brought several suits against Kamalrao to avoid that order. The present suit was one of them and was brought first in the District Court on 15th August 1894, and on the plaint being returned for presentation to the proper Court was then brought in the Subordinate Judge's Court on 12th August 1895.

The plaintiff claimed (*inter alia*) that an injunction should issue restraining Kamalrao from recovering rent on the strength of the abovementioned order for assistance. The Subordinate Judge granted the injunction; but the District Judge reversed that decision and dismissed the plaintiff's suit, on the ground that it was admitted that Kamalrao is the registered occupant of the land, and that the order for assistance given by the Revenue authorities was perfectly valid, and that the payment of rent by plaintiff to Bhavanrao did not operate as a valid discharge.

It has been shown above that the defendant Kamalrao is not the "registered occupant" of the land. He is a superior holder of the land; so is Bhavanrao; so are Kamalrao's brothers superior holders. There is nothing in section 86 of the Land Revenue Code requiring an applicant under that section to be

a "registered superior holder." The term is unknown in the Land Revenue Code. The nearest approach to it is in section 79, under which the Collector is not bound to recognize any person to whom any interest in any alienated holding has been *assigned*, unless the *transfer* has been recorded in the revenue records. But Vithalrao's interest in his deshmukhi vatan or sheri lands has not been assigned or transferred to his five sons, whose full interest has accrued on succession. Kamalrao gains no advantage over his brothers under section 86, because his name is recorded in the revenue records as representing the estate. The order for assistance in the present case may be perfectly good, and one which a Civil Court cannot cancel, though from the provisions [800] of the second clause of section 87 it would seem that the Legislature intended that in disputes of this nature the tenants, having already paid the rent to one of the co-proprietors of the estate, the Collector should, in his discretion, refuse the assistance demanded for recovering that rent again. But the order though good in its inception may be incapable of taking legal effect. A superior holder having no co-holders may obtain an order for assistance, and subsequently the rent may be paid to him. It would be manifestly unjust for him under those circumstances to proceed to enforce the order, and a suit would lie by the tenant for an injunction restraining the superior holder from enforcing the same. If this be so, and if in law a payment of rent to one co-landlord by the tenant is a valid discharge—*Krishnarav* v. *Manaji*, 11 Bom. H. C. Rep., 106, then the Subordinate Judge's decree in the present suit is right. The District Judge relied on section 85 of the Land Revenue Code, and remarked that the tenants should have paid their rents to the village officers, "and if they have now to pay twice over they are themselves to blame." But section 85 does not provide that tenants must pay their rents to the village officers, or that any rents not so paid will have to be paid twice over. No doubt it imposes a penalty on certain superior holders demanding or receiving payment from their inferior holders otherwise than through the village officers; but there is no corresponding penalty or duty imposed on the inferior holders. Here the rent has been admittedly paid to Bhavanrao. The provisions of section 85 do not make that payment invalid.

But it may be pointed out that it is doubtful whether the provisions of section 85 have any application to the present case. They apply to the superior holder of an alienated village or of an alienated share of a village. It appears from the Collector's proceeding of 20th January 1893, that "there are 45 villages in which the name of Vithalrao stood as occupant." The Collector apparently meant "recorded holder of alienated lands" though of course it is quite possible that Vithalrao was also the "occupant" of certain unalienated survey numbers. In any case, it would appear that Vithalrao was not the holder of alienated villages, or alienated shares of villages, but of various survey [801] numbers in 45 different villages. If this be so, then section 85 may have no application. And support is given to this view by the fact stated above that on the 21st February 1893, (Exhibit 31) the Mamlatdar, in consequence of the Collector's above quoted directions, told the tenants of the various pieces of land to pay their rents to Kamalrao. This he presumably would not have done had they been bound by law to pay their rents to the village officers. Of course, legally no revenue officer can, under the Bombay Land Revenue Code, tell a tenant of a superior holder of alienated lands that he should pay his rent to such and such a person.

I have discussed the case at greater length than perhaps the nature of the case itself required, my object being to emphasize the provisions and limitations of certain sections of the Land Revenue Code, which are sometimes imperfectly

understood. Possibly it might conduce to better revenue administration if the Collector were empowered to hold an inquiry and determine who should be the "recognized" holder of alienated lands to whom tenants should attorn until the decree or order of a competent Court is produced. But such at present is not the law. Any one acquainted with the Deccan and Southern Maratha Country must be aware that in the case of large estates, such as deshmukhi and desaigiri vatans, there is a prevalent idea that on the death of the holder the eldest son should manage the estate, even though the rule of primogeniture may not be strictly in force, and that the right to recognize the eldest son as the representative and manager of the family is vested in the Revenue authorities. And that idea has not been eradicated by the tendency of the decisions of our Courts, which require strict proof to give effect to a custom which is in any way opposed to the ordinary rules as to devolution of property according to Hindu law. As to whether there is any such valid custom in Vithalrao's family I offer no opinion, for Kamalrao's brothers are not parties to the suit, and no issue was raised on the point. And as to whether such right to recognize the management of the eldest son should not be vested in the Revenue authorities—as apparently is the case in other provinces, see *e. g*, North-West Provinces Land Revenue Code, sections 94, 95, 98, 101,—the **[802]** matter is one for the consideration of Government and the Legislature.

In my opinion, the decree of the District Judge should be reversed, and that of the Subordinate Judge restored. All costs throughout on defendant.

**Farran, C.J.** :—I entirely concur in the judgment which my learned colleague has delivered and in the reasons upon which he has based his decision. I wish, however, to be understood as not expressing any opinion upon the applicability of section 85, Land Revenue Code, to Vithalrao's holdings, as the question has not been fully argued and the judgments of the lower Courts do not set out their nature; and I have, therefore, not considered the matter. I am also not sufficiently conversant with the subject to offer an opinion as to the propriety or otherwise of extending the provisions of section 71 of the same Code to alienated holdings or otherwise altering the law upon this subject.

*Decree reversed.*

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[22 Bom. 802]

# FULL BENCH.

## APPELLATE CIVIL.

*The 20th July, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Nilkanth Ganesh Naik............(Original Applicant) Appellant

*versus*

The Collector of Thana............(Original Opponent) Respondent.*

*Land Acquisition Act (X of 1870) and Act I of 1894—Award of compensation—Payment of compensation awarded how enforced—Appeal from an order irregularly made—Practice—Procedure.*

The Land Acquisition Act (X of 1870) did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings, and there is no general law which enables a Civil Court to enforce such a statutory liability, when imposed upon a Collector or other civil officer, by means of execution proceedings without a suit. The ordinary mode of enforcing such an obligation is by suit, unless the Legislature when it creates the obligation prescribes such other means of enforcing it.

[803] On the 16th February 1894, under the Land Acquisition Act (X of 1870), an award, of compensation to the claimant for land acquired under that Act was made by the Assistant Judge of Thana, and he subsequently made an order directing the Collector to pay the amount with interest and costs, without, however, fixing a date for payment. On the 1st March 1894, the new Land Acquisition Act (I of 1894) came into force. On the 26th February 1895, the claimant applied to enforce payment of the amount awarded, and the then Assistant Judge (Mr. Knight) re-affirmed the previous order and directed the Collector to pay it on or before the 20th May 1896. No payment, however, was made, and the matter came before the new Judge (Mr. Fitz Maurice) for final order. He held that neither under Act X of 1870 nor the new Act I of 1894 had he any power to enforce payment against the Collector, and he, therefore, dismissed the claimant's application. On appeal to the High Court the matter was referred to a Full Bench.

*Held*, that the Act X of 1870 prescribed no mode of compelling payment by the Collector of compensation awarded under its provisions, but left the persons interested to a suit to enforce such payment. The proceedings under that Act were, therefore, at an end when the award was made. That being so, there were no proceedings pending in the case when the new Act I of 1894 came into force. Clause 2 of section 2 of that Act, therefore, did not apply, and no further steps could be taken under that Act.

*Per* RANADE, J.:—The District Judge's order appealed from was improperly made. The Assistant Judges had jurisdiction to make the previous order, and even if their order was not properly made, it could not be set aside in the way it was done by the District Judge as if an appeal lay to him from such order. That order, however, as now held was wrong, and the irregularity of the District Judge's order thus led to no failure of justice, and fell under section 578 of the Civil Procedure Code (Act XIV of 1882).

*Quære*—whether an award made under the provisions of Act I of 1894 can be enforced against the Collector by execution proceedings.

APPEAL from the decision of J. FitzMaurice, District Judge of Thana, in darkhast No. 2 of 1895.

* Appeal, No. 124 of 1896.

On the 16th February 1894, the Assistant Judge of Thana (Mr. Pratt) under section 15 of the Land Acquisition Act (X of 1870) made an award of compensation to the claimant.

The Collector subsequently desired to withdraw the proceedings in the matter, as the land to which the award related had been acquired and paid for many years previously, but the District Judge (Mr. Khareghat) held that the proceedings could not be withdrawn by the Collector after a reference had been made to the District Judge. He ordered the Collector to pay [804] the amount awarded with interest and costs, but fixed no date for payment.

On the 1st March 1894, the new Land Acquisition Act (I of 1894) came into force.

On the 26th February 1895, the claimant applied to enforce the payment ordered by the award. The Assistant Judge (Mr. Knight) held that although under the old law (section 34 of Act X of 1870) the Judge had no power to order execution, the new law (section 53 of Act I of 1894) by making the Code of Civil Procedure applicable to all proceedings under the Act authorized an order for execution. He was also of opinion that the proceedings in this matter must be regarded as pending, and that, therefore, the new Act was applicable under section 2, clause 2, of Act I of 1894. He, therefore, re-affirmed the order of payment already made by the Judge, and directed that payment should be made on or before the 20th May 1896.

The Collector, however, did not make any payment as directed, and the matter came before the new District Judge (J. FitzMaurice) for final order. The Collector again contended that neither under the old nor the new act had the Judge any power to enforce the award by ordering payment. The Judge agreed with this view, and dismissed the claimant's application for payment.

The claimant appealed to the High Court.

The appeal came on first for hearing before PARSONS and RANADE, JJ., by whom it was referred to a Full Bench consisting of FARRAN, C J., PARSONS and RANADE, JJ.

*Daji Abaji Khare* for the Appellant:—The Judge made an order for payment. His successor (Mr. FitzMaurice) had no jurisdiction, at the instance of the Collector, who had not appealed, to re-open the matter. Section 40 of the old Act (X of 1870) made it obligatory upon the Collector to pay when the award was made. The new Act (I of 1894) was in force when we applied for payment, and section 53 of that Act adopts the procedure prescribed by the Civil Procedure Code (Act XIV of 1882). The matter was still pending when the new Act came [805] into force, and, therefore, that Act applies: see clause 2 of section 2.

Rao Bahadur *V. J. Kirtikar*, for the Respondent:—The award was merely in the nature of a declaration, not of a decree. It could not be executed as a decree. The only mode of enforcing such an award is by a suit. Neither the old Act (X of 1870) nor the new one (I of 1894) does more than provide for fixing the amount of compensation. They do not provide for enforcing the award. The Court becomes *functus officio* as soon as it fixes the amount. Even if the new Act (I of 1894) be held applicable to this case, it only provides for payment of interest (section 28). Article 19 of the Limitation Act (IX of 1871) and article 17 of the Limitation Act (XV of 1877) show that the Legislature intended that a suit should be brought in cases of compensation under the Act.

**Farran, C. J.**:—I am of opinion that the decision of the District Judge in this matter was correct and that the appeal must be dismissed.

It appears to me to be quite clear that the "Land Acquisition Act, 1870," which, as its preamble declares, was an Act "to consolidate and amend the law for the acquisition of land for public purposes and for companies and for determining the amount of compensation to be made on account of such acquisition," did not provide for or contemplate an "award" made under its provisions being enforced against the Collector by execution proceedings. The only provisions which the Act makes for payment are those contained in section 40 and section 42, the former of which imposes a statutory liability upon the Collector to pay the compensation according to the award to the person named therein, and the latter imposes upon him the further statutory liability, when the amount is not paid on taking possession, of paying the amount awarded and the added percentage with interest on such amount and percentage at the rate of six per cent. per annum. There is no general law, of which I am aware, which enables a civil Court to enforce such a statutory liability when imposed upon a Collector or other public officer by means of execution proceedings without a suit. The ordinary mode of enforcing such an obligation is by suit, unless **[806]** the Legislature when it creates the obligation prescribes some other special means of enforcing it. The question, therefore, is "Has the Land Acquisition Act of 1870 prescribed any special mode of action against the Collector"? In my opinion, it has not. Directly it certainly has not done so, and I cannot find any indication of its intention to do so indirectly.

An award under the Act could have been made either by the Collector himself under section 14, or by the Judge and assessors or concurring assessors (not by the Court) under section 34. The decision of the Judge (again not of the Court) if he differed from the assessors was not called an "award" but a "decision," and that decision was appealable. There was no provision made for the contingency of there being no appeal from the "decision" of the Judge, but the intention was, I think, in that case, to treat it as an "award." Hence, in the event of there having been no appeal, an award under the Act could be made in three ways: i, by the Collector under section 14; ii, by the Judge and the one or more concurring assessors under section 34; iii, by the Judge alone under section 35, which in this case was called a "decision."

In none of these cases is any provision made for the Court passing a decree in "accordance with the award," nor is section 205 of the Civil Procedure Code or any section contained in Chapter XVII of the Code made applicable to the proceedings. This consideration would doubtless lose much of its force if the contents of the award drawn up in pursuance of the Act included a direction that the Collector was to pay the amount awarded. The contrary is the case. Section 34 prescribes the particulars which the award is to contain, *viz.*, the amounts awarded under each clause of section 24 so far as applicable to the particular case together with the grounds of awarding each of the said amounts. So far as the compensation is concerned, that is the only matter which the award is to contain. Costs are differently dealt with, but as to the compensation itself the obligation on the Collector to pay it rests solely on the provisions of the sections (sections 40 and 42) of the Act to which I have referred and which apply alike whether the award is made by **[807]** the Collector under section 14 without reference to the Court or made by the Judge and assessors or the Judge alone after such a reference. The terms of the latter section appear to provide that the percentage payable under it is not to be mentioned in the award. These considerations appear to me to be conclusive against the power of the Court to carry the "award" into effect by execution.

There are some further provisions of the Act which tend very strongly to show that the above conclusion is correct and in accordance with the intention of the Legislature :—

(1) The special provisions as to costs contained in the Act. The Collector is to pay them all in the first instance (section 32), but if he is allowed any costs by the award, a special provision is introduced in his favour, that if he does not deduct them from the amount awarded, they may be recovered from the person interested as if they were costs incurred in a suit and as if the award were the decree therein (section 34). There is no such provision made in favour of the person interested as against the Collector. The liability of the latter is left to rest upon the statutory obligation contained in section 32, and the Act prescribes no means for enforcing it.

(2) The provisions of the Code of Civil Procedure made applicable by section 34 of the Act to proceedings before the Court do not include any reference to the execution provisions and sections of the same Code, and upon the general principle *expressio unius alterius exclusio* their application is apparently excluded.

(3) The Legislature, by article 19 of the Schedule II to the Limitation Act, IX of 1871, recognized a suit as the appropriate remedy against Government for compelling payment of compensation for land acquired for public purposes. The present Limitation Act (XV of 1877) contains a similar provision (article 17) ; and Act XIV of 1859, section 1, clause 6 (applicable only to Bengal), contemplates suits as the proper remedy open to suitors for enforcing awards under the Bengal regulations therein referred to. For these reasons, I have come, with- [808] out hesitation or doubt, to the conclusion stated at the beginning of this judgment.

I have gone into this question somewhat fully, because a clear conclusion upon it appears to me to dispose of the appeal. If the Act (X of 1870) prescribed no mode of compelling payment, by the Collector, of the compensation awarded under its provisions, but left the persons interested to a suit to enforce such payment, all proceedings under the Act were at an end when the award was made. Nothing more could be done under the Act, no further step could be taken under its provisions. The proceedings then ceased to be pending. They were at an end. As then no proceedings were pending in this case under Act X of 1870 when Act I of 1894 came into force on March 1st, 1894, it follows that there were no proceedings to which the provisions of the latter Act could be applied under section 2, clause (2). It is, to my mind, quite impossible to continue, under Act I of 1894, proceedings which were completed under Act X of 1870. The order of the Assistant Judge in this case, which was virtually to pass under Act I of 1894 a decree in accordance with the award made under Act X of 1870, was passed without jurisdiction, and the order of the District Judge refusing to proceed against Government under the execution sections of the Code, including section 429, is correct. The District Judge, as I understand his proceedings, did not purport to set aside the order of the Assistant Judge, but declined to further execute the award notwithstanding the order of the Assistant Judge. Even if this view of his procedure is not correct, it appears to me that we cannot now order execution to issue, which we should have to do if we allowed the appeal.

In the above view it is unnecessary for me to consider whether an award made under the provisions of Act I of 1894 can be enforced against the Collector by execution proceedings. That is a complex problem which has been set by the Legislature for solution by the Judges. Such problems often arise when the provisions of one Act are introduced by reference into another and

incorporated with it. Whether section 205 and the execution sections of the Civil Procedure Code are inconsistent with the provisions of Act I of 1894, is a question which [809] may have hereafter to be determined. I shall offer no opinion upon it. It will be for the Collector to consider whether he is not estopped from disputing the applicant's demand for the compensation awarded to him. On that point also I offer no opinion. I would confirm the order dismissing the application. Costs on the appellant.

**Parsons, J.** :—I concur. The questions at issue have been so exhaustively dealt with that it is quite unnecessary for me to say more.

**Ranade, J.** :—The award in this case was made on 16th February 1894, by Mr. Pratt, the Assistant Judge, on a reference by the Collector of Thana under section 15 of Act X of 1870. Later on, an attempt was made by the Collector to withdraw the land-acquisition proceedings on the ground that the reference was made by mistake, as the land to which the award related had been acquired and paid for twenty years ago. Mr. Khareghat, the Judge, however, held that there was no provision in the Act for the withdrawal of proceedings by the Collector after a reference had been made to the District Judge. He ordered the Collector to pay the sum awarded with interest and costs, but fixed no date for the payment.

Act No. I of 1894 came into force on 1st March 1894, a few days after the award was made, and the present application was made by the claimant on 26th February 1895, to enforce the payment ordered by the award. The application was referred to Mr. Knight, the Assistant Judge, and it was contended before him on behalf of the Collector that the award was incapable of execution. On the 18th February 1896, Mr Knight held that although, under section 34 of the old law, the District Judge had no power to order execution, such power was conferred on the Court by the extended scope of section 53 of Act I of 1894, and that, though the award was made under the old Act, its enforcement was regulated by the new Act, as the proceedings must be regarded as pending within the terms of section 2, clause 2, of the new Act. He accordingly re-affirmed Mr. Khareghat's order, filling up the omission in it of the date of payment, and directed that the payment should be made on or before 20th May [810] 1896. As no payment was made by the Collector within the time fixed, the matter again came up for final orders before the District Judge. The Collector again raised the contention that neither under the old nor under the new Act had the District Judge any power to enforce the award. This contention was upheld by the District Judge, who accordingly dismissed the claimant's application. The present appeal is against this order of dismissal.

The case was at first argued before Mr. Justice PARSONS and myself, but as there was a difference of opinion between us on the points of law raised in the appeal, it was arranged, that it should be re-heard before a Bench of three Judges, consisting of the two before whom it was first heard and the Chief Justice.

At this second hearing, a preliminary point was raised that the District Judge had no power to revise and set aside an interlocutory order passed by the Assistant Judge. That order was made after full enquiry on 18th February 1896, and it reaffirmed the previous order of Mr. Khareghat. The Collector's representation to the District Judge against Mr. Knight's order was not made till 2nd July 1896. The Bombay Civil Courts' Act (sections 14—19) regulates the powers of Assistant Judges. It is not clear whether the reference to the Assistant Judge in this case was made under section 16 for inquiry and report, or whether the Assistant Judge was invested with the powers

of District Judge under section 19. The wording of the order shows that the Assistant Judges, Mr. Khareghat and Mr. Knight, did not merely inquire and report. Under these circumstances, it may be presumed that they had jurisdiction to pass the order. And even if their order was not proper, it could not be set aside in the way it was done by the District Judge, as if an appeal lay to him from such order. I am, therefore, of opinion that the District Judge's order appealed from in this case was improperly made.

This circumstance by itself does not, however, preclude this Court in regular appeal from considering the validity or otherwise of the order passed by the Assistant Judge directing the enforcement of the award. It was admitted in the course of the [811] argument, and in fact it is clear from the Assistant Judge's own reasoning, that, as far as Act X of 1870 was concerned, there was no provision by which the Judge who made the award could direct its enforcement against the Collector, as though it were a decree between the claimant and the Collector. Section 34 of the old law, it is clear, only extended the provisions of the Civil Procedure Code so far as they relate to the inquiry before the award was made. The functions of the Court do not, as remarked by the District Judge, absolutely cease with the determination of the compensation; for in the matter of costs directed to be paid by the claimant, power is given to the Court to enforce an order about costs as though the award were a decree in a suit. This special provision shows that, in other respects, no such power was conferred on the District Judge. Sections 40, 41 do indeed impose a statutory liability on the Collector to make the payment, but there is no procedure laid down by which this liability can be enforced, except by a separate suit as provided for by articles 17 and 18 of the Limitation Act. This was the view taken by this Court in the ruling referred to by the District Judge, and that decision must govern the present case.

The Assistant Judge, however, was of opinion that the new Act I of 1894 was applicable to this proceeding, and that, therefore, the Courts had power to enforce this award. When the case was first argued, I was inclined to take this view, especially as it appeared to me to be the intention of the Legislature to extend the scope of the old section 34 re-enacted as section 53, and thus to make the whole Code applicable as far as possible to land acquisition disputes. The words employed in sections 31—34 are also more significant, as they direct the Collector to make the payment with interest and costs, if any. On further consideration of the whole subject, I have come to agree with the Chief Justice and Mr. Justice PARSONS, and to hold that this case must be disposed of independently of the new Act. The award cannot be held to have been a pending proceeding under section 2, clause 2. If the award was not enforceable on the date when it was signed, no subsequent enactment could alter its character, unless there was any express provision to that effect in the Act. Section 2, clause 2, contains no such provision.

[812] The irregularity of the District Judge's order has thus clearly led to no failure of justice, and falls under section 578 of the Civil Procedure Code. The order of dismissal must, therefore, be upheld, and the claimant referred to the only remedy open to him under Act X of 1870.

Costs on appellant.

*Order confirmed.*

NOTES.

[Awards under the Land Acquisition Act, 1894, were held executable in (1906) P.R. 53 which was followed in (1911) 36 Bom. 360 disapproving (1910) 35 Bom. 146 where the same view as in this decision was maintained. See also (1905) 32 Cal. 921; (1907) 34 Cal. 470 (effect of a special jurisdiction having been created by the Statute).]

[22 Bom 812]
## APPELLATE CIVIL.

*The 26th July, 1897.*
PRESENT :
MR. JUSTICE PARSONS, AND MR. JUSTICE RANADE.

Mulchand Kuber............(Original Plaintiff) Appellant
*versus*
Bhudhia and another............(Original Defendants) Respondents.*

*Hindu law—Marriage—Marriage of a girl without her father's consent—Suit by father to have marriage declared void*—Factum valet—*Applicability of the doctrine to marriage.*

Under the Hindu law a duly solemnized marriage cannot be set aside in the absence of fraud or force, on the ground that the father did not give his consent to the marriage.

The texts relating to the eligibility of persons who can claim the right of giving a girl in marriage, are directory and not mandatory.

SECOND APPEAL from the decision of E. H. Leggatt, Assistant Judge of Ahmedabad.

Suit by a father to have the marriage of his daughter (defendant No. 2) to the first defendant declared null and void.

The parties to this suit were Lewa Kunbis by caste. Plaintiff was a resident of Ahmedabad. In consequence of some dispute in the family, his wife (defendant No. 3) left his house and went to live with her mother at Gomtipur, a village about two miles distant from Ahmedabad. She took with her his infant daughter Mahalaxumi (defendant No. 2) who was about 3½ years old.

Thereupon the plaintiff applied to the District Court to obtain the custody of his child and for an injunction restraining his wife from disposing of her in marriage.

This application was rejected. Shortly afterwards the girl was given in marriage to defendant No 1 by her mother (defend-[813]ant No. 3) without the consent of the plaintiff and in defiance of his wishes.

The plaintiff then filed this suit praying for the custody of his daughter and for a declaration that her marriage with the first defendant was null and void.

The defendants pleaded (*inter alia*) that the plaintiff had given his consent to the marriage of his daughter, that the match was a fit and proper one, and under the Hindu law a marriage once performed could not be annulled.

The Subordinate Judge held that the girl was given in marriage without the plaintiff's consent or knowledge, that the marriage was celebrated in fraud of his rights, and that the doctrine of *factum valet* was not applicable. He, therefore, passed a decree for the plaintiff, declaring the marriage null and void, and ordering the defendant to deliver up possession of the minor (defendant No. 2) to the plaintiff.

On appeal, the Assistant Judge held that, though the marriage was performed without the plaintiff's consent, it was not invalid on that account, in the absence of fraud on the part of the mother. He, therefore, reversed the first Court's decree and dismissed the suit. His reasons were as follows :—

"The Hindu law appears to be that the father has the right to perform the marriage ceremony and not the mother, but it also seems that a marriage once performed is valid,

* Second Appeal, No. 249 of 1897.

and nothing is said as to the father's consent. As is said in the case referred to, where the Legislature contemplates the invalidity of a marriage to which the father's consent is wanting, it lays down the law in express terms, and if it does not do so, it must be presumed that the father's consent is not absolutely necessary.

"I think, moreover, that I must take into account the fact that the father applied for an injunction restraining his wife from giving his daughter in marriage and failed to obtain the injunction. In refusing to grant his application, the Court gave so much colour to the mother's claim to be allowed to perform the ceremony as to negative any idea of fraud on her part. This being so, the question raised and left undecided by the High Court in the case referred to (I. L. R., 11 Bom., page 256) as to whether the Civil Court would set aside a marriage on the ground of fraud by the parties intermarrying, has no application and need not be discussed.

"There is not sufficient evidence to show that the marriage was in itself an improper one. The father may be able to sue the mother for the money [814] received on account of the marriage of his daughter, on the ground that he was the only person entitled to give her in marriage, but this would not affect the validity of the marriage itself.

"Under the circumstances I think the marriage is valid and cannot be annulled.

"I, therefore, reverse the decision of the Subordinate Judge and dismiss the suit."

Against this decision the plaintiff appealed to the High Court.

*Ganpat Sadashiv Rao*, for Appellant :—It is found, as a fact, that the girl's marriage was performed without her father's consent and authority. Under the Hindu law it is the father's right to dispose of the girl in marriage; failing him the paternal relations have this right, and in their default, the mother The mother thus stands last on the list of relations who by law are empowered to give a girl in marriage. So long as the father is alive, the mother has no authority to give away her daughter without his consent. A marriage performed without his consent is invalid—*Nundlal* v. *Tapeedas*, 1 Borr., 16. It is a fraud on the father's right for the mother to usurp his authority and give their daughter away without his knowledge and consent. Such fraud vitiates the marriage contract and renders it null and void—*Aunjona Dasi* v. *Prahlad Chandra*, 6 B. L. R., 243. The doctrine of *factum valet* has no application to such a case, for the obvious reason that there is a complete absence of authority in the mother to give away the girl. The prohibition of the law is not merely directory, but mandatory. The cases of *Baee Rulyat* v. *Jeychund*, Bellasis, (1840-48), 43, and *Khushalchand* v. *Bai Mani*, I. L. R., 11 Bom., 247, are distinguishable from the present case, because in both those cases the father had abandoned his wife and daughter, and acted in a manner showing that he waived his legal right to dispose of his daughter in marriage.

*C. H. Setalvad*, for Respondents :—According to the Hindu law a marriage once duly celebrated cannot be annulled. The consent of the father is not essential to the validity of the marriage. The case of *Khushalchand* v. *Bai Mani*, I L. R., 11 Bom., 247, is conclusive on this point. See also *Bai Diwali* v. *Moti Karson*, *ante*, p. 509. As to the question of [815] fraud, the lower Court finds, as a fact, that there is no proof whatever of any fraud, constructive or actual, on the part of the mother or any other person who brought about this match.

**Ranade, J.** :—The parties to this suit are Lewa Kunbis. Both the lower Courts have held that the marriage of appellant-plaintiff's daughter Mahalaxumi, aged 3½ years, with the minor respondent, himself a boy 7 or 8 years old, was celebrated by the child's mother and her maternal relations without the knowledge and consent of the appellant. The Court of First Instance held that there were clear indications of fraud and concealment, and as the caste was one in which remarriages were permitted, it held that appellant was

entitled to the declaration he sought in respect of setting aside the marriage and the Court also awarded appellant's claim to the custody of the child.

In appeal, the Assistant Judge was of opinion that the circumstances of the case negatived the existence of fraud, and that the marriage was in other respects not an improper one. He further held that a marriage duly celebrated by the child's mother could not be set aside on the ground of the absence of the consent of the father, inasmuch as such consent was not absolutely necessary. The Assistant Judge accordingly dismissed the claim for the declaration sought, as also for the custody of the child.

The chief contention raised in appeal before us is that, under the circumstances of the case, the marriage was null and void, as the appellant's consent and authority were not secured prior to its celebration. The defence in the Court of First Instance was made to rest on an allegation that the appellant was present at the time of the celebration. This defence broke down, and the decision was made to rest chiefly on the doctrine of *factum valet* to which the lower Court of appeal has referred in its judgment. This doctrine of *quod fieri non debuit factum valet*, or its Sanskrit equivalent, that "a thing cannot be made otherwise by a hundred texts," has been frequently referred to in our reports in connection with questions relating to marriage, adoption, alienation, and maintenance of widows—*Khushalchand* v. *Bai Mani*, I. L. R., 11 Bom., 247; [816] *Lakshmappa* v. *Ramava*, 12 Bom. H. C. Rep., 364; *Gopal* v. *Hanmant*, I. L. R., 3 Bom., 273. The general principles underlying the maxim were laid down in *Lakshmappa* v. *Ramava*, and re-affirmed in *Gopal* v. *Hanmant* by Sir M. WESTROPP.

In the first of these judgments it is stated that the application of the maxim must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction. In cases in which the Shastra is merely directory, or only points out particular persons as more eligible than others, the maxim may usefully and properly be applied if the precept or recommended preference be disregarded. When the defect is one which can be described as one of the nature of *non potuit* rather than of *non debuit*, then the maxim does not apply—*Gopal* v. *Hanmant*. In the words of West and Bühler's Digest, p. 909 (*a*), "prohibition or injunction resting on the essential qualities or mutual relations of its objects is distinguished as indispensable from one going only to an incident or matter of degree, or to the ceremony, a defect in which does not generally vitiate the purposed transaction if the precept has been complied with as far as was reasonably practicable."

The distinction between directory and prohibitory injunctions being so clear, we have next to see how far the authority of the father to give his girl in marriage falls under one or the other class of injunctions. The decided cases to which reference was made in the course of the argument leave no doubt on this point. The case of *Nundlal* v. *Tapeedas*, 1 Borr., 16, may be left out, for it related only to a betrothal contract, and not to a completed marriage, and the only point decided in it was that contracts of betrothal to be binding must be made by or with the parents of the children. The next case in Bellasis' Reports (*Baee Rulyat* v. *Jeychund*) is more to the point. There, as here, the dispute was between husband and wife, and the girl was only 3 years old when her mother got her married. The Court held that a duly solemnized marriage could not be set aside on the ground that the father did not give his consent to the marriage. In a Bengal case—[817] *Modhoosoodun Mookerji* v. *Jadub Chunder*, 3 Cal. W. R., 194,—it was held that a Koolin father was not such a natural guardian of his child as its mother, and that the absence of his consent would not invalidate a marriage duly solemnized by the mother.

The Madras High Court came to a similar decision where the dispute was between the widowed mother and her husband's brother—S. *Namasevayam Pillay* v. *Annamai Ummal*, 4 Mad. H. C. Rep., 339. This was also the view taken by the Calcutta High Court in *Brindabun Chandra* v. *Chundra Kurmokar*, I. L. R., 12 Cal., 140, where also the mother's right to dispose of a minor child was questioned by the uncle of the child on the authority of the Smruti texts, which give preference to such relations over the mother in this connection.

Most of these cases were reviewed and considered by this Court in *Khushalchand* v. *Bai Mani*, and by the Madras High Court in *Venkatacharyulu* v. *Rangacharyulu*, I. L. R., 14 Mad., 316. In the first of these cases the operation of the maxim *factum valet* was considered, and Sir C. SARGENT observed that, upon a true construction of the texts, the giving of the girl in marriage was not a right, but a duty to be discharged, and, in the absence of express words invalidating the gift in marriage, the consent of the person upon whom this duty devolves is not of the essence of the marriage, and if it is not, the maxim applies. It is true the learned Chief Justice expressed no opinion as to how far the presence of fraud would invalidate such a marriage, but there, as in the present case, there was no reason for interference, on the ground of fraud the existence of which the lower Court of appeal has expressly negatived in the present case.

The appellant's pleader contended that there was a constructive, if not a direct, fraud upon the father's authority. As the District Court did not grant the injunction which the husband had prayed against his wife, and, moreover, as the District Judge has found expressly that the marriage was not an improper one, there is not much room for presuming constructive fraud. Fraud and force, such as was alleged in the case of *Aunjona Dasi* v. *Prahlad Chandra Ghose*, 6 B. L. R., 243, must vitiate any transaction however solemnly celebrated [818] by the observance of the usual ceremonies, and a suit to set aside the marriage will lie. But, in the absence of these elements, the maxim of *factum valet* will govern, as the texts only refer to the greater or less eligibility of the relations who can claim the right to make the choice and perform the ceremony. The custom of the caste is not shown to be adverse to the celebration of the girl's marriage at 3½ to a boy of 7, and no fraud can be presumed from the fact of this early celebration. The circumstance that remarriage is permitted by the rules of the caste is irrelevant in the decision of the question of the validity of the marriage.

On the whole, therefore, we must hold that the appellant-plaintiff's claim was properly dismissed by the Lower Appellate Court. We dismiss the appeal. Costs on appellant.

*Decree confirmed.*

## NOTES.

[ See the notes to 22 Bom., 509 *supra*.]

[22 Bom. 818]

## APPELLATE CIVIL.

*The 26th July, 1897.*

PRESENT.

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Ratanchand............(Original Respondent) Appellant

*versus*

Javherchand............(Original Plaintiff) Respondent.*

*Hindu law—Widow—Funeral expenses of widow—Husband's estate chargeable with such expenses.*

Under the Hindu law the estate of the husband is liable for the funeral expenses of the widow; her *stridhan* cannot be charged with such expenses.

SECOND APPEAL from the decision of Rao Bahadur V. V. Paranjpe, First Class Subordinate Judge of Broach, A. P.

One Parbhudas Kalliandas died in July 1875, leaving a childless widow, Bai Divali.

Bai Divali died on or about the 11th April 1893. She left a will, bequeathing the whole of the property in her possession to her brother, the defendant.

The plaintiff thereupon filed this suit, as the nearest kinsman and reversionary heir of Parbhudas Kalliandas, to recover the property in dispute from the defendant.

The defendant pleaded (*inter alia*) that the whole of the pro-**[819]**perty in suit belonged to Bai Divali; that she was competent to will it away; and that, even if any portion of the property in his possession were found to have belonged to Parbhudas Kalliandas, he (the defendant) was entitled to retain out of such property a sum of Rs. 400 which he had spent on the funeral ceremonies of Bai Divali.

The Court of First Instance held that part of the property in suit, namely, a house, some ornaments and outstanding debts, had been inherited by Bai Divali from her husband; that the rest of the property was her *stridhan*; and that her husband's estate was liable for her funeral expenses.

On appeal, the Subordinate Judge with appellate powers varied the decree of the first Court by declaring that the defendant should recover the funeral expenses of Bai Divali from her *stridhan*.

Against this decision the defendant preferred a second appeal to the High Court.

*L. A. Shah*, for Appellant (Defendant).

*Manekshah Jehangirshah*, for Respondent (Plaintiff).

**Ranade, J.**:—The plaintiff in this case claimed the estate of Parbhudas as being his heir and entitled thereto on the death of his widow Divali. The defendant claimed under a will executed by Divali. The Subordinate Judge, A. P., held that the disposition by Divali, in her will, of the property of her husband was invalid, gave the plaintiff a decree for what he found to be the estate of Parbhudas, and left the defendant in possession of the *stridhan* of Divali.

The only objection raised to the decree in this Court relates to the obligation of paying for the funeral expenses of Divali. The Subordinate Judge has charged the *stridhan* of Divali with these expenses. We think that this is

* Second Appeal, No. 306 of 1897.

wrong. We are of opinion that the estate of the husband is liable for them. We can find no express authority on this point, but it has been decided that a widow can charge her husband's estate with the liability to pay these expenses. See *Sadashiv* v. *Dhakubai*, I. L. R., 5 Bom., 450. If the plaintiff [820] were administering the estate of Parbhudas, he would have to pay the funeral expenses of the widow; he would also have to pay the defendant the legacy left him by the widow, and we think that the fact that the defendant now claims his legacy by way of set-off cannot affect the merits of the claim. The Judge of the first Court was evidently right upon this point, and we do not understand why the Subordinate Judge, A. P., raised it, seeing that the plaintiff never made it a ground of appeal.

We vary the decree of the Lower Appellate Court by awarding the house to the plaintiff to be taken possession of only after he has paid into Court for the use of the defendant the sum of Rs. 150. Costs throughout in proportion, except the costs of Exhibit 8 in appeal, which are to be borne by the plaintiff.

*Decree varied.*

[22 Bom. 820]

## APPELLATE CIVIL.

*The 27th July, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Dagdu............(Original Plaintiff) Appellant

*versus*

Balvant Ramchandra Natu and another............(Original Defendants Nos. 1 and 2) Respondents.*

Benami—Benamidar, *right of, to sue in his own name—Purchase by a non-agriculturist in name of an agriculturist—Suit by* benamidar *for redemption—Court fees payable as if real purchaser was plaintiff—Dekkhan Agriculturists' Relief Act (Act XVII of 1879)—Practice—Procedure.*

Where a purchase is made *benami* and a suit is brought by the *benamidar* in order that the real purchaser may escape the consequences to which the latter would be liable if he purchased and sued in his own name, the Court will look behind the record to see who the real purchaser is.

A *benamidar* may maintain a suit in his own name, but the Court will put the defendant in the same position as if the real were the actual plaintiff.

One Dagdu, an agriculturist, purchased certain land *benami* for Kelkar, a non-agriculturist, and brought a suit for redemption under the provisions of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). Under the notification of the Government of India, No. 2092, dated the 29th July 1881, the fees in case of suits by agriculturists for redemption were remitted, and the plaintiff, therefore, paid no stamp duty on the plaint.

*Appeal, No. 29 of 1897.

[821] *Held*, that Dagdu might maintain the suit in his own name, but must pay the usual stamp fees, and that the suit should proceed as an ordinary suit as though Kelkar was the nominal as well as the real plaintiff.

APPEAL from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Poona.

Suit for redemption. The plaintiff, who was an agriculturist, alleged that he had purchased the land in question at an execution sale. He now sued to redeem it from a mortgage for Rs. 1,000, dated the 8th June 1874, and for possession.

The defendants pleaded (*inter alia*) that the plaintiff was merely a *benamidar* having bought the land *benami* for one Shridhar Ballal Kelkar, who was the real purchaser and the real plaintiff. They contended that the *benamidar* was not entitled to bring this suit, and that Kelkar, who was not himself an agriculturist, was using the plaintiff in order to obtain the benefits of the Dekkhan Agriculturists' Relief Act.

The Subordinate Judge dismissed the suit, holding that the plaintiff, who was a *benamidar* for Kelkar, had no right to sue. The following is an extract from his judgment:—

"A *benamidar* can, no doubt, sue in his own name (I. L. R., 18 All., 89), but in this case there are reasons why the plaintiff should not be allowed to sue in his own name. The suit is a barefaced attempt to defraud the public revenue. By the plaintiff suing as an agriculturist, a fee of Rs. 484 on the plaint is lost to Government. This suit is, again, an attempt to take undue advantage of the provisions of the Dekkhan Agriculturists' Relief Act, which provides a special mode of taking account in transactions in which agriculturists are concerned, or by which agriculturists are affected (*vide* sections 12 and 13 of the Dekkhan Agriculturists' Relief Act). But this is a privilege which is intended for agriculturists only (*vide* P. J., 1862, p. 424, and P. J., 1884, p. 203)."

The plaintiff appealed.

*Balkrishna N. Bhajekar*, for the Appellant (Plaintiff):—The evidence does not show that the plaintiff is a *benamidar*. Kelkar has expressly disclaimed any interest in the property. But even if the plaintiff is a *benamidar* he is entitled to bring the suit in his own name—*Annaji* v. *Bapuchand*, I. L. R., 7 Bom., 520; *Ravji* v. *Mahadev*, *ante*, p. 672; [822] *Bhola Pershad* v. *Ram Lall*, I. L. R., 24 Cal., 34. Further, we contend that the Judge ought to have made Kelkar a party to the suit.

*Narayam G. Chandavarkar*, for the Respondents (Defendants):—The Dekkhan Agriculturists' Relief Act was not passed with a view of benefiting persons who are not agriculturists. It was passed for the benefit of agriculturists only—*Amichand* v. *Kanhu*, P. J., 1884, p. 203; *Rajaram* v. *Lakshman*, P.J., 1882, p. 424. On the evidence the Judge found, as a fact, that the plaintiff purchased the property *benami* for Kelkar. That being so, the plaintiff could not maintain the suit in his own name notwithstanding the disclaimer by Kelkar—*Hari Gobind* v. *Akhoy Kumar*, I. L. R., 16 Cal., 364.

**Farran, C. J.**:—Upon the issue of fact which arises in this appeal we have arrived at the same conclusion as the Subordinate Judge, First Class, *viz.*, that the purchase by the plaintiff Dagdu of the property in suit at the Court's sale referred to in the plaint was a *benami* purchase for Kelkar, and that the latter is conducting this suit in the plaintiff's name for his own benefit. Though each strand in the rope of proof may not of itself suffice to establish that position, yet all the threads when taken in combination lead, we think, with irresistible force to that result. The facts are set out in the judgment of the Subordinate Judge and it is unnecessary for us to repeat them. The learned

pleader for the appellant did not, indeed, discuss them as a whole, but contented himself with contending that certain facts upon which the Subordinate Judge relied were not inconsistent with an opposite view to that which the Subordinate Judge has adopted, but we should not be justified in reversing a finding of fact upon such a partial review of the evidence. When it is considered as a whole we think that there can be but little doubt that the finding of the lower Court is correct.

The suit has been brought by the plaintiff Dagdu as an agriculturist, under the provisions of the Dekkhan Agriculturists' Relief Act, for the possession of field Survey No 428 or for redemption and possession of this land along with other fields. The plaintiff has correctly valued his claim as found by the Subordinate Judge, [823] but on the ground of being an agriculturist has paid no stamp duty on the plaint, in so far as the suit is one for redemption. The Subordinate Judge has rejected the claim upon that ground. Hence this appeal.

It is not suggested that Kelkar, the real purchaser of the land in suit, is an agriculturist. The question, therefore, arises whether a *benami* purchaser suing on behalf of the real owner, or, to state the relation in another form, the real owner suing in the name of an agriculturist nominal plaintiff is entitled to the benefit of the notification of the Government of India, No. 2092, dated 29th July 1881 (see *Bombay Government Gazette*, 1881, Part I, p. 420), remitting the fees in the case of suits for the redemption of mortgaged property when the plaintiff is an agriculturist. The case, so far as we are aware, is one of the first impression. In the somewhat analogous case of a pauper suing on behalf of another person really interested in both Courts of Common Law and Equity in England it has been held that he will not be allowed to continue the action or suit unless he gives security for costs—*Burke* v. *Lidwell*, 1 J. and L., 703 ; *Andrews* v. *Marris*, 7 Dowl., 712. The law is thus stated in Chitty's Archbold, Chap. XXXIII, p. 399, Ed. (1885): "It may also be taken as a general rule that where another person is in fact proceeding with an action in the name of the party on the record, and that party is in a state of pauperism and insolvency, the Court will stay the proceedings until security for costs be given." We refer to this practice to show that in some cases the Court will look beyond the record to see who is the real plaintiff in the suit and will put the defendant in the same position as if the real were the actual plaintiff.

It is not, we think, open to us, having regard to the ruling in *Ravji* v. *Mahadev*, *ante*, p. 672, to hold that a *benami* purchaser is not entitled to maintain a suit in his own name, but that case also shows that the owner subsequently added as a plaintiff is treated as the real plaintiff throughout suing in the name of his *benamidar*. For the purpose of limitation the subsequent change of names is immaterial. In the leading case upon this subject, *Nand* [824] *Kishore* v. *Ahmad Ata*, I. L. R., 18 All., 69, the Court recognises with approval the principle, deducible from the cases of *Fuzeelun Beebee* v. *Omdah Beebee*, 10 Cal. W. Rep., 469, and *Meheroonissa Bibee* v. *Hur Churn Bose*, 10 Cal. W. Rep., 220, that where the purchase is made by the real purchaser in the name of a *benamidar* to escape the consequences in which a purchase in his own name would involve him, the Court will look behind the record to see who the real purchaser is—at least these cases which embody that principle are cited with approval by the Allahabad High Court. In the present case we cannot doubt that Kelkar bought the equity of redemption of the lands in suit in the name of the plaintiff Dagdu to enable him to sue without payment of the usual stamp fee and to obtain the benefit resulting from the provisions of the Relief Act in favour of agriculturists. This, in our opinion, he cannot be permitted to do. We think,

however, that the suit should be allowed to proceed as an ordinary suit on payment of the usual stamp fees as though Kelkar was the nominal as well as the real plaintiff. This decision is not, in our opinion, in any way at variance with *Annaji* v. *Bapuchand*, I. L. R., 7 Bom., 520, or *Gulabpuri* v. *Pandurang*, P. J., 1886, p. 142, or *Amichand* v. *Kanhu*, P. J., 1884, p. 203, though in the latter two cases it was apparent that persons other than the agriculturist plaintiff might under certain circumstances reap a considerable portion of the advantage derived from the suit. That is, however, a result which the Relief Act contemplates in some instances—section 3 (*z*). There was no doubt that in these cases the actual plaintiff was an agriculturist and the stamp objection did not arise.

We shall, therefore, remit the case, giving the plaintiff three months' time within which to pay the legal stamp fee upon the plaint. Should he not do so, the decree will be confirmed with costs. If he does, the case will be heard on the merits. Costs to abide the result.

*Case remitted.*

NOTES.

[See also, 1899) 21 All., 380; (1907) 10 O. C., 263; (1899) 13 C. P. L. R., 33 where this was followed.]

[826] APPELLATE CIVIL.

*The 27th July, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Bala and others............(Original Plaintiffs) Appellants

*versus*

Balaji Martand............(Original Defendant) Respondent.*

*Hindu law—Joint family—Ancestral property—Mortgage by father and one of the sons—Agreement by father alone that mortgagee should enjoy the property for a term of years in satisfaction of debt—Agreement not binding on sons—Alienation—Decree against father—When binding on his sons—Dekkhan Agriculturists' Relief Act (XVII of 1879); Sec. 44 and Sec. 15A.*

In 1888 one Dhondi and his eldest son Bala mortgaged certain ancestral property for Rs. 1,500. In 1890 Dhondi alone came to an arrangement with the mortgagee by which it was agreed that the mortgagee should enjoy the income of the mortgaged property till 1900 A. D. in full satisfaction of the mortgage-debt. This agreement was filed in Court under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) on 4th April 1891, when it took effect as a decree.

In execution of this decree the mortgagee sought to attach the property mortgaged. Dhondi having died in the meantime, his sons objected to the attachment on the ground that the decree was fraudulent and collusive. But this objection was disallowed by the Court, and the property was attached. Thereupon Dhondi's sons filed a suit for redemption of the mortgage of 1888.

Defendant pleaded that the mortgage was merged in the agreement of 1890, and that the plaintiffs had no right to redeem.

* Second Appeal, No. 274 of 1897.

*Held*, that the agreement was not binding upon the plaintiffs. By the agreement the right to redeem the mortgage before its fixed period under the provisions of section 15 A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) ceased, and the right to the surplus profits in the hands of the mortgagee over and above the mortgage-debt was also lost, without any countervailing advantage or benefit. Such an agreement by a Hindu father is not binding on his sons in respect of ancestral property. It amounts *pro tanto* to an alienation, by him, of the ancestral estate without consideration.

*Held*, also, that as the agreement was not binding upon the plaintiffs, the decree against their father based upon the agreement was also not binding upon them.

SECOND APPEAL from the decision of Rao Bahadur Thakurdas M., Additional First Class Subordinate Judge, A. P., of Poona.

Suit for redemption. The mortgaged property was a *mokasa* allowance of Rs. 412 annually received from the Government trea-[826]sury at Bhimthadi in the Poona District. It was the ancestral property of one Dhondi and his sons Bala, Aba, Gangaram, and Bapu, a minor.

On the 28th June 1888, Dhondi and his eldest son Bala mortgaged the *mokasa* allowance to the defendant to secure the repayment of Rs. 1,500 with interest at 18 per cent. per annum; the mortgage to be redeemable in the year 1900 A.D. on taking accounts in the usual manner.

On the 28th April 1890, Dhondi came to an arrangement with defendant (mortgagee), by which it was agreed that the defendant should enjoy the allowance till A.D. 1900 in full satisfaction of the mortgage-debt.

This agreement was made before the village conciliator, and was forwarded by him to the Subordinate Judge of Bhimthadi, who ordered it to be filed in the Court under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) on the 4th April 1891, when it took effect as a decree of the Court.

Dhondi having died, the defendant applied for execution of the decree against Dhondi's sons and legal representatives Bala, Aba, Gangaram, and Bapu, a minor.

Bala resisted this application on the ground that the decree was fraudulent and collusive and, therefore, not binding on Dhondi's sons. The Subordinate Judge overruled this objection and passed an order for attachment of the *mokasa* allowance.

Thereupon Bala filed the present suit in 1894 for redemption of the mortgage of 1888, alleging that the mortgage-debt had been satisfied. Bala's brothers were made co-plaintiffs after the institution of the suit.

The defendant pleaded (*inter alia*) that the plaintiffs had no right to redeem; that the mortgage was merged in the consent decree passed between him and the deceased Dhondi in 1891; that all objections taken to the decree by the plaintiffs having been overruled by the Court in the execution proceedings, the plaintiffs were bound by the decree; and that the suit was barred under section 13 of the Code of Civil Procedure (Act XIV of 1882).

The Court of First Instance rejected the plaintiff's claim, holding that the mortgage was no longer subsisting, having been super-[827]seded by the consent decree between the deceased Dhondi and the mortgagee, and that the decree was binding on the plaintiffs as sons and heirs of Dhondi.

This decision was upheld, in appeal, by the First Class Subordinate Judge with appellate powers. He held that the agreement and the decree made thereon were binding on the plaintiffs; that the mortgage was merged in the decree (*Navlu* v. *Raghu*, I. L. R., 8 Bom., 303); and that the plaintiffs' claim was barred by section 13 of the Civil Procedure Code, they being the legal

representatives of Dhondi. (He cited, on that point, *Nimba* v. *Sitaram*, I. L. R., 9 Bom., 458.

Against this decision the plaintiffs appealed to the High Court.

*Ganpat Sadashiv Rao* for the Appellants (Plaintiffs):—Dhondi had no power to deal with joint ancestral property so as to bind his sons, except with their consent or for their benefit. The consent decree between Dhondi and the mortgagee cannot bind the plaintiffs, who were not parties to it. It was, moreover, made in fraud of their rights. It deprives them of their right of redemption. It puts the mortgagee in absolute enjoyment of the property without any liability to account. Though the mortgage-debt has been more than paid off, the plaintiffs cannot under the decree recover the surplus profits in the hands of the mortgagee. Such an arrangement is against the interests of the sons and is beyond the authority of the father. A Hindu father ordinarily represents the family in litigation as well as in other transactions, and a decree obtained against him as manager would, no doubt, bind the family. But the decree must be obtained in *bona fide* litigation. A consent decree does not stand on the same footing—*Assamathem* v. *Roy Lutchmeeput*, I. L. R., 4 Cal., 142. And no effect can be given to such a decree when it is manifestly injurious to the interests of the sons.

There was no appearance for the Respondent.

**Farran, C.J.**:—This was a suit filed by Bala to redeem a mortgage which he and his late father Dhondi executed on the 28th June 1888, in favour of the defendant to secure payment of the sum of Rs. 1,500 with interest thereon at the rate of Rs. 18 per cent. per annum redeemable in Shake 1822 on making up ac-**[828]**counts in the usual way. The mortgaged property consisted of a *mokasa* (family) allowance of Rs. 412 per annum payable at the Mamlatdar's treasury at Bhimthadi and was ancestral estate. Dhondi and his sons were agriculturists. The brothers of the plaintiff Bala were subsequently made parties plaintiffs to the suit.

The defendant pleaded (*inter alia*) that the father Dhondi in his lifetime on the 28th April 1890, had come to an agreement with the defendant before the conciliator of mauje Muram whereby it was arranged that the mortgagee was to enjoy the allowance up to the said Shake year 1822 in full satisfaction of the mortgage-debt. This agreement, which was come to under section 43 of the Dekkhan Agriculturists' Relief Act, 1879, was filed in Court under section 44 of the same Act and thereupon took effect as a decree. Neither Bala nor his brothers were made parties to these proceedings. The lower Courts have held that the mortgage of 1888 became merged in the decree, and that the plaintiffs are bound by the decree as though they had been parties to the proceedings under the Dekkhan Agriculturists' Relief Act. The plaintiffs have appealed, and the question which we have to determine is whether the above ruling is correct. The respondent has not appeared in support of the decision of the lower Courts. So we have heard no argument on his side of the question.

As a Hindu father's powers in respect of ancestral property, though in some respects peculiar when compared with the powers of other Hindu managers, are still of a limited character, we must consider the operation and effect of the agreement of 1890 upon the mortgage of 1888 before determining how far Dhondi's sons are bound by it and by the decree passed thereon; for it must be borne in mind that the sons of Dhondi were co-parceners with their father when the agreement was entered into, and that as such co-parceners, and not as the legal representatives of Dhondi, they are now seeking to redeem.

Under the mortgage of 1888 the plaintiffs and their father were entitled to an account and under the provisions of section 15A of the Relief Act

were entitled to redeem though the fixed [829] period of the mortgage had not expired; and the Court was also in a redemption suit entitled to reduce the rate of interest stipulated for in the mortgage if it were deemed exorbitant or excessive. A simple calculation shows that even allowing interest at 18 per cent. per annum the *mokasa* allowance received by the defendant mortgagee would have paid the mortgage-debt and interest in between seven and eight years. A large surplus would thus have been due to the mortgagors at the end of the mortgage term. By the agreement which Dhondi entered into, when it under section 44 of the Relief Act obtained the force of a decree, the right to redeem the mortgage before its fixed period ceased, and the right to the surplus of the *mokasa* over and above the mortgage-debt and interest was lost.

The net result was that the father by the agreement gave up the right of the family to receive the sum of Rs. 1,800 or thereabout, without any countervailing advantage or benefit. Such an agreement by a Hindu father is not, in my opinion, binding upon his sons in respect of ancestral property. It amounts *pro tanto* to an alienation by him of the ancestral estate without consideration. See upon this point Mayne's Hindu Law, pl. 311, and the cases referred to by the learned author.

It remains to consider whether the filing of such an agreement, operating as a decree under section 44 is a decree binding upon Bala and his brothers, who were not parties to the proceedings. No case, that I am aware of, has gone as far as that. In the first place, it was a decree founded upon consent, and the Courts draw a clear distinction between adverse decrees obtained in regular course and consent decrees in so far as the interest of third persons not parties to the proceedings is concerned. An example will be found in *Assamathem* v. *Roy Lutchmeeput*, I. L. R., 4 Cal , 142. Besides, if the agreement of Dhondi was not one binding upon his sons, he would not properly represent his sons in a suit filed to enforce it. When the transaction is one by which the sons are bound, then a decree based upon such a transaction is binding upon them even though they are not parties to it. Most of the authorities upon this subject will be found collected in *Davalava* v. *Bhimaji*, I. L. R., 20 Bom., 338. But when the original transaction is not binding upon the [830] sons, then the decree against their father based upon such a transaction is not binding upon them when they are not parties to the suit in which it is passed. For example, a decree against a father in a suit by a purchaser to recover possession of ancestral estate voluntarily alienated by the former is not binding upon the sons not made parties to the suit, and so even if it is an alienation by the father for debts of an illegal or immoral character which the sons are not liable to pay—*Mussamut Nanomi* v. *Modun Mohun*, L. R., 13 I. A., 1 ; *Daulat Ram* v. *Mehr Chand*, L. R., 14 I. A., 187. The present case appears to me to fall within the analogy of these decisions. In the case of *Davalava* v. *Bhimaji*, I. L. R., 20 Bom., 338, the original transaction was clearly binding upon all the heirs of Nur Mahomed. The case of the plaintiff Bala is even stronger than that of his brothers, as he was one of the co-mortgagors in 1888 and was not made a party to the proceedings in which the terms of the mortgage which he had executed were altered to his prejudice.

On the whole, I am of opinion that the fetter upon redemption imposed by the proceedings of 1890 upon the father of the plaintiffs is not binding upon them as co-parceners even though it acquired under section 44 of the Relief Act the force of a decree against Dhondi himself and his sons as his legal representatives. I notice that the execution proceedings which were relied upon as a bar to the present suit were resisted by the plaintiff Bala in his latter capacity and are not, therefore, available as a defence to this suit.

I would reverse the decrees of the lower Courts and remand the suit to have the mortgage-account taken by the Subordinate Judge. The respondent must pay the costs of the appeals in this and the Lower Appellate Court. Costs already incurred in the first Court to be costs in the cause.

**Candy, J.**:—I concur, and for the same reasons. I would merely add that it would indeed be unfortunate if we felt bound to hold that the inequitable arrangement, entered into between Dhondi and defendant in 1890, bound Bala and his brothers. It was, on the face of it, in fraud of Dhondi's sons and coparceners. This case shows how necessary it was by Act VI of 1895, section 12, **[831]** to substitute the present provisions of section 44 of the Dekkhan Agriculturists' Relief Act for the same section as it stood previously to 1895. Such a case as the present could not have occurred had the present provisions of section 44 been in force. The Subordinate Judge would at once have seen, on a scrutiny of the agreement, that Bala, who had joined in the original mortgage, was not a party to the agreement.

*Decree reversed and case remanded.*

**NOTES.**

[As regards the validity of gifts by the father, see also (1903) 27 Mad., 162 ; (1907) 31 Bom., 373 ; (1907) 17 M. L. J., 528 ; (1901) 26 Bom., 163.]

**[22 Bom. 831]**

## APPELLATE CIVIL.

*The 29th July, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Kashinath Dada Shimpi............(Original Plaintiff) Appellant

*versus*

Narayan valad Bapu Shimpi............(Original Defendant) Respondent.*

*Easement—Easements Act (V of 1882), Sec. 28, Cl. (d)—Right to discharge smoke over a neighbour's land—Acquisition of right by prescription.*

A right to discharge smoke over adjoining land can be acquired by prescription. The definition of easement in the Easements Act (V of 1882) is wide enough to embrace such an easement, and section 28, clause (*d*), expressly recognizes the right to pollute air as a right capable of being acquired by prescription.

SECOND APPEAL from the decision of Rao Bahadur D. G. Gharpure, First Class Subordinate Judge of Nasik with appellate powers, confirming the decree of Rao Saheb G. N. Kelkar, Subordinate Judge of Yeola.

Suit for a declaration that the plaintiff was entitled to have the smoke from his house discharged through certain smoke holes in the east wall of his house over the defendant's land and to restrain the defendant from building on his land so as to interfere with the plaintiff's right.

The Subordinate Judge held (*inter alia*) that no one had a right to send smoke issuing from his house over the land of another. He dismissed the suit.

On appeal by the plaintiff the Judge confirmed the decree.

The plaintiff preferred a second appeal.

* Second Appeal, No. 375 of 1897.

*Mahadev V. Bhat* for the Appellant (Plaintiff):—The lower Courts have held that such an easement as the plaintiff claims cannot be recognized at all. That is not correct—Easements Act [832] (V of 1882), section 28, clause (*d*); Gale on Easements, p. 283; Goddard on Easements, p. 109.

*Narayan G. Chandavarkar* for the Respondent (Defendant).

**Farran, C. J.**:—We do not consider that there is any warrant, in law, for the Additional Subordinate Judge, A. P, ruling that a right to discharge smoke through smoke holes in a wall over a neighbour's land cannot be acquired by prescription. If this were so, a person after twenty years' user could block up the apertures in his neighbour's wall by which his kitchen was kept free of smoke. The definition of easement in the Easements Act (V of 1882) is wide enough to embrace such an easement, and section 28, clause (*d*), expressly recognises the right to pollute air as a right capable of being acquired by prescription.

In *Crump* v. *Lambert*, L. R., 3 Eq., 409 at p. 413, Lord ROMILLY, M. R, said: "There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapour or water, or any other gas or fluid. * * * It is true that by lapse of time if the owner of the adjoining tenement, which, in case of light or water is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbour; but until that time has elapsed the owner of the adjoining......tenement * * * retains his right to have the air that passes over his land pure and unpolluted and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water."

We send down the following issues:—

1. Has the plaintiff a present right acquired by prescription to pass smoke through the smoke holes (*dharis*) in his wall over the defendant's premises, or through any or which of such smoke holes (*dharis*)?

2. Does the building erected by the defendant interfere with the free passage of smoke through such smoke holes?

Findings to be certified in a month.

*Issues sent down.*

## [833] PRIVY COUNCIL.

*The 10th and 11th February, and 1st April, 1898.*

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN, AND SIR R. COUCH.

Damodardas Tapidas............Appellant

*and*

Dayabhai Tapidas and another............Respondents.

On appeal from the High Court at Bombay.

*Hindu will--Construction of bequest—Indian Succession Act (X of 1865), Secs. 82 and 111—Absolute estate given.*

This appeal related to three clauses in the will of a Hindu, who bequeathed his property to his two sons, one of whom had a son. The other son was childless, his only issue having died before the will was made. There were gifts over on the death of either son.

The Courts below, construing the first of the three clauses, decided that each of the two sons took a life-interest in the property comprised in that clause, as tenants-in-common; and that the ulterior interest, not having been validly disposed of, fell into the residuary estate.

On this appeal, with reference to section 82 of "the Indian Succession Act 1865," made to apply to wills made by any Hindu in the town of Bombay, by section 2 of the Hindu Wills Act, 1870, some doubt was expressed by the Judicial Committee whether in that clause it sufficiently appeared that the estates given to the sons were only estates for life. It was, however, in the view taken of the other clause of which the construction was in dispute, unnecessary to determine that point.

In the next clause to be construed there were words which had been held by the appellate High Court to give to each of the two sons of the testator only a life-estate in a half share of the residuary estate. Whether those words, which followed a gift to the testator's two sons of the whole residue in equal shares, were so clear that only this restricted interest was intended to be given to them, was considered in like manner to be open to doubt in regard to the rule of construction imposed by section 82. But this was also not required to be determined, as this clause, the 13th in the will, was not applicable under the circumstances.

It was now determined that the third and last of the disputed clauses, No. 18 in the will, clearly gave the residuary estate to the testator's two sons, in equal shares, each an absolute estate, except in the case of the subsequent birth of a son or daughter. The two clauses, 13 and 18, were not, in the Committee's opinion, intended to be read together and reconciled, nor were they mutually explanatory. They were each intended to provide for different circumstances.

*Held*, that the two sons of the testator must be declared to have each taken an absolute interest in the half share of the residuary estate.

[834] APPEAL from a decree (7th April 1896) of the appellate High Court, varying a decree (28th March 1895) of the High Court in its original jurisdiction.

The suit was brought on the 6th November 1894, by the respondent Dayabhai Tapidas for the construction of a will in the Gujarati language dated the 26th May 1885, made by his father Tapidas Varajdas, a Hindu of Bombay, who died on the 31st March 1886, leaving houses and other property in Bombay acquired by himself. The testator left a widow, who died on the 12th August 1887, two daughters, and two sons, Dayabhai and Damodardas. The first of these sons, the plaintiff, had a son Karsandas, whom he now sued as co-defendant with Damodardas. The only issue of the latter had died in infancy before the date of the will.

The clauses, the subject of contention, the 8th, 13th and 18th in the will, are set forth in the report of the appeal in the High Court, (1895) I. L. R.,

21 Bom., 1, where the judgments of the Courts, original and appellate, are given at length.

The plaintiff, and his son, the second defendant, claimed that, on the true construction of the clauses, the plaintiff and the first defendant were each entitled to a life-interest only in the houses comprised in clause 8, and in the residuary estate referred to in clauses 13 and 18; and that after the death of the plaintiff and of the first defendant, then the second defendant would be absolutely entitled to all.

In answer to this the first defendant, Damodardas, contended for the construction that he and his brother, the plaintiff, each took an absolute estate as tenants-in-common in all the property comprised in all the three clauses.

On this appeal the principal question was resolved into whether the interest taken by the two brothers in the residuary estate was absolute or only for their lives.

The issues fixed in the Court of First Instance appear in the report of the appeal in the High Court (I. L. R., 21 Bom., at p. 5) already referred to.

**[835]** Upon the first and second of these issues the first Court (CANDY, J.) decided that, under the 8th clause of the will, Damodardas and Dayabhai took, on the death of the widow, a life-interest only in the property mentioned in the clause, and the rest of the estate and interest in the same was undisposed of and fell into the residue of the estate Upon the third and fourth issues he held that the two sons of the testator took an absolute estate as tenants-in-common in the residue, under the provisions of clauses 13 and 18 of the will, subject to the interest of Damodardas being defeasible if he should die without having a son born to him in the life-time of his brother. Upon the fifth and sixth the first Court could not say what the interest of Karsandas would be in the property, while the two sons of the testator were both alive; but that the two sons had power to alienate beyond their lives, subject to the proviso that the interest of Damodardas was defeasible in the case of his dying without having had a son born to him in the life-time of his brother.

An appeal having been heard by a Divisional Bench of the appellate High Court (FARRAN, C.J., and STRACHEY, J.), the Judges concurred in the decisino of the first Court on the first issue, holding that the testator, when he gave the incom of the houses in clause 8 to his sons equally, did not intend more than that their possession should extend to their lives respectively.

As to the gift of the residue under clauses 13 and 18, they held (p. 17) that the proper construction of clause 13 was that "on the death of one brother before the other, without having had issue sons, or without leaving issue sons, whichever might be the correct interpretation of the words, the gift over to the surviving brother would take effect, although both brothers survived the testator."

They held, in effect, that the estates of the two sons in the residue were life-estates. As to the gift over, they held (p. 20) that the most natural meaning to attach to this was that "on one brother dying, not having male issue, the estate of that brother, subject to the provision for his daughter and widow, passed to the surviving brother."

On the whole case the appellate High Court were of opinion that to hold that the testator's sons took only life-estates in the **[836]** property which they were to divide and take under clause 13, also given to them by clause 18, gave better and more complete effect to the declared intention of the testator than to hold (by rejecting the direction in favour of the sons' sons as ineffectual and void) that the two sons of the testator took absolute estates.

The result of the judgment of the High Court was that the construction put upon the clauses was the following:—Dayabhai and Damodardas each took a life-estate in a moiety of the houses bequeathed in clause 8, and in a moiety of the residuary estate under clauses 13 and 18. The reversion of Dayabhai's share was now vested in his son Karsandas.

If Damodar should die without leaving a son, his moiety would devolve upon his brother Dayabhai, or, if the latter should be dead, upon his son Karsandas. The Court considered it premature to decide what would be the result if Damodar should have a son, or to decide as to the rights of other sons of Dayabhai, should he have any.

Before the decree was settled, it having been made known that Damodardas had had two children, who had died in infancy before the date of the will, and, by consent, argument having been heard thereupon, there was the following alteration. The judgment concluded thus (p. 22): "Reading then the expression 'have issue' in the sense of 'leave issue,' the sense which we have indicated, the result as to the reversion of Dayabhai's share being now vested in his son Karsandas must be struck out."

On this appeal by Damodardas

*Cohen*, Q. C., and *Mayne*, for the Appellant, argued that the High Court had wrongly construed the clauses of the will. The decision should have been that the two sons of the testator each took an absolute interest on the death of the widow, in both the property bequeathed in clause 8 and in the residuary estate bequeathed in clauses 13 and 18. The Court of construction should have declared the gift, as made to the testator's sons, to have been an absolute gift to each of an equal share. The limitations over, which were to take effect contingently on the happening of a specified uncertain event, were not to take effect before the period when the property would have been dis-[837] tributed to the sons. They were, therefore, void, not being in accordance with section 111 of the Indian Succession Act, 1865. Gifts to persons not existing when the gifts should take effect, would not operate. Part XIII of the above Act was referred to, and also *Alangamonjori Dabee* v. *Sonamoni Dabee*, (1889) I. L. R. 8 Cal., 637; *Norendra Nath Sircar* v. *Kamalbasini Dasi*, (1895) L. R., 23 Ind. Ap., 18; I. L. R., 23 Cal., 563; and the *Tagore* case, (1872) L R., Ind. Ap., Sup. Vol. I, 47. The period of distribution in this case was not at the death of the testator, but at the death of the son who first should die. The attempted disposition was that the surviving son should succeed to a deceased son's share; but, if the latter left issue, the surviving brother should not exclude the issue of the deceased brother. The only construction, legally permissible, was that the two sons each took absolute estates, which either originally were, or might have become, indefeasible. The words "have issue sons" meant "have" or "have had issue sons," and there was no sufficient reason derivable from the will for taking the words to mean "leave issue sons." If the absolute estate, which, it was contended, was given by section 13, were defeasible on the death of either son leaving issue, then an adopted as well as a natural-born son would count as an heir. Again, if it was right to conclude, as the High Court had concluded, that the words in clause 13 "in the event of their" (meaning my sons') "decease, they" (meaning my sons' sons) "are their heirs," were to be taken as words of gift to sons' sons, that gift would be void, because it would be a gift to persons not necessarily in being at the period of distribution. If, on the other hand, those words were to be taken as meaning that sons, and sons only, should inherit, such a declaration would be void as opposed to the principal rules of inheritance of the Hindu law. If the High Court were right in their decision, that the interests given to the

the testator's sons by clauses 13 and 18 were only life-estates, then it followed that the residue had not been disposed of according to law. The consequence would be that this residue would pass at once to the testator's sons as intestate inheritance. Thus in any view they obtained absolute estates.

**[838]** *Jardine*, Q. C., and *Arathoon*, for the first respondent, the plaintiff, Dayabhai, argued that the High Court was right in holding that the appellant did not take an absolute and indefeasible estate in his moiety of either the house property or of the residuary estate. It did not follow that in a Hindu will a gift must be entirely void, if made, for instance, in favour of an uncertain class coupled with persons or a person to whom the gift could validly be made. The legal part of the disposition would take effect—*Ram Lal Sett* v. *Kanai Lal Sett*, (1886) I. L. R., 12 Cal., 663. In that case the intention of the testator was to make a gift to two persons mentioned in the will, who were capable of taking it, and there were other legatees, unborn at the date of the gift, who were to be permitted to come in afterwards and share in it. The decision was that though the latter part of the disposition was invalid, and inoperative, the former part, or gift to the two, should receive effect notwithstanding that the whole intention of the testator could not be carried out. Part of the judgment in *Rai Bishenchand* v. *Asmaida Koer*, (1884) I. L. R., 6 All., 560, was to a similar effect. Here the plaintiff, Dayabhai, was in the advantageous position of having a son who was living at the time of the testator's death, which in this case was the period of distribution. Reference was made to Mayne's Hindu Law and Usage, paras. 354, 356, and to the Succession Act, X of 1865, Secs. 100, 102.

*Cozens Hardy*, Q. C., and *Branson*, for the second respondent, Karsandas, argued that the High Court correctly decided that under clause 8 the two sons of the testator took only life-estates as tenants-in-common, and that the ulteri or interest fell into the residue. That Court had also rightly maintained that the true construction of clauses 13 and 18 was that Dayabhai and Damodardas took each a life-interest in a moiety of the residuary estate. And it was the true construction that if either of these brothers should die leaving no issue, his moiety should devolve upon the surviving brother; and that if the brother should not have survived, but should have left male issue, then the moiety should devolve upon such male issue.

*Conen* replied.

**[839]** Afterwards, on the 1st April, their Lordships' **judgment** was delivered by

**Sir R. Couch**:—The suit in this appeal was brought to obtain a judicial construction of the will of Tapidas Varajdas, a Hindu inhabitant of Bombay, who died on the 31st March 1886, leaving a widow Navivahu and two sons, the respondent Dayabhai and the appellant Damodardas, and two daughters. Dayabhai had then two sons living; Damodardas had two infant sons, who died before the date of the will. The widow Navivahu died on the 12th August 1887.

The will is dated the 26th of May 1885, and is a long document, in Gujarati, divided into numbered paragraphs. The 8th, 13th and 18th are the only parts of it which it is necessary to refer to in this appeal.

The suit was brought by Dayabhai against Damodardas and Karsandas, one of the sons of Dayabhai, and the plaint, after stating the making of the will and the death of the testator, stated that the residue of his estate, except the house and land at Surat, had been divided and was then being enjoyed in severalty by the plaintiff and the first defendant, the house and land at Surat being enjoyed by them jointly. In the written statement of Damodardas the facts thus set forth in the plaint were admitted, and it was contended that he

and Dayabhai took an absolute estate as tenants-in-common in the house mentioned in clause 8 and in the residue of the testator's estates under clauses 13 and 18. Karsandas in his written statement contended that he was absolutely entitled to the houses and the residue of the property referred to in clauses 8, 13 and 18 after the death of Dayabhai and Damodardas.

The original Court and the appellate Court have both held that Damodardas and Dayabhai took a life-interest only in the houses as tenants-in-common, and that the ulterior interests therein, not being validly disposed of, fell into the residue. On the argument of the appeal before their Lordships this was not disputed, and the contention related only to the construction of clauses 13 and 18. Section 82 of "The Indian Succession Act, 1865" enacts that where property is bequeathed to any person, he is [840] entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him. This section is by section 2 of "The Hindu Wills Act, 1870" made to apply to wills made by any Hindu in the town of Bombay, and their Lordships have some doubt whether in the 8th clause it sufficiently appears that the sons were to take only an estate for life. It is, however, in the view which their Lordships take of clauses 13 and 18, unnecessary to determine it.

In the 13th clause the testator after referring to the business carried on in the name of Shah Tapidas Varajdas and Company, in which he had two shares and Damodardas one share, and his intention to make Dayabhai a partner, says that in the event of his decease the sons remaining joint shall carry on the business, their shares being half and half, and the commission is to be received by them in equal shares. "But if my son Bhai Damodardas should not make Dayabhai a partner in accordance with what is written above, and should not annually give him an equal moiety out of the commission money of the Alliance Cotton Manufacturing Company, Limited, that may be received annually, then out of my property of all descriptions and moneys he shall first give Bhai Dayabhai Rs. 2,00,001, namely, two lakhs and one." Then he says: "Afterwards on what is mentioned in this will being given to all, as to the whole of the property which may remain over, my sons may divide and take the whole," and then follow the words which have been held by the High Court to give to the sons only a life-estate in a half share of the residue. It appears to their Lordships that the latter part of the clause beginning "afterwards" is intended to apply to the case of Dayabhai not becoming a partner in the business and receiving from Damodardas the Rs. 2,00,001. According to the plaint and the admissions in the written statements, the whole of the residue of the estate, except the house and land at Surat, has been divided between the sons and is now enjoyed in severalty by them. There is no statement or any ground in the plaint or written statements for supposing that Dayabhai has received the two lakhs and one rupee. Clause 13, therefore, does not appear to their Lordships to be applicable in the circumstances which have arisen, and it may also be observed that what has been said about section 82 [841] of the Succession Act with reference to the 8th clause is applicable to clause 13. It may be doubted whether the words which follow the direction, that the sons may divide and take the whole of the residue in equal shares, are so clear as to show that only a restricted interest was intended to be given to them. In their Lordships' opinion, clause 18 is that which is now applicable to the residue, and there is no difficulty in its construction. It gives the residue to the sons in equal shares absolutely, except in the case of the subsequent birth of a son or a daughter. Their Lordships cannot agree with the appellate Court in thinking that the two clauses must be read together and reconciled

and must be treated, not as antagonistic, but as mutually explanatory of each other. They are intended to provide for different circumstances. They will humbly advise Her Majesty to reverse the decree of the High Court, except the order therein as to the costs of the suit, and to declare that Damodardas and Dayabhai each took an absolute interest in a half share of the residuary estate of the testator. The costs of this appeal of both parties, to be taxed as between solicitor and client, will be paid out of the property of the testator.

*Appeal allowed.*

Solicitors for the Appellant:—Messrs. *Payne and Lattey.*

Solicitors for the Respondent, Dayabhai Tapidas:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent. Karsandas Dayabhai:—Messrs. *T. L. Wilson & Co.*

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[ 22 Bom. 841 ]

## CRIMINAL REFERENCE.

*The 4th February, 1897.*

PRESENT:

MR. JUSTICE JARDINE, AND MR. JUSTICE RANADE

Queen-Empress
*versus*
William Plumner.*

*Criminal procedure—Continuing offence—Cantonments Act (XIII of 1889), Sec. 26—Rule 2 of the Rules made under Section 26—Additional fine for continuing offence.*

The additional fine referred to in Rule 2 of the Rules framed under section 26 of the Cantonments Act, XIII of 1889, is not only to be imposed *after* the first [842] conviction, but is to follow proof that failure is persisted in. The additional fine cannot be imposed as a threat in case of possible persistence, which, being in the future, cannot be made matter of present proof. The continuing failure must be matter of later and separate inquiry and proof.

*In re Limbaji*, see *ante* p. 766, followed

**REFERENCE** under section 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged under the cantonment regulation † framed under section 26 of the Cantonments Act (XIII of 1889) with having failed to

* Criminal Reference, No. 137 of 1896.

† 1. The Cantonment authority may by notice in writing: . . . . .

(3) if any plan for the construction of private latrines or urinals has been approved by the Cantonment authority— . . . . . .

(f) require any person having the control of a private latrine or urinal to rebuild or alter the same in accordance with such plan.

(2) Whoever fails to comply with any notice issued under Rule 1 shall be punishable with fine which may extend to fifty rupees, and in case of a continuing failure with an additional fine which may extend to five rupees for every day after the date of the first conviction on which the failure is proved to have been persisted in (see *Bombay Government Gazette* for 1896, Part I, p. 615).

rebuild latrines according to a certain plan in houses Nos. 9 and 10, Queen's Garden, Poona.

He was convicted by a Cantonment Magistrate at Poona and sentenced to pay, in respect of each of the said houses, a fine of Rs. 15 and a further fine of Rs. 5 for each day the latrine remained unbuilt.

The District Magistrate referred to the High Court the question whether the additional fine for a continuous offence was legal.

The reference was heard by a Division Bench (JARDINE and RANADE, JJ.)

*Per* CURIAM :—The reasoning in *In re Limbaji*, see *ante* p. 766, applies to "continuing failure" under Rule 2 of the General Order of the Government of India, No. 723, dated 19th June 1896, (for which see the *Bombay Government Gazette*, Part I, of 1896, p. 615). This rule shows in plain language that the additional fine is not only to be *after* the first conviction, but is to follow proof that the failure is persisted in. The additional fine cannot be imposed as a threat against possible persistence, which, being in the future, **[843]** cannot be matter of present proof. The continuing failure must, therefore, be matter of later and separate inquiry and proof. The Court, therefore, sets aside the sentences of further fine of Rs. 5 per day.

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**[ 22 Bom. 843 ]**

## CRIMINAL REVISION.

*The 24th June, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

In re Rahimu Bhanji.*

*Municipality—Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 84—Taxation—Duty on goods imported within municipal limits—"Imported"—Meaning of the word.*

A rule of the Thana Municipality provided for the levy of octroi duty on certain articles "when imported within the Thana Municipal District."

*Held*, that goods merely passing through the municipal district in the course of transit to Bombay were "imported" within the meaning of the rule and were, therefore, liable to duty.

APPLICATION under section 435 of the Criminal Procedure Code (Act X of 1882).

The Municipality of Thana passed a rule or bye-law imposing an octroi duty on certain articles "when imported within the Thana Municipal District." The accused was prosecuted (under section 84 of Bom. Act VI of 1873) for refusing to pay the duty imposed on certain goods which, it was alleged, he had imported. He contended that inasmuch as the goods in question merely passed through the district in the course of transit from the village of Valva to Bombay they were not "imported" within the meaning of the rule, and were not, therefore, subject to duty.

* Criminal Revision, No. 55 of 1897.

It was admitted by the prosecution that the goods passed out of municipal limits on the same day on which they came within those limits.

The Magistrate held that, though the goods merely passed through the municipal limits, they were "imported" within those limits, and were, therefore, liable to pay the duty.

Against this order the accused applied to the High Court under its revisional jurisdiction to set aside the Magistrate's order.

[844] *Trimbak R. Kotwal* for the Accused.

*M. V. Bhat* for the Municipality.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

*Per* CURIAM:—We must give the word "imported," in the rules of the Thana Municipality, its ordinary meaning. As soon, therefore, as the goods in the present case passed within the limits of the municipality, they were imported, that is, brought within those limits from a place without its boundaries. The only remedy of the applicant, if he exports them, whether that is done on the same day or at some other more distant time, is to claim a refund of the duty paid. We reject the application.

*Application rejected.*

NOTES.

[In the Criminal Procedure Code, 1898, sec. 517 the words 'or in its custody' were inserted so that now, there need not be any express opinion that an offence had been committed. See also (1906) 29 Mad., 375 ; (1903) 30 Cal., 690 as regards the scope of secs. 517-523.]

[ 22 Bom. 844 ]

## CRIMINAL REVISION.

*The 15th July, 1897.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Devidin Durgaprasad*

*Criminal Procedure Code (Act X of 1882), Secs. 517 and 523—Disposal of property produced before a Court during an inquiry—Restoration of previous possession, if no offence is committed.*

Section 517 of the Code of Criminal Procedure (Act X of 1882) is the only section under which a Court can make an order for the disposal of property produced before it in the course of an inquiry or trial. And it has jurisdiction to pass the order only if the case falls within the section, that is, if it is property "regarding which an offence appears to have been committed, or which has been used for the commission of an offence." Otherwise, the only legal order which the Court can pass is one restoring the previous possession.

A Presidency Magistrate, finding the evidence not sufficient to warrant a conviction, discharged the accused but ordered the property which had been produced during the inquiry to be detained until the title of the rightful owner was proved before a Civil Court. On a subsequent day her apparently acting under section 523 of the Code, ordered the property to be delivered to the complainant from whose possession it had not been taken.

*Held*, that both the orders were *ultra vires*. The Magistrate was, therefore, directed to dispose of the property in a legal manner. If he found that the case fell within section 517 he should pass such order as he thought fit if he found that it did not, he must restore the previous possession.

* Criminal Revision No. 137 of 1897.

[845] APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged under sections 381 and 411 of the Indian Penal Code (Act XLV of 1860) with dishonestly receiving and retaining stolen property consisting of twenty-one currency notes of the collective value of Rs. 275 belonging to the complainant, Motichand Harakchand.

The accused was arrested by the police and the money was found in his possession. The police produced the money before the Third Presidency Magistrate (Mr. Webb) in the course of the inquiry.

The Magistrate found that there was not sufficient evidence to warrant a conviction, and discharged the accused. At the same time, he made an order for the disposal of the property produced before the Court, in the following terms:—

"From the statement made by the accused it appears that the money found is not his, and it must be detained until the title of the rightful owner is proved before a Civil Court.

This order was made on the 15th March 1897.

The accused applied to the Magistrate to have the money returned to him, as it belonged to his master.

The Magistrate issued notice to the complainant, and after hearing both parties passed the following order on the 11th May 1897:—

"On hearing advocates for the opponent herein, and on reading the statement of applicant Devidin Durgaprasad that the moneys were his master's and not his, and bearing in view the decision in the case of *Queen-Empress* v. *Joti*, I. L. R., 8 Bom., 338, the order of the Court is that the money, the subject of the notice, be delivered to the opponent, Motichand Harakchand."

Against this order the accused applied to the High Court under its revisional jurisdiction.

The applicant appeared in person.

*M. V. Bhat* for the Complainant

*Per* CURIAM:—We do not know under what section of the Code the Presidency Magistrate purported to act when he ordered the property to be delivered to Motichand Harakchand. He [846] cites *Queen-Empress* v. *Joti*, I.L.R., 8 Bom., 338, so that apparently he considered he was acting under section 523. But the property in the present case had been produced before his Court in an inquiry, so that section 517 is the only section that would apply: see *In re Ratanlal Rangildas*, I. L. R., 17 Bom., 748 He had, therefore, jurisdiction only in case he found that it was property "regarding which any offence appears to have been committed, or which has been used for the commission of an offence." Whether he so found or not, is not stated in his order disposing of the case He discharged the accused, because the evidence was not sufficient to warrant a conviction. At that time (15th March 1897) he ordered the property to be detained until the title of the rightful owner was proved before a Civil Court. It was in modification of that order that he on the 11th May 1897, ordered the delivery of the property to Motichand Harakchand. Both orders appear to us to be made without jurisdiction, and we reverse them, and we direct that he dispose of the property in a legal manner after giving the parties notice. If he finds that the case comes within section 517, then he can make such order as he thinks fit; if he finds that it does not, then the only legal order he can pass is to restore the previous possession.

[22 Bom. 846]
## APPELLATE CIVIL.

*The 2nd August, 1897.*
PRESENT:
MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Chunilal............(Original Defendant) Appellant
*versus*
Bai Jethi............(Original Plaintiff) Respondent.*

*Limitation Act (XV of 1877), Art. 132—Unpaid purchase-money—Suit to recover the money from the vendee personally and from the property sold—Personal remedy—Limitation.*

Unpaid purchase-money is a charge on the property in the possession of the vendee, and a suit to enforce it against the property so charged falls under article 132 of the Limitation Act (XV of 1877). But the article does not extend the time allowed otherwise under the Act to claims to recover the money from the defaulter personally or his other property. The limitation for the personal remedy is three years under article 111.

*Virchand* v. *Kumaji*, I. L. R., 18 Bom., 48, and *Ram Din* v. *Kalka*, L. R., 12 I. A., 12, followed.

[847] Where certain land was sold and possession given to the vendee in 1890, and a suit was brought in 1895 to recover the unpaid purchase-money from the vendee personally as well as from the property sold,

*Held* that the personal claim was time-barred.

SECOND APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad.

In 1890 the plaintiff's father sold the land in dispute to the defendant for Rs. 283, and the defendant was put into possession. He did not, however, pay the purchase-money, but he signed a *khata* in the vendor's books for the price.

In 1895 the plaintiff brought this suit for the purchase-money, claiming to recover it from the defendant personally as well as from the property sold.

The defendant pleaded (*inter alia*) that the suit was barred by limitation.

The Court of First Instance held that the plaintiff had a lien on the land for the amount claimed, and that she could enforce her claim from within twelve years from the sale. It, therefore, passed a decree for Rs. 283 together with interest, and, in default of payment within two months, plaintiff was to recover the amount by sale of the land.

This decree was varied, in appeal, by the District Judge, who held that the defendant was also personally liable to pay the purchase-money. He, therefore, passed a decree for the amount claimed both against the defendant personally and against the property sold.

Against this decision the defendant preferred a second appeal to the High Court.

*R. V. Desai*, for the Appellant:—The decree passed by the Lower Appellate Court against the defendant personally is bad in law. Article 132 of the Limitation Act applies only to suits brought to recover money charged upon immoveable property out of the property so charged—*Ram Din* v. *Kalka Persad*, I. L. R., 7 All., 502; L. R., 12 I. A., 12. Unpaid purchase-money is a charge on the property sold, and a suit to recover the money from the property falls under article 132—*Virchand* v. *Kumaji*, I. L. R., 18 Bom., 48. But a suit to recover the money from the vendee personally does not fall under this article.

* Second Appeal, No. 285 of 1897

[848] The limitation for such a suit is three years—*Dulanbi* v. *Sakharam*, P. J., 1886, p. 112, and *Gangabai* v. *Venkaji*, P. J., 1886, p. 169. The plaintiff's claim to a personal decree against the defendant is, therefore, barred by limitation. Strictly speaking, the article which governs the present suit is article 111* of the Limitation Act. Under that article the suit is wholly barred. The plaintiff has now lost her right to proceed either against the vendee personally or against the property in his possession. As the suit is brought more than three years after the completion of the sale, the suit should, therefore, be dismissed.

*G.M. Tripathi*, for the Respondent:—It is not open to the appellant to object to the decree so far as it allows the plaintiff to recover the money from the property itself. Against this part of the decree the defendant did not appeal in the Court below, and he cannot raise this objection in second appeal. As regards the personal remedy, none of the cases cited expressly rule that it is barred in a case like this. Article 132 of the Limitation Act applies. The remarks of the Privy Council in *Ram Din's* case, I. L. R., 7 All., 502, as to the three years' limitation are *obiter dicta*. Under article 111, limitation runs from the date of the completion of the sale. The sale here is not yet completed; the property is not yet transferred to the vendee in the Government records. The personal claim is, therefore, within time.

**Parsons, J.**:—The District Judge in this case gave a decree for the recovery of the money sued for by the sale of the property sold, and in case that proved insufficient, from the defendant personally. It is objected that the latter part of the decree is bad, since the personal remedy is time-barred.

The facts are these. In 1890 the plaintiff's father conveyed the land to the defendant by a parol sale for Rs. 283. The defendant was placed in possession of the land. No money was paid, but the defendant signed a *khata* in the plaintiff's father's books for the 283 rupees. It is this sum of Rs. 283 with interest that the plaintiff has sought to recover in this suit, which was filed in 1895.

Unpaid purchase-money is a charge on the property in the possession of the vendee, and a suit to enforce it falls under [849] article 132 of the Limitation Act, 1877. See *Virchand* v. *Kumaji*, I. L. R., 18 Bom., 48. But as ruled by the Privy Council in the case of *Ram Din* v. *Kalka Pershad*, L. R., 12 Ind. Ap., 12, article 132 applies only to suits brought for money charged upon immoveable property for the purpose of recovering it out of the property so charged. It does not extend the time allowed otherwise under the Act to claims to recover the money from the defaulter personally or his other property. We must, therefore, see whether under article 111, which is relied on as being the most favourable other article that can possibly apply to the case, the personal claim of the plaintiff is within time. We must hold that it is not, because there can be no doubt that the sale was completed and the title accepted when the defendant was placed in possession of the land. The fact that there has been as yet no mutation of names in the revenue records, does not show the contrary. Both the lower Courts find that the defendant has been in the enjoyment of the land ever since 1890. There was even a suit in 1891 brought by the plaintiff's father against the defendant in which the former

* [ Art. 111:—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| By a vendor of immoveable property to enforce his lien for unpaid purchase-money. | Three years. | The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance. |

tried to get back the land on the plea that it had been only let to the defendant, but the suit failed, as the latter successfully pleaded the sale and his possession.

We vary the decree of the Lower Appellate Court by striking out so much of it as allows the plaintiff to recover anything from the defendant personally, and we order the respondent to bear the costs of the appeals in this and the Lower Appellate Court.

*Decree varied.*

NOTES.

[Article 111 of the Limitation Act, (as amended in 1908) runs, 'By a vendor of immoveable property *for personal payment of* unpaid purchase-money.'

The italicised words give effect to the ruling in 22 Bom., 846; (1899) 21 All., 454; (1905) 2 A. L. J., 379; (1906) 29 Mad., 305 F.B., overruling (1898) 21 Mad., 141; (1901) 24 Mad., 233; (1906) 9 O.C., 284.]

[22 Bom. 849]

## APPELLATE CIVIL.

*The 10th August, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Bai Ful............(Original Plaintiff) Appellant

*versus*

Desai Manorbhai Bhavanidas............(Original Defendant) Respondent.*

*Pauper—Pauper appeal—Application for leave to appeal as a pauper—Such application rejected—Limitation for subsequent appeal—Limitation Act (XV of 1877), Sec. 5 and Sch. II, Arts. 152 and 170—Sufficient cause for delay—Civil Procedure Code (Act XIV of 1882), Secs. 409, 410, 413, 582A and 592.*

[850] A plaintiff whose suit had been dismissed, presented an unstamped memorandum of appeal and with it a petition for leave to appeal as a pauper. Inquiry as to pauperism was directed, and in the result the leave to appeal as a pauper was refused, but the Judge gave leave to amend the memorandum of appeal by stating the claim at a lower valuation, thus reducing the amount of stamp fee required, and a week's time was granted to the appellant to pay the fee. The fee was duly paid, and the appeal was accepted, but when it came on for hearing it was dismissed as barred by limitation. On second appeal to the High Court,

*Held*, (reversing the decree and remanding the case) that the appeal was not barred by limitation.

By FARRAN, C. J., on the following grounds:—In the case of appeals, section 592 of the Civil Procedure Code (Act XIV of 1882) requires two separate documents to be presented,—a memorandum of appeal and an application for leave to appeal as a pauper. When the Judge disposes of the pauper application he does not thereby necessarily dispose of the appeal. He may still treat it as an existing appeal if the appellant desires to continue it. The rule in section 413 of the Civil Procedure Code cannot apply to appeals; for, in view of the fact that the Limitation Act (XV of 1877, articles 152 and 170) prescribes the same time for filing an appeal and for applying for leave to appeal as a pauper, the practical result would be that in every case where an application for leave to appeal as a pauper is refused, the appeal if then presented would be time-barred. These considerations must have been in

* Second Appeal, No. 816 of 1896.

the mind of the Legislature when it enacted the Civil Procedure Code of 1882, as the Limitation Act was then in existence. The District Judge was, therefore, under no legal obligation to dismiss the appeal when he refused the appellant' leave to appeal as a pauper, and that he did not do so was clear from the fact that he allowed the memorandum of appeal to be amended.

Section 582A of the Civil Procedure Code (Act XIV of 1882) indicates the will of the Legislature that appeals shall not be rejected on the ground of their not being sufficiently stamped if such insufficient stamping arose from the appellant's mistake. In analogy thereto I think that the District Judge was acting within his powers when he allowed the appellant to stamp the memorandum of appeal.

By CANDY, J., on the ground that under the circumstances there was sufficient cause for not presenting the appeal within the proper time, and that the delay might be excused under section 5 of the Limitation Act (XV of 1877).

SECOND APPEAL from the decision of E. H. Leggatt, Assistant Judge of Ahmedabad, confirming the decree of Rao Saheb Mahadev Shridhar, Subordinate Judge of Nadiad.

The plaintiff sued the defendant for an account of his dealings as her agent, valuing her claim at Rs. 230.

[851] The defendant denied that he was plaintiff's agent, or that he had ever managed her property.

The suit was dismissed on the 19th April 1894. On the 1st June following the plaintiff presented an unstamped memorandum of appeal to the District Judge and along with it a petition for leave to appeal *in forma pauperis*. The petition was held to be in time, as the vacation had intervened.

In the appeal the plaintiff valued her claim at Rs. 2,500, and not at Rs. 230 as in the original suit, and the stamp fee in the appeal was considerable.

The District Judge directed an inquiry as to the plaintiff's pauperism. The inquiry occupied a considerable time and the result of the inquiry was to show that the appellant could pay the stamp fee on a valuation of Rs. 230, but not on that of Rs. 2,500.

On the 20th December 1894, the District Judge, expressing an opinion that the appeal could be made with advantage on the lower valuation, refused the petition to appeal as a pauper, but made the costs of the application costs in the appeal.

The appellant applied for leave to amend her memorandum of appeal by reducing the valuation to Rs. 230, and a week's further time to pay the court-fee on that amount and stamp the memorandum of appeal. This was granted on the 4th January 1895.

On the 7th January 1895, she paid the fee; her memorandum of appeal was stamped, and was then accepted by the District Judge.

The appeal afterwards came on for hearing before the Assistant Judge, who dismissed it as barred by limitation. The following is an extract from his judgment:—

"The defendant takes two preliminary objections to this appeal: the first is that the plaintiff, who made an application to be allowed to sue *in forma pauperis* in that application, estimated the relief sought at Rs. 2,500, though the valuation in the original suit was only Rs. 230. The plaintiff's application was rejected, and she thereupon instituted the appeal, valuing her claim at Rs. 230. The defendant urges that having once valued her claim at Rs. 2,500, she cannot now be allowed to reduce her valuation to Rs. 230 in order to avoid paying the necessary court-fees. This question has, however, been already decided by the District Court, and I see no reason to re-open it. The District Court suggested [852] that the plaintiff should reduce her valuation, and the plaintiff having acted on that valuation I cannot now interfere.

"The other objection taken to the appeal by the defendant is that the appeal is time-barred. The application to be allowed to appeal *in forma pauperis* was made within thirty days of the date of decision in the original suit which was decided on 19th April 1894. That application was rejected on 20th December 1894, and the District Judge in an order dated 4th January 1895, allowed the plaintiff eight days within which to produce the necessary stamp, and the appeal was filed on 7th January 1895.

"The defendant refers to I. L. R., 20 Bom., p. 503, where it is most clearly laid down that 'the plaintiff's application to sue as a pauper having been disposed of, there was no proceeding pending which could be continued and kept alive by the payment of court-fees. On the rejection of an application for leave to sue as a pauper, the only course open to the applicant is to institute a suit, and the date of the institution of that suit for the purposes of limitation is the actual date thereof. The plaintiff could not then be regarded as a pauper, and section 4 of the Limitation Act would have no application.'

"The plaintiff contends that she had sufficient cause for not instituting the appeal within the prescribed period, and that, therefore, the appeal is admissible under section 5 of the Limitation Act. She also contends that the District Court having allowed time for the production of the stamp, and the appeal having been admitted, the appeal ought to be considered within time. The case referred to covers the first objection; for the fact that the application for leave to sue as a pauper was rejected, shows that there was no sufficient cause. Moreover, a time-barred appeal should be dismissed even though admitted—Illustration (*b*) of section 4 of the Limitation Act. I think I am bound, by the ruling cited, to hold the appeal time-barred."

The plaintiff preferred a second appeal.

*Gokuldas K. Parekh*, for the Appellant (Plaintiff):—The appeal was not barred. It was filed on the day on which the petition to appeal as a pauper was presented. The delay was caused by the order of the Court. *Skinner* v. *Orde*, L. R., 6 Ind. Ap, 126: I. L. R., 2 All., 241, applies. *Keshav* v. *Krishnarao*, I. L. R., 20 Bom., 503, is inconsistent with that case. It, however, relates to a suit, not to an appeal.

*K. N. Ghodi*, for the Respondent (Defendant):—When the Judge rejected the petition to sue as a pauper, there was no proceeding before the Court. The appeal was, therefore, barred. There is no distinction between a suit and an appeal. The order allowing further time for paying the court-fee was *ultra vires*. The follow-[853]ing cases were referred to:—*Ram Sahai* v. *Maniram*, I.L.R., 5 Cal., 807; *Ramcy* v. *Broughton*, I. L. R., 10 Cal., 652; *Venkatarayudu* v. *Nagadu*, I. L. R., 9 Mad, 450; *Bechi* v. *Ashanullah Khan*, I. L. R., 12 All., 461; *Moshaullah* v. *Ahmedullah*, I. L. R, 13 Cal., 78; *Husaini Begam* v. *The Collector of Muzaffarnagar*, I. L. R., 9 All., 655.

**Farran, C. J.**:—The practice of the High Court on its Original Side is that when a party within the proper time presents an appeal and petition to be allowed to appeal as a pauper, the Court receives them and upon a perusal of the record determines, under section 592 of the Civil Procedure Code, whether it sees reason to think that the decree appealed against is contrary to law or to usage having the force of law, or is otherwise erroneous or unjust. This necessarily takes often a longer time than the twenty days allowed for an appeal from a High Court decree (Limitation Act, 1877, article 151). If in such cases, as often occurs, the view of the High Court is unfavourable to the appellant, the Court directs the pauper, if he still desires to appeal, to pay the usual stamp fee either forthwith or, if the appellant applies for time, within some reasonable period, and, if the fee is paid in accordance with the order, treats the appeal as having been presented in time.

The above practice has been judicially approved on at least three occasions. In Suit No. 2 of 1892, the late Chief Justice Sir CHARLES SARGENT relying on

*Skinner* v. *Orde* ruled that an appeal was presented in time in a case where a decree was pronounced on the 11th July 1893, an application to appeal as a pauper was presented with a memorandum of appeal on the 3rd August (a considerable time having been occupied in drawing up the decree), the application was finally rejected on the 18th December following, and the appeal stamp duty was paid on the next day. A similar ruling was made in Suit No. 251 of 1896, *Tullockchand* v. *Gokulbhoy*, I. L R., 21 Bom., 724, and in Suit No. 423 of 1895, *Jumnabai* v. *Vissondas*, I. L. R., 21 Bom., 576, where after the rejection of the pauper application, the appeal was allowed to be proceeded with in regular course, after the time for appealing had elapsed if the appeal [854] had been treated as being presented on being stamped when the pauper application was rejected. The memorandum of appeal in the former of these cases had, however, been stamped when presented with the application to appeal as a pauper with the usual stamp fee of Rs. 2.

This is the course of practice which the District Judge at Ahmedabad followed in the present instance in accepting the appeal. On the 19th April 1894, the plaintiff's suit was dismissed. On the 1st June following, the plaintiff presented a memorandum of appeal unstamped, and an application to be allowed to appeal *in formâ pauperis*. This application, on account of the intervention of vacation, was in time. The suit was for an account. The plaintiff in the original Court had valued her claim at Rs. 230. In appeal she valued it at Rs. 2,500. It must be presumed that the District Judge did not see reason to reject the application under section 592, as he directed the Subordinate Judge to inquire into the pauperism of the appellant. The result of this inquiry, which occupied a considerable time, appears to have been that it was shown that the appellant could pay the stamp fee on Rs. 230, but not on Rs. 2,500. The District Judge on the 20th December 1894, having expressed his conclusion to that effect and his opinion that the appeal could be prosecuted with advantage on the lower valuation (it being a suit for an account) refused the appellant's application to appeal as a pauper, but made the costs of the application costs in the appeal.

The appellant thereupon applied for leave to amend her memorandum of appeal by reducing the valuation to Rs. 230, and for time to pay the court-fee. This application was disposed of on the 4th January 1895, when the appellant was allowed a week's time to stamp the appeal This she did on the 7th January and her appeal was then accepted. The District Judge did not record whether the appeal was admitted under section 5 of the Limitation Act on his being satisfied that the plaintiff had sufficient cause for not presenting it within the period of limitation prescribed therefor, or whether he treated the appeal as having been presented within time though unstamped (when he permitted it to be stamped) as if it had been stamped when originally presented.

[855] The Assistant Judge when the appeal came on for hearing dismissed it as time-barred. He relied upon the decision in *Keshav* v. *Krishnarao* as governing the case.

In my opinion the above stated practice of the High Court and the action of the District Judge of Ahmedabad in the present case are not inconsistent with any of the provisions of the Civil Procedure Code and are strictly analogous to the procedure laid down in the amending section 582A of that enactment. This view is, I think, supported by the ruling of the Madras High Court in *Patcha Saheb* v. *Sub-Collector of North Arcot*, I. L. R., 15 Mad., 78, which was based upon the principle of *Skinner* v. *Orde*, L. R., 6 I A., 126. This principle was also applied in *Moti Sahu* v. *Chhatri Das*, I. L. R. 19 Cal., 780.

In dealing with this question, I exclude from consideration the case of an unstamped memorandum of appeal and petition to appeal *in formâ pauperis* fraudulently presented and prosecuted. That gives rise to different considerations. They have no application here. The District Judge did not consider the action of the plaintiff fraudulent, else he would not have given her time to pay the stamp fee.

Now the first point to consider is—Did the memorandum of appeal cease to be a memorandum of appeal when the application to appeal as a pauper was refused? When presented, the application and the memorandum of appeal were two separate documents and in this respect they differ from a petition to sue as a pauper which includes both the plaint, the allegations as to pauperism and the prayer to sue *in formâ pauperis*. In the case of a petition to sue as a pauper, this Court has held that when the pauper petition is rejected under section 409, the proceedings are at an end and the Judge has no power to allow the petition to be stamped as a plaint, section 413 providing the only course open to the applicant, *viz*., to institute a suit in the ordinary manner. In proceedings under section 592, when the Judge refuses leave to appeal as a pauper, he effectually deals with the pauper application, but does he necessarily thereby deal with the memorandum of appeal which accompanied it? I think not. **[856]** The section does not say so. In my opinion the rule laid down in the second division of section 413 is not, by reason of the dissimilarity of the proceedings and for another reason which I shall hereafter refer to, a rule applicable to pauper appeals, and the Judge has, I think, also the memorandum of appeal to deal with when he refuses the application for leave to appeal as a pauper. I see nothing in the Code to prevent his treating it as still a memorandum of appeal if the appellant on being refused leave to appeal as a pauper desires with the aid of borrowed funds or the assistance of friends to continue the appeal. An unstamped memorandum of appeal is not a nullity—*Patcha Saheb* v. *Sub-Collector of Arcot* (*supra*); *Skinner* v. *Orde* (*supra*).

If section 413 as interpreted in *Keshav* v. *Krishnarao* (*supra*) applied to the memorandum of appeal which accompanies an application to appeal as a pauper, the result would be that in every case where such an application is made the appeal would be time-barred when the application is refused. A pauper appellant is allowed thirty days to file his application (Limitation Act, article 170). The same time is allowed for an appeal (article 152). If the pauper presents his petition in the time allowed for his doing so, and it is subsequently refused, he cannot appeal. His appeal is time-barred. The liberty reserved to him by section 413 to file an appeal in the ordinary manner is an unmeaning expression—an idle form of words. Even if he does not avail himself of the full time which the law allows him, the same result follows in almost all cases. It is practically impossible for a Court to deal with a pauper application, except under the proviso to section 592, within such a period as, in the event of its being dismissed, will leave to the pauper the opportunity of presenting a fresh momorandum of appeal within the thirty days to which the Legislature limits him. "If the statute compels such results, we must not shrink from construing it correctly, because this construction would lead to injustice. But if, without violating any legal principle, this can be avoided, I think it ought to be done." The above are the words of Lord HERSCHELL in *Welton* v. *Saffery*, (1897) A.C., 299 at p. 318. The Limitation Act of 1877 was in force when the Code of 1882 was enacted, and these considerations **[857]** must I think, have been present to the mind of the Legislature when they enacted section 592, else why should they have provided for the presenting of two separate documents, and not one as in the case of a petition to sue as a

pauper? The result is that, in my opinion, the District Judge was under no legal obligation to dismiss the appeal presented by the appellant in this case when he refused leave to the appellant to appeal as a pauper. That he did not do so, is clear from his making the costs of the pauper inquiry costs in the appeal and subsequently making an order allowing the memorandum of appeal to be amended.

The new section 582A of the Civil Procedure Code, which is an enabling section passed to obviate the consequences of certain High Court rulings of great strictness, is not applicable to pauper appeals, but it is indicative of the will of the Legislature that appeals shall not be rejected on the ground of their not being sufficiently stamped if such insufficiency arises from mistake on the part of the appellant. In analogy thereto I think that the District Judge was acting within his powers when he allowed the appellant in the present case to stamp her memorandum of appeal. I rely upon *Skinner* v. *Orde* in support of that opinion. I have had an opportunity of reading the judgment of my learned colleague, who does not take the same view of the question as I do. With reference to it, I would only say that, in my opinion, section 28 of the Court Fees' Act has no application in the case of a pauper appeal.

If I am in error in the view which I have taken of the law upon this point, the same result would be arrived at by considering the presentation in good faith of an application to appeal as a pauper as in general sufficient cause for not presenting the appeal in time. In that case I should refer the order of the District Judge of Ahmedabad to the provision of the law contained in section 5 of the Limitation Act, and though he has not so expressed himself, treat him as having admitted the appeal after time upon the above ground.

I am unable to agree with the view of the Assistant Judge that the pending of a pauper application, if it is dismissed, cannot be treated, in law, as sufficient cause for not presenting a regular [868] appeal in time, and I should allow the appeal on that ground. I prefer, however, to base my judgment on the more general grounds above indicated.

I would, therefore, reverse the decree of the Lower Appellate Court and remand the appeal for a hearing on the merits. Costs, costs in the cause.

**Candy, J.** :—I am not conversant with the practice of the appeal Court on the Original Side of this Court; and I do not know the reasons which governed the rulings referred to by the learned Chief Justice. But, as regards the Mofussil, on the facts of the present case, it should, I think, be taken that the District Judge, Ahmedabad, excused the delay caused by the inquiry into the pauper application, and so allowed the appeal to be filed on 7th January 1895. That, in my opinion, was the only course open to him. Section 582A, which was introduced into the Civil Procedure Code by Act VI of 1892, applies to memoranda of appeals or applications for review in which the insufficiency of the necessary stamp was caused by a mistake on the part of the appellant or applicant as to the amount of the requisite stamp. It is hardly possible to make these words applicable to the case of an appellant who asks to be allowed to appeal as a pauper, and, therefore, presents an application to that effect accompanied by a memorandum of appeal which bears no stamp. There is no mistake as to the amount of the requisite stamp: there is no insufficiency of stamp: there is no stamp at all. It would have been very easy for the Legislature when enacting section 582A to have widened its provisions so as to embrace a case such as that now before us. It did not do so, and I doubt whether we should be justified in assuming that there may be a procedure in analogy with the section. By section 592 the rules in Chapter XXVI are to be applied to pauper appellants "in so far as those rules

are applicable." That is the chapter which relates to "suits by paupers." Section 410 is applied as far as it is applicable. Thus, if the application is granted, the memorandum of appeal which accompanied the application is numbered and registered, and is deemed the appeal in the suit. Section 413 should be similarly applied. If the application is rejected, the [859] applicant shall be at liberty to file an appeal in the ordinary manner. There is possibly no objection to the memorandum of appeal, which accompanied his application, being returned to him so that it may be used as the memorandum of appeal "instituted in the ordinary manner," that is, with the necessary court-fee attached, but I car find no rule in the Civil Procedure Code providing that if this is done, then the appeal shall be deemed to have been instituted on the day when the application to appeal as a pauper was presented.

In the present case, the procedure was quite outside any section of the Civil Procedure Code. The District Judge on 20th December 1894, delivered his written order rejecting the application to be allowed to appeal as a pauper. Then the pleader of the would-be appellant put in an application to be allowed to amend his memorandum of appeal. There was no authority for such an application to be received. No permission of the Court was necessary. The would-be appellant was at liberty to institute an appeal in the ordinary manner, and after the expression of opinion from the District Judge that Rs. 230 would be the right valuation of such an appeal, there could be no mistake about the requisite Court-fee. But, as I said above, I think we may, without distorting the facts, take it that in effect the District Judge excused the delay, and so allowed the appeal to be instituted beyond time.

The case of *Patcha Saheb* v. *Sub-Collector of North Arcot*, I. L. R., 15 Mad., 78, was not one in which the appellant had tried to appeal as a pauper. The facts were that the appeal memorandum was presented *unstamped* within the period of limitation to the Sheristedar of the Court on the 11th June, the Court then being in recess. A note was made on the appeal memorandum that the stamp could not be procured and would be filed on the next Court day. This was not done, and no reason for the default appears in the report of the case. The stamp was ultimately affixed on 25th June, when the appeal was admittedly barred by limitation. The High Court said: "Following the principle laid down in *Skinner* v. *Orde*, L. R., 6 I. A., 126, we must hold that the petition must be regarded as an [860] appeal from the date on which it was presented, and not from the date on which the stamp was received."

With the utmost respect I am quite unable to follow that decision. The principle laid down in *Skinner* v. *Orde* was that the plaintiff was a pauper when his petition to sue as a pauper was filed. Pending the proceedings to enquire into his pauperism, and before any order was passed thereon, he raised the necessary funds and paid the Court-fee. This was a case not provided for in terms by the Civil Procedure Code (Act VIII of 1859), and the Judicial Committee thought that in the absence of fraud it approached more nearly to the state of things contemplated by section 308, which provided what should happen if the prayer of the petition was granted, than that by section 310, which provided what should be the effect of the rejection of the petition. But in the Madras case there was simply an unstamped memorandum of appeal, an unexplained default in filing the necessary stamp on the next Court day. If the decision of the Madras High Court is correct, then all that a would-be appellant need do is to file within the period of limitation an unstamped memorandum of appeal, and pay the requisite fee any time afterwards, and then he can claim that the appeal was duly presented. This would be directly contrary to section 28, clause (1), of the Court Fees' Act, and would not be

covered by clause (2), for it could not be said that the memorandum of appeal was through mistake or inadvertence received, filed or used in the Court or office without being properly stamped.

I do not think that the fact that when a would-be appellant presents an application for leave to appeal as a pauper he presents with it a separate memorandum of appeal (whereas a would-be plaintiff asking for leave to sue as a pauper writes his application and plaint all in one), makes any difference. If the Legislature intended that on the Court refusing to allow the would-be appellant to appeal as a pauper, the Court must dispose of the memorandum of appeal, which had been filed with the application, then nothing would have been easier than to enact provisions to that effect. No doubt the short period of limitation given for filing an appeal in a District Court must in most cases make an [861] appeal time-barred if the application to be allowed to appeal as a pauper is refused. This difficulty would hardly arise in the case of suits for which the period of limitation is longer. But then it must be remembered that section 5 of the Limitation Act does not apply to plaints, whereas it does to appeals.

Possibly the position taken by the Assistant Judge is strictly logical, when he says that the fact that the application for leave to sue (he meant *appeal*) as a pauper was rejected shows that there was not sufficient cause to excuse delay. But, in my opinion, it might work injustice to draw such a hard and fast line. In the present case, in the absence of fraud, there was, I think, sufficient cause for delay. The District Judge who inquired into the pauper petition evidently did not think that plaintiff had been acting in bad faith in at first valuing her appeal at Rs. 2,500. I think, therefore, that we should uphold his action. No doubt the Assistant Judge in hearing the appeal was at liberty to review the question as to the admissibility of the appeal—*Mulna* v. *Krishnaji*, I. L. R., 14 Bom., 594, and similarly in second appeal we are at liberty to review his decision, holding that there was not sufficient excuse for delay.

I concur in reversing the decree of the District Court and remanding the appeal to be heard on the merits, costs being costs in the cause.

*Decree reversed and case remanded.*

**NOTES.**

[1. There is no legal obligation to dismiss the appeal;—(1899) 26 Cal., 925; (1904) P. R., 84; (1904) 26 All., 329. See also (1906) P. R., 78; (1904) 6 Bom. L. R., 373; (1913) 22 I.C., 884 (Lower Burma); (1910) 11 I.C., 160 (Sind).

2 See also sec. 149, C.P.C., 1908, as regards the power to make up deficiency of Court-fees.]

[22 Bom. 861]

## APPELLATE CIVIL.

*The 11th August, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Haribhai Maneklal............(Original Plaintiff) Appellant

*versus*

Sharafali Isabji............(Original Defendant) Respondent.*

***Restraint of trade—Contract Act (IX of 1872), Sec. 27—Agreement to share profits of trade—Parties—Practice.***

Four persons, each of whom owned a ginning factory, entered into an agreement, which (*inter alia*) provided that they should charge a uniform rate of Rs. 4-8-0 per *palla* for ginning cotton; that of this sum, Rs. 2-8-0 should be treated as the [862] actual cost of ginning and that the remaining Rs. 2 should be carried to a common fund to be divided each year between the parties to the agreement in proportion to the number of ginning machines which each of them possessed. The agreement was to be in force for four years. The other parties had carried out the agreement, but the defendant, although he had carried the Rs. 2 to a separate account, refused to pay the plaintiff his share of the amount. He also refused to pay the other two parties their shares. The accounts had been duly made up, showing the sums which the defendant under the agreement had to pay both to the plaintiff and the two other parties to the agreement. The plaintiff sued the defendant for his share. The defendant contended that the agreement was in restraint of trade and was, therefore, not enforceable, and that the plaintiff ought to have made the other parties to the agreement, parties to the suit.

*Held*, that the plaintiff was entitled to recover his share from the defendant. The only agreement sought to be enforced in this suit was the agreement to divide the profits. That was a lawful agreement founded upon consideration (*viz.*, the mutual agreement to share each other's profits) and it might be enforced.

*Held*, also, that the other parties to the agreement were not necessary parties to the suit. The accounts had been made up and were admittedly correct, and they showed that the defendant had nothing to receive from any of the parties to the agreement, but that he was indebted in a definite sum to the plaintiff.

*Per* FARRAN, C. J.:—"I am inclined to agree with the Lower Appellate Court that the stipulation that the parties to the agreement are bound to charge at the rate of Rs. 4-8-0 per *palla* for ginning cotton, is a stipulation in restraint of trade."

*Per* CANDY, J.:—"I am not satisfied that the agreement in question was, as a fact, in restraint of trade—and further, to accurately quote the words of section 27† of the

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* Second Appeal, No. 465 of 1897.

† [ Sec. 27:—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Agreement in restraint of trade void.

*Exception* 1.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Saving of agreement not to carry on business of which good-will is sold;

*Exception* 2.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business, similar to that of the partnership, within such local limits as are referred to in the last preceding exception.

of agreement between partners prior to dissolution;

*Exception* 3.—Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.]

or during continuance of partnership.

Contract Act. I am not satisfied that it was an agreement by which any one was restrained from exercising a lawful trade."

SECOND APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Dhulia with appellate powers, confirming the decree of Rao Saheb R. V. Patki, Subordinate Judge of Nandurbar.

Suit to recover Rs. 2,351 from the defendant as the plaintiff's share of profits under an agreement.

The plaintiff alleged that on the 6th September 1891, he and the defendant and two other persons, each of whom owned a ginning factory, entered into a written agreement which provided (*inter alia*) that each should work his factory at his own cost, that they should all charge a uniform rate of Rs. 4-8-0 per *palla* for ginning cotton (such rate to be liable to alteration by mutual [863] agreement); that Rs. 2-8-0 of that sum should be retained by each as expenses, and that the rest should be carried to a common fund to be divided each year among the parties to the agreement in proportion to the number of ginning machines which each of them possessed. The agreement was to last for four years, and the accounts were to be settled every year.

The plaintiff complained that the accounts had been made up according to the agreement, but the defendant refused to pay him his share.

The defendant pleaded (*inter alia*) that the agreement was opposed to public policy as being in restraint of trade, and that the plaintiff ought to have sued for an account, making all the other parties to the agreement parties to the suit. He also contended that the contract was without consideration.

The Subordinate Judge dismissed the suit, holding that the agreement was without consideration.

On appeal, the Judge confirmed the decree on the ground that the agreement was in restraint of trade.

The terms of the agreement, as stated by the Judge, were as follows:—

"The agreement provided that the executants thereof should work their respective factories at their own respective costs; that they should charge traders of cotton at Rs. 4-8-0 per *palla* of cotton to be ginned; that of the said Rs. 4-8-0 the owner of the factory should deduct Rs. 2-8-0 on account of the expenses of working the factory and should credit the remaining Rs. 2 as profits to be divided among the four executants in proportion to the number of gins which each of them had; that none of them was at liberty to reduce or increase the said rate of Rs. 4-8-0 without the consent of all; that none of them was at liberty to increase the number of gins, and if any one of them was desirous, he could increase only four gins with an additional boiler; that if any one of them gave *sukhdi* or *dalali* to any trader, he was to be liable to a fine of Rs. 2,551; that regular accounts were to be kept; that the accounts should be settled and the profits divided in Jesht every year; and that the agreement was to continue in force for four years; that, in case of any dispute arising, the parties should first resort to arbitration, and if that failed, then to Court."

The plaintiff preferred a second appeal.

*Macpherson* with *Ganesh K. Deshmukh* appeared for the Appellant (Plaintiff):—The suit is for specific performance of the [864] agreement and also to recover an ascertained sum due to us by the defendant. The figures and account were stated in the plaint and they were admitted by the defendant to be correct. The question is, whether, by the provisions of the agreement in dispute, any one was restrained from exercising his trade within the terms of section 27 of the Contract Act. The section has no application. It applies only when any one is restrained from carrying on his trade. In the present case there was, no doubt, an arrangement that a fixed price should be charged and a fixed rate should be deducted from it for expenses. It was a legal stipulation according to which the parties agreed to carry on their business. It

did not prevent them from carrying on their trade. There was no restraint on the trade, but only an imposition of certain conditions by agreement of parties —*Mogul Steam Ship Company* v. *McGregor*, 21 Q.B.D., 544. The tendency of modern decisions is to amplify the contracting powers of parties. Supposing that the agreement was in restraint of trade, still as a certain part of the agreement was performed by us, we are entitled to relief, at least to that extent. Our claim for money is distinct and separable from a suit to enforce the agreement. We claimed relief with respect to that part of the contract which was actually performed.

*Lang* (Advocate-General) with *Purushottam P. Khare* appeared for the Respondent (Defendant):—The suit, as framed, is not maintainable even if the contract is valid. The plaintiff alone is not entitled to sue. He must join the other parties to the agreement. The defendant cannot make any payment to the plaintiff until the accounts are adjusted in a suit to which all the contracting persons are parties. The agreement restrained the defendant from carrying on to its full extent his business of ginning cotton. Partial restraint of trade is not illegal according to English law, but it is illegal according to Indian law. The agreement operated unfairly towards the public and stopped the defendant's trade to a certain extent. It is, therefore, void. Section 27 of the Contract Act makes no distinction between total and partial restraints of trade. It applies to both equally.

[865] **Farran, C. J.**:—The terms of the agreement sued on in this suit are set out in the judgment of the Lower Appellate Court. It was entered into by the owners of four ginning factories, and provided that the executants should work their respective factories at their own respective costs; that they should charge an uniform rate of Rs. 4-8-0 per *palla* of cotton to be ginned (but the rate was liable to be altered by mutual agreement), and that they should treat Rs. 2-8 of that sum as the actual cost of ginning, and that the remaining Rs. 2 should be carried to a common fund which was to be divided each year between the firms, the parties to the agreement, in the month of Jesht in proportion to the number of gins which each of them possessed. There were other minor stipulations which were not referred to in argument and which I need not consider in detail. The agreement was to continue in force for four years.

The parties to the agreement appear to have all observed and carried out its working terms. Most of the parties to it have divided the Rs. 2 set aside for division in pursuance of the provisions to that effect. The defendant alone, though he also has carried the Rs. 2 to a separate account, refuses to pay to the plaintiff his share of the amount. There are also two other gin-owners parties to the agreement, whose shares also in the defendant's separate account he refuses to pay. The accounts have all been made up showing the amounts which the defendant under the agreement has to pay to the plaintiff and to each of the other two gin-owners. The plaintiff has sued to recover his share. The Lower Appellate Court has come to the conclusion that the plaintiff's claim is not recoverable at law. Hence this appeal.

I am inclined to agree with the Lower Appellate Court that the stipulation that the parties to the agreement are bound to charge at the rate of Rs. 4-8 per *palla* for ginning cotton is a stipulation in restraint of trade. Agreements of this description whereby traders agree amongst themselves to sell their wares at a fixed price, or labourers so agree to labour only at a stipulated wage, or whereby manufacturers agree with one another to carry on their works under special conditions, have in the English Courts [866] usually been treated as agreements in restraint of trade, but have in some instances been upheld and

in some instances been ruled void according as the restraints in such agreements were or were not deemed to be only sufficient to protect the interests of the parties entering into them. An early instance of a case in which such an agreement was held by a majority of the Court to be void will be found in *Hilton* v. *Eckersley*, 6 E. and B., 47. A late instance, where some of the stipulations in such an agreement were held valid and some void, is that of *Collins* v. *Locke*, 4 App. Cases, 674. These were agreements in partial restraint of trade which are in many instances recognized as valid by English law.

The Contract Act, section 27, as hitherto interpreted by the Courts in India, appears to render void contracts in restraint of trade which do not fall within the exceptions to the general rule laid down in the section to the extent to which they are in restraint of trade—*Madhub Chunder* v. *Rajcoomar Doss*, 14 Beng. L. R.. 76; *Nur Ali Dubash* v. *Abdul Ali*, I. L. R., 19 Cal., 765; *Mackenzie* v. *Striramiah*, I. L. R., 13 Mad., 472, where other Indian cases are cited.

The balance of these Indian authorities appears to support the Subordinate Judge (First Class) in his view that the covenant of the signatories to the agreement to gin cotton only if the cotton merchant offering it agrees to pay Rs. 4-8 for ginning, is a void covenant. I use the expression "appears", because I have not critically examined each case. That is the effect which a perusal of them collectively has left upon my mind. When it becomes necessary actually to decide the point it will be necessary to consider them minutely as well as the exact language of section 27. There are other minor covenants contained in the agreement which stand upon the same footing.

This conclusion, if it is correct, is not, however, by any means, decisive of the present case. Covenants of this class, though they may be void and unenforceable, are certainly not illegal in the sense of being contrary to law. That is laid down by almost all the Law Lords who gave judgments in the case of *Mogul Steam Ship Co.* v. *McGregor*, 21 Q. B. D., 544. It is the basis of the decision in [867] that case. Here the four firms in question have agreed to divide what may be called, though not with strict accuracy, the profits of their respective ginning factories amongst themselves in certain proportions, the consideration for each of the contracting parties doing so being the promise of the other contracting parties to do the same by him. This is of itself a perfectly valid contract. The consideration for the promise is not, I think, the mutual covenant to charge an uniform rate of Rs. 4-8 per *palla* for ginning, although that rate is the main ingredient in arriving at the amount which is divisible under the agreement; but the mutual agreement to share each other's profits is the true consideration. There is no question now of enforcing any of the covenants in the agreement which are in restraint of trade. The parties have throughout observed them without objection. The only agreement which is left to be performed is the agreement to divide the profits. That is a lawful agreement founded upon consideration, and I fail to see why it should not be enforced.

It is contended that the plaintiff cannot sue without making all the other persons who are parties to the agreement parties. That would be a good objection if the accounts had not been made up and the parties had not settled every thing between themselves. The accounts which the defendant takes no exception to, and of which he admits the correctness, show that he has nothing to receive from any of the other firms, but that he is indebted to the plaintiff in a certain amount and to two others of the contractors in a definite sum each. There is no reason, that I can see, why the plaintiff should not sue to recover the sum which the defendant owes him.

The arbitration issue is abandoned by counsel for the defendant. I am of opinion that under these circumstances there must be judgment for the plaintiff for the amount claimed, and costs throughout.

**Candy, J.**:—The question is simply whether the present agreement came within the terms of section 27 of the Contract Act, *i.e.*, whether by the agreement any one was restrained from exercising a lawful profession, trade or business.

[868] These owners of four ginning factories agreed to do business together for four years, charging Rs. 4½ per *palla*. The clause in the agreement, on which the Lower Appellate Court relied as showing that the agreement came within the terms of section 27 of the Contract Act, is clause 5. It runs as follows:—"If it be thought that the rate should be lowered or increased, the owners of the abovementioned factories should reduce or raise the rate by unanimous consent." There was also a further clause providing a penalty for the enforcement of such agreement. It is not alleged that the object of the owners of the factories was to force up the rate for ginning, or that that was actually the result of the agreement. The apparent object was to prevent competition among themselves, which might induce one or more of them to ask absurdly low rates in order to drive the others away. Such a competition would, in reality, be injurious to trade; the present combination was for the advancement of trade. If other factories were set up, or if the cotton traders took their cotton away to other existing factories, the four contracting owners would probably have found it to their advantage to lower the rate for ginning. If cotton became very scarce, they might have found it advisable to raise their rate.

As to whether a combination between traders or business men is or is not in reality "in restraint of trade," the answer must, of course, depend upon the facts of each particular case, and opinions will be found to differ, even though the facts are admitted. Thus, to take the instance of the well known facts, which I need not recapitulate, in the celebrated case of *Mogul Steamship Co.* v. *McGregor, Gow and Co.*, 21 Q. B. D., at p. 553, Lord COLERIDGE, who tried the case, said: "It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent. on their bills at Christmas on condition of their customers dealing with them, and with them only." In the Court of Appeal, Lord ESHER, (23 Q B. D., at p. 610), took the contrary view, that "an agreement among two or more traders, who are not and do not intend to be partners, but where each is to carry on his trade according to his own will, except as regards [869] the agreed act, that agreed act being one to be done for the purpose of interfering, *i.e.*, with intent to interfere with the trade of another, is a thing done not in the due course of trade, and is, therefore, an act wrongful against that other trader, and is also wrongful against the right of the public to have free competition among traders." It will be noticed that the agreed act in the present case would not come within the terms used by the Master of the Rolls. Lord BOWEN, when dealing with the question as to the defendants' conference or association being illegal as being in restraint of trade said (p. 619): "If indeed it could be plainly proved that the mere formation of 'conferences,' 'trusts' or 'associations' such as these were always necessarily injurious to the public,.........and if the evil of them were not sufficiently dealt with by the common law rule, which held such agreements to be void...common law ought to discover...some further remedy...Neither of these assumptions are, to my mind, at all evident." FRY, L. J., (pp. 626, 628), assumed for the sake of argument that such an agreement was in restraint of trade.

So, too, apparently did Lord HALSBURY in the House of Lords, [(1892), Appeal Cases 35 , and Lord WATSON, (id., p. 40), while Lord HANNEN thought (id., p. 58) that it was in restraint of trade. On the other hand, Lord MORRIS said (id., p. 50): " Was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was, in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise." Lord FIELD went further. He said (id., p. 57):—" I cannot say upon the evidence that the agreement in question was calculated to have or had any such result" (i.e. as being in restraint of trade). Lord BRAMWELL hesitated, but was inclined to the opinion that the agreement was not in restraint of trade. He said (p. 45):—"The first position of the plaintiffs is that the agreement among the defendant is illegal as being in restraint of trade, and, therefore, against public policy and so illegal.........No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing [870]is against public policy, and void. How can the Judge do that without any evidence as to its effect and consequences? If the shipping in this case was sufficient for the trade, a further supply would have been waste. There are some people who think that the public is not concerned with this—people who would make a second railway by the side of one existing, saying 'only the two companies will suffer,' as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference did not prevent a waste, and was not good for the public. Lord COLERIDGE thought it was—see his judgment.........Let it be that each member had tied his hands; let it be that that was in restraint of trade; I think upon the authority of *Hilton* v. *Eckersley*, 6 E. & B., 47, and other cases, we should hold that the agreement was illegal, that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure."

I am inclined to adopt the above language to the present case, and to say that I am not satisfied that the agreement in question was, as a fact, in restraint of trade—and further, to accurately quote the words of section 27 of the Contract Act, I am not satisfied that it was an agreement by which any one was restrained from exercising a lawful trade.

The exceptions to the section do not enlarge the terms of the section. They apply to cases in which under certain specified circumstances a person agrees to be restrained from exercising a lawful profession, trade or business. In *Hilton* v. *Eckersley*, 6 E. & B., 47, certain persons agreed under certain circumstances, which would not come within the exceptions to section 27 of the Contract Act, to be restrained from exercising their lawful business; they were under those circumstances to absolutely close their businesses. So, too, in the leading case of *Madhub Chunder* v. *Rajcoomar Doss*, 14 Beng. L. R., 76, the plaintiff agreed not to carry on his business in a certain locality, and it was held that the words " restrained from exercising a lawful profession, trade or business" are intended to apply to a restriction limited to some particular place. The principle of this ruling has not been extended. In *Carlisles*, [871] *Nephews and Co.* v. *Ricknauth*, I. L. R., 8 Cal., 809, the plaintiffs stipulated that they would make no sales of goods of the same description as they were selling to defendant before a certain date. It was contended that this was a stipulation in restraint of trade within the meaning of section 27 of the Contract Act; and the case just quoted was relied on. GARTH, C. J., said: "This case was of a very peculiar character; but assuming that case to have

been well decided, we think it has no application to the present. The language of section 27 is, no doubt, somewhat general and unsatisfactory; but I am clearly of opinion that it was never intended to prohibit such a stipulation as that with which we are now dealing in contracts for the sale of goods." In *The Brahmaputra Tea Company, Limited* v. *Scarth*, I. L. R., 11 Cal., 545, the stipulation, which was held to be void under section 27 of the Contract Act, was one by which a person was in express terms restrained from exercising a lawful profession, trade or business for a term of years. In *Mackenzie* v. *Striramiah*, I. L. R., 13 Mad., 472, a licensee for the manufacture of salt agreed that all salt manufactured by him should be sold to plaintiffs at a fixed price. HANDLEY, J., said: "Clause 12 (of the agreement) does not, in my opinion, purport to restrain defendant from exercising his trade or business within the meaning of section 27 of the Contract Act. It is merely an agreement to sell all the salt he manufactures during a certain period to plaintiffs at a certain price. No doubt a negative covenant not to sell to anybody else may be implied, but that is not such a restraint from exercising his trade or business as the section contemplates......I understand the section to aim at contracts by which a person precludes himself altogether, either for a limited time or over a limited area, from exercising his profession, trade or business." In *Nur Ali Dubash* v. *Abdul Ali*, I. L. R., 19 Cal., 765, the stipulations in question came exactly within the terms of section 27. The High Court said: "The effect of those articles was absolutely to restrain the plaintiff from carrying on the business of a dubash, and also to create a partial restraint upon his power to carry on the business of a stevedore. As to the first, nothing need be said; as to the second, the case of *Collins* v. *Locke*, 4 App. Ca., 674, shows (were [872] authority needed for the proposition) that the plaintiff's agreement 'to act only as *ghat serang* of the said five ships,' and not to 'do any services to ships belonging to anybody else' (save his old ships), was in partial restraint of trade in the strict legal meaning of the expression." It is equally clear that the words quoted above may well be said to come within the express terms of section 27. In *Collins* v. *Locke*, the first clause in the agreement was a stipulation held to be bad; it was one which restrained "three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of employing any of these parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well founded their objections may be to employ him" (p 688). In short, the contract in parties in express terms restrained themselves from exercising their lawful business. There can be no doubt that such a contract would fall within the terms of section 27 of the Contract Act. The second clause of the agreement, which was held to be good, contained no terms by which any one was restrained from exercising his lawful business. It provided that if either of the named firms should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the first clause, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring. I venture to think that such an agreement would not be within the express terms of section 27. On the agreement as a whole the Judicial Committee remarked (p. 685): "The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it and *so to prevent competition, at least among themselves*, and also, *it may be*, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an

agreement, having these objects, is invalid if carried into effect by proper means, that is by provisions reasonably necessary for the purpose, though the effect of them *might* be to [873] create a partial restraint upon the power of the parties to exercise their trade."

It is apparently contended that because in the case quoted above from 14 B. L. R., p. 76, Sir R. COUCH said that the words 'restrained from exercising a lawful profession, trade or business, in section 27' 'do not mean an absolute restriction, and are intended to apply to a *partial* restriction, *a restriction limited to some particular place*,' therefore they are intended to apply to an agreement like the present one by which no one is directly restrained from exercising a lawful profession, trade or business, because *it may be* that till outside competition came into play the price agreed upon by the parties would be kept up, and thus partially the parties would be restrained from doing business at a lower rate than what they agreed on. I can find no reported authority in the Indian Courts for putting such an extended meaning on the words of section 27 of the Contract Act. A partial restriction, a restriction limited to some particular locality, is different from a problematical restriction, which may or may not be the effect of the agreement, but which was not the object of the contracting parties.

I would not extend the meaning of section 27 beyond what the words primarily mean. There may be contracts which do not come within the terms of that section and its exceptions, and yet may be contracts "in partial restraint of trade," and as such, contrary to public policy and so void (sections 23, 24, Contract Act). That is the common-law doctrine by which restraints of trade, even though partial, are presumed to be bad, the presumption being rebuttable. It is for the Court to determine whether the contract be a fair and reasonable one or not, and the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. (Per PARKE, B., in *Mallan* v. *May*, 11 M. & W., 653 at p. 665.) But in the present case the argument was restricted to section 27, and it is unnecessary for me to pursue the subject further, because I am clearly of opinion that even if the agreement in question, to have a uniform rate for ginning, is void, that is, not enforceable by law, the present claim by plaintiff to [874] recover his share of the profits is clearly enforceable. It is true that in the case quoted above from 14 B. L. R. the Court said: "If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendant to pay the money; and the whole contract must be treated as one which cannot be enforced." But in *Bishop* v. *Kitchin*, 38 L. J. (Q. B.), 20, COCKBURN, C. J., LUSH, HANNEN and HAYES, JJ., said: "The agreement having been executed, and the plaintiff having submitted to the restraint, he is clearly entitled to recover the consideration due in respect of it." There is a difference between an action brought to enforce the illegal restraint and an action brought to recover the consideration for the restraint. In *Wallis* v. *Day*, 2 M. and W., 273, to the argument of counsel that the contract being an absolute one, binding the plaintiff not to carry on trade for his whole life, not limited in point either of time or place, was void as against public policy, and on the authority of all the cases, Lord ABINGER, C. B., remarked (p. 276): "Can you show any case, except where the prohibition was attempted to be enforced. I should require a strong authority to say, (although the prohibition would not be binding as against the party himself,) that there being nothing *criminal* in the contract, he should not have the benefit of it, where he has in fact performed it."

Assuming, however, that these dicta are not applicable to cases under the Contract Act, it is clear, as pointed out by the learned Chief Justice, that the agreement in the present case to charge Rs. 4-8-0 per *palla* is not the consideration for the agreement to divide the Rs. 2 profits. There is, therefore, no valid objection to plaintiff recovering what is clearly his due.

I concur in reversing the decree of the lower Courts and awarding the claim.

*Decrees reversed.*

NOTES.

[See also (1904) 29 Bom., 107; (1903) 6 Bom. L.R., 23; (1912) 34 All., 587; *Russell* v. *Amalgamated Society of Carpenters*, (1910) 1 K.B., 506 C.A.; (1898) 23 Bom., 103.]

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## [875] APPELLATE CIVIL.

*The 16th August, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Karsan............(Original Defendant No. 1) Appellant

*versus*

Ganpatram and another............(Original Plaintiffs) Respondents.*

*Civil Procedure Code (Act XIV of 1882), Sec. 283—Order passed in attachment proceedings not binding on judgment-debtor if not a party—Order passed without investigation—Suit to set aside the order—Limitation Act (XV of 1877), Art. 11.*

One Asha was in possession of certain land as plaintiff's tenant and in his life-time mortgaged it with possession to the first defendant. After Asha's death, defendant No. 1 obtained a money decree against Asha's heirs and in execution attached the land. Thereupon the plaintiff sought to raise the attachment on the ground that Asha was merely a tenant-at-will whose interest ceased at his death. Defendant No. 1 contended, on the other hand, that Asha was a permanent tenant and that his interest, as such, had descended to his heirs and was liable to attachment. On the 20th February 1892, the Court ordered the attachment to be removed without deciding the question raised by the parties which it held could not be determined in such a proceeding. Defendant No. 1 did not bring any suit under section 283 of the Code of Civil Procedure (Act XIV of 1882) to set aside the order and establish his right to the land. In 1894 the plaintiff filed the present suit against the first defendant and the heirs of Asha to recover possession of the land. The Subordinate Judge passed a decree in his favour against the first defendant, holding that the order in the attachment proceedings was conclusive against the latter, no suit having been filed by him within a year under section 283 of the Civil Procedure Code. He, however, refused to pass any decree against the heirs of Asha, inasmuch as they had not been parties to the attachment proceedings and, moreover, were not in possession of the land. On appeal, this decree was confirmed. The first defendant appealed to the High Court.

*Held* (reversing the decree of both the lower Courts) that the case must be remanded and tried on the merits.

By PARSONS, J., on the ground that although the order in the attachment proceedings had become conclusive as against the first defendant, it did not affect Asha's heirs, who had not been parties to it. As against them, therefore, the plaintiff had to prove his title, and

* Second Appeal, No. 470 of 1897.

if he failed to do so he could not recover. The first defendant being in possession might set up this *jus terti* and might plead the title of the other defendants.

[876] By RANADE, J., on the ground that the order in the attachment proceedings having been passed without investigation of the question there raised by the parties, it did not become conclusive against the first defendant notwithstanding his failure to bring a suit within twelve months to set it aside, and that he was not precluded from raising his defence in the present suit.

SECOND APPEAL from the decision of the First Class Subordinate Judge, A. P., of Broach.

Suit to recover possession of land. The first defendant pleaded that the land had been in the possession of one Asha; that he (defendant No. 1) held it as mortgagee of Asha; and that the plaintiff was not entitled to recover it without paying off the mortgage.

Defendants Nos. 2 to 6 were Asha's heirs and did not defend the suit.

It appeared that the land was originally in possession of Asha as the plaintiff's tenant. Asha mortgaged it to the first defendant, who after Asha's death obtained a money-decree against his (Asha's) heir (defendant No. 2) and in execution attached the land. The plaintiff intervened and sought to raise the attachment on the ground that the deceased Asha was his tenant-at-will; that his tenancy had terminated at his death, and that no interest had devolved upon his heir liable to attachment. The first defendant contended that Asha was a permanent tenant and that, as such, he had an interest which came to his heir and was liable to attachment.

Asha's heirs were not parties to these attachment proceedings.

The Subordinate Judge on the 20th February 1892, made the following order raising the attachment:—

"Upon these admitted facts I am of opinion that the land under attachment should be released from it. The judgment-debtor's possession and that of his representative in interest are admitted to be as tenants of the petitioners. Whether that possession was that of a permanent tenant and whether the deceased had a saleable interest in the land attached, are mixed questions of fact and law, very intricate and complicated. They cannot be inquired into and decided in the miscellaneous proceeding. Under this view I order that the attached land shall be released from attachment."

The first defendant did not file any suit under section 283 [877] of the Civil Procedure Code (Act XIV of 1882) to establish his right to the lands.

In 1894 the plaintiff filed the present suit against the first defendant and Asha's heirs (defendants Nos. 2 to 6) to recover possession.

The Subordinate Judge passed a decree against the first defendant, holding that the above order in the attachment proceedings was conclusive against the first defendant as between him and the plaintiff, no suit having been brought under section 283 of the Civil Procedure Code. As against the other defendants, he refused to pass any decree, inasmuch as they had not been parties to the attachment proceedings and were not in possession of the land.

This decree was confirmed, on appeal, by the First Class Subordinate Judge of Broach, A. P.

Thereupon defendant No. 1 preferred a second appeal to the High Court.

*Manekshah Jehangirshah*, for Appellant.

*C. H. Setalvad*, for Respondent.

The following authorities were cited in argument: *Bukshi Ram* v. *Sheo Pergash Tewari*, I. L. R., 12 Cal.. 453; *Venkapa* v. *Chenbasapa*, I. L. R., 4 Bom., 21; *Chandra Bhusan* v. *Ram Kanth*, I. L. R., 12 Cal., 108; *Badri*

*Prasad* v. *Muhammad Yusuf*, I. L. R., 1 All., 381; *Sardhari Lal* v. *Ambika Pershad*, I. L. R., 15 Cal., 521; *Khub Lal* v. *Ram Lochun*, I. L. R., 17 Cal., 260; *Kedar Nath* v. *Rakhal Das*, I. L. R., 15 Cal., 674.

**Parsons**, J.:—The plaintiffs brought this suit in ejectment to recover possession of a certain field, Survey No. 1243, with mesne profits for three years, alleging that it was their land, let to their tenant Asha, and that on his death in 1888 (Samvat 1994) the lease determined and they became entitled to the possession of the land. They sued the heirs and representatives of Asha (defendants Nos. 2 to 6), and the mortgagee of Asha (defendant No. 1).

Defendant No. 1 alone appeared and contested the claim on the ground that Asha was not the tenant-at-will of the plaintiffs, [878] but a permanent tenant who had mortgaged to him his occupancy rights and placed him in possession.

The Judge of the Lower Appellate Court refused to enter on the merits of the case, as he was of opinion that the contention of the defendant No. 1 was *res judicata* by reason of his omission to file a suit within a year of an order passed against him under section 280 of the Code of Civil Procedure. It appears that the defendant No. 1 had obtained a decree against Asha's heirs for a debt due to him by Asha, and in execution of the decree he attached this property. The plaintiffs objected to the attachment on the ground that Asha had no attachable interest in the property, as he, when alive, only held the property as their tenant. The defendant asserted the permanent nature of Asha's tenancy. The Subordinate Judge passed the following order:—

"Upon these admitted facts I am of opinion that the land under attachment should be released from it. The judgment-debtor's possession and that of his representative in interest are admitted to be as tenants of the petitioner. Whether that possession was as a permanent tenant and whether the deceased had a saleable interest in the land attached are mixed questions of fact and law, very intricate and complicated. They cannot be enquired into and decided in the miscellaneous proceeding. Under this view I order that the attached land shall be released from attachment."

It must, we think, be taken that this was an order passed under section 280, releasing the property from attachment, though it did not decide the point at issue between the parties. The defendant, therefore, was bound to bring a suit to establish the right he claimed within a year from the date of the order. (See *Sardhari Lal* v. *Ambika Pershad*, I. L. R., 15 Cal., 521; *Khub Lal* v. *Ram Lochun*, I. L. R., 17 Cal, 260.)

The question is, what was the right that the defendant claimed. It was argued that it was merely the right to attach and sell the property in execution of his money decree, and that so far only the order was binding upon him, and *Bukshi Ram* v. *Sheo Pergash Tewari*, I. L. R., 12 Cal., 453, was cited in support of the argument. It may be doubted if the argument is sound. The right the defendant claimed was the right to attach and sell Asha's equity of [879] redemption of this property. He asserted that Asha had this saleable interest, while the plaintiffs asserted that Asha being dead, no interest at all survived to his representatives or assigns. The Subordinate Judge decided in favour of the plaintiffs, leaving the defendant free to establish his case by a regular suit. It would seem, therefore, that the first defendant not having brought the suit within the time allowed by law, is bound by the order.

We do not, however, see how the order can be binding upon the other defendants, who are the heirs and representatives of Asha. They were not parties to the proceedings in which the order was passed, and they were not bound to bring any suit to establish their title. (See *Kedar Nath* v. *Rakhal Das*, I. L. R., 15 Cal., 674, in which this point is fully discussed.) They, therefore, in this suit are free to set up the title of Asha and their own title as

his representatives in bar of the plaintiffs' claim to possession of the property, and the plaintiffs, who sue in ejectment, are bound to prove their title as against them. If the plaintiffs fail to prove their title, or if, in other words, the defendants, who are the representatives of Asha, prove that Asha was a permanent tenant, then the plaintiffs would not be entitled to the possession of the land. The decree in that case should be in favour of the defendants Nos. 2 to 6. It has always been held that a person in possession can plead *jus tertii*, and, therefore, in this case, the defendant No. 1 can plead the title of the other defendants in support of his possession under a mortgage, the legality of which was never questioned in the execution proceedings. We think, therefore, that the lower Courts were wrong in disposing of the case on the preliminary point of *res judicata* and in not raising and disposing of an issue as to the title of the plaintiffs as against the defendants Nos. 2 to 6. We, therefore, reverse the decrees of both the lower Courts, and remand the case to the Court of First Instance for trial on the merits. All costs to be costs in the cause.

**Ranade, J.** :—The chief point for consideration in this appeal is whether the order in the execution proceedings (Exhibit 6) had the effect of estopping the appellant from pleading the defence raised by him in this suit. Both the lower Courts have held [880] that as that order was passed against the appellant, and he took no steps to set it aside under section 283, he was shut out from urging his present defence, as the order became conclusive after the statutory period laid down by article 11 of the second schedule of the Limitation Act had expired.

The facts of the case are clearly set forth in the judgment of the Court of First Instance. The appellant obtained a money decree in 1891 against the heirs of deceased Asha Girdhar, and attached the lands in dispute as belonging to his judgment-debtor. The respondents thereupon made an application for the removal of the attachment, alleging that the judgment-debtor had no right, title, or interest in the land, but that he held it as respondents' tenant, and that the land belonged to the respondents. The appellant answered that the land had been in the possession of his deceased judgment-debtor as a permanent tenant from time immemorial, and that the respondents had only a right to receive Rs. 2 as rent. He further stated that in a rent suit respondents' right had been established in respect of this rent only, and that the land had been mortgaged to him (the appellant), and had been since in his possession as mortgagee. The respondents, on the other hand, alleged in these miscellaneous proceedings that Asha was their tenant-at-will, and not a permanent tenant. On these pleadings, the Subordinate Judge disposed of the application on 20th February 1892, saying that he "was of opinion, upon these admitted facts, that the land under attachment should be released from it. The judgment-debtor's possession, and that of his representative in interest, are admitted to be as tenant of the petitioners (respondents in the present appeal). Whether that possession was as a permanent tenant, and whether the deceased had a saleable interest in the land attached, are mixed questions of fact and law, very intricate and complicated, and cannot be inquired into and decided in a miscellaneous proceeding." The attachment was accordingly removed. No suit was filed by the appellant under section 283 to establish the right which he claimed to the property in dispute. The present suit was brought by the respondents to recover possession of the land in dispute against the appellant and the heirs of Asha, and the appellant pleaded that Asha's interest in the [881] land was that of a permanent tenant, and that he was a mortgagee of that interest.

Upon this statement of facts, both the lower Courts have held that the appellant was estopped from raising these defences by reason of the order re-

moving the attachment having become conclusive under the operation of section 283. Reliance was chiefly placed upon the rulings in *Badri Prasad* v. *Muhammad Yusuf*, I. L. R., 1 All., 381, and *Sardhari Lal* v. *Ambika Pershad*, I. L. R., 15 Cal., 521, in support of the view that the order had a conclusive effect. We have now to see how far the present case falls within the purview of these rulings.

In the case before their Lordships of the Privy Council, the application was made by the wife and sons of the judgment-debtor to the effect that as they were not parties to the decree, their interests in the family property were not liable to be sold, and that only the right, title and interest of the judgment-debtor should be sold. The Court thereupon ordered that the property should be released from attachment as it was ancestral property, and that only the right, title and interest of the judgment-debtor should be sold. More than twelve months after this order was made, the attaching creditor brought a regular suit in which he sought for a declaration that the debt was binding upon the judgment-debtor's sons. It was held by both the original and appellate Courts in India that the suit was barred under article 11, and their Lordships of the Privy Council upheld this decree. The contention before their Lordships was that the order releasing the attachment was passed on a defective investigation, and that the miscellaneous proceeding should have determined the precise extent of the shares of the judgment-debtor and of his sons. Lord HOBHOUSE, in delivering the judgment of the Privy Council, observed, with reference to this contention, that the Code did not prescribe the extent to which the investigation should go, and that this would depend upon the circumstances of each case. It seems to me that the ruling furnishes no guidance in deciding a case like the present, where the Subordinate Judge expressly states in his order that he did not inquire into the question of the nature of Asha's interest in [882] the land, and the question of possession and mortgage raised by the appellant. As regards the Allahabad case, the judgment shows clearly that the order was passed upon investigation, and on a consideration of the oral and written evidence adduced on both sides. It, therefore, furnishes no help in deciding a case in which there was admittedly no investigation.

Where there has been no investigation in the attachment proceedings, it has been held by all the High Courts that the order passed in such proceedings had not a conclusive effect, and that article 11 of the Limitation Act (XV of 1877) did not apply to such cases. In the Allahabad Full Bench case noted above, the judgment of PEARSON, J., shows the grounds on which that case was distinguished from a previous decision which suggested the reference. In this last case, it was observed that there had been no adjudication on the point of possession, and that, therefore, the order did not operate as *res judicata*. There are numerous decisions more directly in point, and which clearly show that when the order is passed without investigation, it has no conclusive effect. The wording of section 278 clearly requires the Court to proceed to investigate the claim or objection. It is only when the application is unnecessarily delayed that there is to be no investigation. Under section 279, evidence has to be adduced by both sides, and under sections 280, 282 the Court has to be satisfied, one way or the other, on the point of right or possession. Investigation is thus obligatory, however summary may be the nature of the proceedings. In a case decided by the North-West Provinces High Court, it was laid down that the Judge was bound to inquire and determine the question of possession as between claimant and judgment-debtor—*Bhola Dut* v. *Shah Ahmed*, 3 Agra, 397. Where again attachment was released without investigation, it was held that it had no effect in the way of estoppel on failure to bring a suit

within a year to set it aside—*Mussumat Kamran* v. *Neit Ram*, 6-N.-W. P., 185. In this case the order was very similar to the one in the present case. The Judge had stated that "as the registered sale-deeds were of long standing, the matter cannot be settled without a civil suit. It is not proper [883] at present that the sale should be carried out." In a Calcutta case it was held that where the Court refused to entertain an application or to order the stay of a sale, because the application was made too late, article 11 of the Limitation Act, or rather the equivalent provision of the last clause of section 246 of Act VIII of 1859, had no application—*Syed Mahomed* v. *Kanhya Lal*, 2 Cal. W. R., 263. This Calcutta ruling was followed by this Court in *Venkapa* v. *Chenbasapa*, I. L. R., 4 Bom, 21, and by the Madras High Court in *Venkatanaru* v. *Akkamma*, 3 Mad. H. C. Rep., 139. In *Rash Behari* v. *Budden Chunder*, 12 Cal. L. R., 550, the order was to the effect that "To enter into evidence would lead to an adjudication * * of complicated questions of fact, which it would not be at all easy and convenient to try summarily." It was held that such an order did not become conclusive by reason of failure to bring a suit within one year to set it aside. It is true this ruling referred to an order under section 335, and not section 283, but it has been held in *Minguel Antone* v. *Waman Lakshman*, P.J., for 1889, p. 17, that the rulings under section 283 must equally apply to those under section 335. In *Bhikha* v. *Sakarlal*, I. L. R., 5 Bom., 440, the order stated that as applicant did not want to proceed further, no investigation was made, and it was held that article 11 did not apply. In such cases there was, in fact, no order under sections 280 or 282, and as there was no investigation, there was no estoppel. Similarly in *Chandra Bhusan* v. *Ram Kanth*, I. L. R., 12 Cal., 108, it was ruled under section 281 that it is only when an order is made after investigation that it operates as estoppel. When an application was rejected because the boundaries did not agree, and it was not likely that applicant would suffer by reason of the sale, it was held that the limitation of one year did not apply. Of course it is otherwise when the claimant gives no evidence, or insufficient evidence, or is absent. In these cases the order operates as though it were passed after investigation—*Tripoora Soonduree* v. *Ijjutoonnissa Khatoon*, 24 Cal. W. R., 411; *Gooroo Doss Roy* v. *Sona Monee*, 20 Cal. W. R., 345; *Sreemunto Hajrah* v. *Syud Tajooddeen*, 21 Cal. W. R., 409

[884] From a review of all these authorities, it is clear that the order in this case expressly avoided deciding the question of Asha's rights and appellant's mortgage, and as such it must be held to have been passed without investigation, and appellant's failure to bring a suit within twelve months did not preclude him from raising his defence in the present suit.

There is an additional reason for coming to the same finding in the present suit. The respondent-plaintiffs have joined the heirs of the deceased Asharam as parties to this suit. They were not parties to the miscellaneous application, and they cannot be shut out from raising the defence that they have permanent rights in the land. The point, that the judgment-debtor cannot be regarded as being necessarily a party in attachment proceedings under sections 278, 283, has been settled by a long course of rulings of the several High Courts—*Shivapa* v. *Dod Nagaya*, I. L. R., 11 Bom., 114; *Ajibal Narasinha* v. *Shirekoli Timapa*, I. L. R., 17 Bom., 629; *Kedar Nath* v. *Rakhal Das*, I. L. R., 15 Cal., 674; *Mannu Lal* v. *Harsukh Das*, I. L. R., 3 All., 233.

For all these reasons, I am of opinion that both the lower Courts were in error in holding that the appellant was precluded in this case from urging his defence in the present suit. He has clearly a right to require the Courts to

adjudicate upon the nature and extent of Asha's interest and his own mortgage. We reverse the decrees of both the Courts below.

*Decree reversed.*

**NOTES.**

[In (1910) P.R., 28; (1910) P.L.R., 63, Art. 11 was applied. See also (1908) 11 O.C., 180.]

[ 22 Bom. 884 ]

APPELLATE CIVIL.

*The 19th August, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Chudasama Naudhabhai and others............(Original Defendants) Appellants

*versus*

Naran Tribhovan and others............(Original Plaintiffs) Respondents.*

*Talukdar Gujarat Talukdars' Act (Bom. Act VI of 1888,) Sec. 31, Cl. 2—Sale in execution of a decree - Sale of talukdari estate—Sanction of Government.*

A talukdar mortgaged his talukdari estate in 1883, *i.e.*, prior to the passing of the Gujarat Talukdars Act (Bombay Act VI of 1888). In 1893 the mort-[885]gagee sued on his mortgage and, without having the sanction of the Governor in Council, obtained an order in the District Court for the sale of the mortgaged property, that Court holding that the provisions of section 31, clause 2, of Bombay Act VI of 1888 did not apply to the case of a mortgage effected prior to the passing of the Act. On appeal to the High Court,

*Held*, reversing the order of the District Court, that clause 2 of section 31 of Bombay Act VI of 1888 applied to the case and that a sale in execution of a decree was such an alienation as came within the terms of the section and required the previous sanction of the Governor in Council. The Court, however, directed the District Judge to give the plaintiffs a reasonable time for the production of the sanction, and ordered that in case they produced it, the order for sale should be affirmed, otherwise the plaintiff's application for sale should be dismissed.

*Nagar Pragji* v. *Jivabhai*, I.L.R., 19 Bom., 80, and *Doshi Fulchand* v. *Malek Dajiraj*, I. L. R., 20 Bom., 565, referred to and explained.

APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad.

On 4th October 1883, one Pathabhar, a talukdar of Dhandhuka, mortgaged his talukdari estate (by *san* mortgage) to the plaintiff for Rs. 7,500.

On the 25th March 1889, Bombay Act VI of 1888 (the Gujarat Talukdars' Act) came into force. That Act contains the following provision :—

"Section 31, clause (2).—No alienation of a talukdar's estate, or of any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the talukdar."

In 1893 the plaintiff brought this suit to recover Rs. 5,000, being the amount of instalments due under the mortgage together with interest up to date of suit, by sale of the mortgaged property.

* Appeal No. 42 of 1897.

The District Judge of Ahmedabad, who tried the case, held that under the above section he could not pass any decree against the mortgaged property, as it was a talukdari estate. He, therefore, passed a decree on 3rd February 1894, directing the amount [886] claimed to be recovered from the private property of the talukdar other than the property mortgaged.

In appeal, the High Court in October 1895, following the ruling in *Doshi Fulchand* v. *Malek Dajiraj*, amended the decree of the District Judge by directing that if the judgment-debtors failed to pay the decretal amount within six months from the date of the decree, the decree-holder might apply for an order absolute for sale of the mortgaged property, P. J., 1895, p. 428.

The judgment-debtors having made default, the decree-holder presented a darkhast (No. 48 of 1896) stating that Rs. 11,566-13-1 were due to him under the decree and praying for the sale of the mortgaged property and for payment of that amount out of the proceeds.

The District Judge raised the following issue:—

"Can the estate of a talukdar, having regard to the provisions of section 31 of Bombay Act VI of 1888, be sold in execution of a decree obtained subsequently to that Act coming into force, in respect of an incumbrance created on the estate prior to the date of that Act coming into force, without the sanction of the Governor in Council."

The District Judge found this issue in the affirmative, and directed the mortgaged property to be sold in execution of the decree.

Against this decision the judgment-debtors appealed to the High Court.

*Lang*, Advocate-General, (with Rao Bahadur *Vasudev J. Kirtikar*) for the Appellants.

*N. V. Gokhale*, for the Respondents.

The following authorities were referred to in argument:—*Kalian* v. *Pathubhai*, I. L. R., 17 Bom., 289; *Nagar Pragji* v. *Jivabhai*, I. L. R., 19 Bom., 80; *Doshi Fulchand* v. *Malek Dajiraj*, I. L. R., 20 Bom., 565; *Shah Kalidas* v. *Chudasama Nadhabhai*, P. J., 1895, p. 428.

**Ranade, J.**:—There is no doubt an apparent conflict between the ruling in *Nagar Pragji* v. *Jivabhai*, I. L. R., 19 Bom., 80, and the remark made in [887] the judgment in *Doshi Fulchand* v. *Malek Dajiraj*, I. L. R., 20 Bom., 565, in which a doubt is expressed as to the correctness of the extension given in *Nagar* v. *Jivabhai* to the principle laid down in *Kalian* v. *Pathubhai*, I. L. R., 17 Bom., 289. In this last case, it was ruled that when the incumbrancer had obtained a decree for the sale of mortgaged property prior to 25th March 1889, on which day Bombay Act VI of 1888 came into force, the prohibition under clause 2 of section 31 of that Act did not apply, and the decree was capable of execution as before the Act. The facts are not fully reported in *Nagar Pragji* v. *Jivabhai*, but as the decree in that case was passed in August 1889, within a few months after the Act came into force, the suit was presumably instituted before the prohibition became operative. This circumstance assimilates the case to the class of cases referred to in *Kalian* v. *Pathubhai*.

There is no particular reason to distinguish cases in which a decree has been obtained from those in which proceedings had been presumably instituted before the Act came into force. In *Doolubdass* v. *Ramloll*, 5 Moore I. A., 109, their Lordships of the Privy Council had to consider how far retrospective effect could be given to the provisions of an Act of 1848, which declared that "all agreements by way of wager shall be null and void," and it was held that this prohibition did not affect the validity of existing contracts, at all events not those contracts on which actions had already been brought before the new Act came into force. The test suggested in *Moon* v. *Durden*, 2 Exch. R., 22, which is

a ruling on the English Act against wagers, *viz.*, the use of the word 'shall' in that Act, applies equally to section 31 of Act VI of 1888. The principles of the construction of statutes in this connection were very clearly stated in *G. Lee Morris* v. *Sambamurthi*, 6 Mad. H. C Rep., 122, where it was observed that the general principle is that rights already acquired shall not be affected by the retrospection of a new Act, and that the law regulating the acquisition of rights is the law as it stood when the facts out of which the right springs occurred. Of course, this is only a presumption, and if the intention to give retrospective effect can be clearly gathered from the provisions [888] of the new Act, such intention must prevail for reasons such as those referred to in *Shivram* v. *Kondiba*, I. L. R., 8 Bom., 340. These principles appear to me to cover the decision in *Nagar Pragji* v. *Jivabhai*, I. L. R., 19 Bom., 80, and as one of the Judges who decided that case, I see no reason to think that the extension thereby given to the principle of the ruling in *Kalian* v. *Pathubhai*, I. L. R., 17 Bom., 289, was not correct. It was on this account that the same Judges who decided *Nagar* v. *Jivabhai*, when they were called upon to decide the case reported in *Shah Kalidas* v. *Chudasama Nadhabhai*, P. J. for 1895, p. 428, followed the more cautious procedure suggested in *Doshi Fulchand* v. *Malek Dajiraj*, I. L. R., 20 Bom., 565. In *Shah Kalidas* v. *Chudasama Nadhabhai* as the incumbrance was of a date prior to the Act, but the suit was instituted long after the Act came into force, a decree was passed for the amount due, but its enforcement by sale of the property was made subject to the provisions of section 89 of the Transfer of Property Act, which would, it was observed, make it possible for the creditor to obtain the sanction of Government before the sale actually took place. This direction was in accordance with the course suggested in *Doshi Fulchand* v. *Malek Dajiraj*, I. L. R., 20 Bom., 565. It will be thus seen that there is really no conflict between the several rulings of this Court noted above.

I would follow the course laid down in *Shah Kalidas* v. *Chudasama Nadhabhai*, P. J. for 1895, p. 428, in the present case, and vary the order of the District Judge by directing that time may be allowed to the decree-holder to produce the sanction required by section 31, clause 2, and only after he produces such sanction steps should be taken to execute the decree.

**Parsons, J.** :—As my learned colleague distinguishes the case of *Nagar Pragji* v. *Jivabhai*, I. L. R., 19 Bom., 80, from the case of *Doshi Fulchand* v. *Malek Dajiraj*, I. L. R., 20 Bom., 565, on the ground that in the former the suit had been instituted prior to the coming into force of the Gujarat Talukdars' Act, 1888, the necessity to refer this case to a Full Bench pointed out in the latter decision does not exist. In this case, of which a prior stage is reported in *Shah Kalidas* v. *Chuda*-[889]*sama Nadhabhai*, P. J., 1895, p. 428, the Act came into force long before the suit was filed and, therefore, under section 31 (2) there can be no alienation of the estate or any portion thereof without the previous sanction of the Governor in Council. A sale in execution of a decree is such an alienation as comes within the terms of this section (see *Kalian* v. *Pathubhai*, I. L. R., 17 Bom., 289).

We must, therefore, reverse the order of the District Judge and direct that he give the plaintiffs such time as shall to him seem reasonable for the production, by them, of the sanction of the Governor in Council; in case they produce the same, he can then affirm his present order, otherwise he must dismiss their darkhast. We leave him to dispose of the costs incurred throughout.

*Order reversed.*

NOTES.

[See also (1909) 11 Bom. L.R., 1372 as regards retrospectivity.]

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[22 Bom. 889]

## CRIMINAL REVISION.

*The 26th August, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Motiram.*

*Criminal Procedure Code (Act X of 1882), Sec. 345—Compounding offences—Mischief—Mischief done to the private property of a village Mahar.*

The accused was charged with mischief for causing damage to crops which were the private property of a village Mahar. The Magistrate refused to allow the offence to be compounded, on the ground that the damage was done to a village Mahar and, therefore, could not be treated as damage affecting only a private person,, as Mahars had duties to perform in connection with the village.

*Held* that the offence was compoundable under section 345 of the Code of Criminal Procedure (Act X of 1882), as the damage was caused to a private person and not to the public. The fact that the complainant was a village Mahar would not make his personal property the property of the public, or even of the Mahar community generally.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

The complainant was a vatandar Mahar of the village of Gartad in Khandesh.

[890] The accused was the revenue patel of the village. He was charged with causing damage to the complainant's property by rooting up the hedge of his threshing floor, and letting in cattle, which consumed a portion of the crops.

At the hearing of the case before the Second Class Magistrate a *rajinama* was filed, expressing the willingness of the parties to compound the case.

The Magistrate refused to allow the offence to be compounded, on the ground that the damage was done to a village Mahar with a view to driving him out of the village, and, as such, could hardly be treated as affecting only a private person, as Mahars had duties to perform in connection with the village.

The Magistrate convicted the accused of mischief under section 427 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for one month and pay a fine of Rs. 50.

This conviction and sentence was confirmed, on appeal, by the Magistrate of the First Class, Khandesh.

The accused thereupon applied to the High Court under its revisional jurisdiction to set aside the conviction and sentence.

*G. K. Deshmukh*, for Accused.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

**Parsons, J.**:—The Magistrate refused to allow the offence to be compounded, because "the damage was done to a village Mahar and, therefore, could

* Criminal Application for Revision, No. 194 of 1897.

not be treated as damage affecting only a private person, as Mahars have duties to perform in connection with the village." Section 345 of the Criminal Procedure Code says that "mischief, when the only loss or damage caused is loss or damage to a private person, may be compounded by the person to whom the loss or damage was caused." These words evidently refer to the definition of mischief in section 425 of the Penal Code, under which the loss or damage may be caused either to the public or to any person. They thus declare that when the loss or damage is caused to the public, the offence cannot be compounded, but that it can when the loss or damage is caused to any person. In the present case, the damage was caused to harvested [891] crops, which were the private property of the complainant. It was, therefore, a loss or damage caused to a private person and not to the public. The fact that the complainant was a village Mahar would not make his personal property the property of the public or even of the Mahar community generally. The Magistrate ought, therefore, to have entertained the application of the complainant to compound the case. We reverse the conviction and sentence, and remand the case to the trying Magistrate with instructions that he should admit the application, and, if he finds that the complainant is desirous of compounding the offence, act accordingly.

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[22 Bom. 891]

## APPELLATE CIVIL.

*The 7th September, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Hiralal and another............(Original Plaintiffs) Appellants

*versus*

Bai Asi and another............(Original Defendants) Respondents.*

***Letters Patent, 24 and 25 Vict., C. 104, Cl. 15—Appeal from an order of a single Judge of the High Court in the exercise of the Court's revisional or extraordinary jurisdiction—Appeal.***

No appeal lies under clause 15 of the Letters Patent from an order of a single Judge of the High Court dismissing an application for the exercise of the Court's extraordinary or revisional jurisdiction.

The Letters Patent provide for an appeal only from a judgment passed in the original or appellate jurisdiction of the High Court.

APPEAL under Clause 15 of the Letters Patent, 1865, from an order of Mr. Justice CANDY.

The plaintiffs sued in the Court of Small Cause at Broach to recover Rs. 75 on a bond executed by Bai Asi for herself and as guardian of her minor son Isaji Saleman.

The Court decreed the claim against Bai Asi alone, holding that she had no authority to bind her minor son.

* Appeal No. 69 of 1897 under the Letters Patent

The plaintiffs thereupon applied to the High Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887) for the exercise of its revisional jurisdiction by calling for the record of the case and allowing the claim against the minor also.

[892] The application came on for hearing before Mr. Justice CANDY, who dismissed it.

Against this order of dismissal, plaintiffs preferred an appeal under clause 15 of the Letters Patent.

*K. M. Jhaveri*, for the Appellants.

**Parsons, J.**:—This is an appeal from the order of CANDY, J., dismissing an application for the exercise of this Court's extraordinary jurisdiction by calling for the record of a case from the Small Cause Court of Broach under section 25 of the Provincial Small Cause Courts Act, 1887. The point is whether under clause 15 of the Letters Patent an appeal lies from his order.

That clause gives a right of appeal from the judgment of one Judge of the High Court or of one Judge of any Division Court pursuant of section 13 of the said recited Act. Section 13 of the Act provides for the exercise of the original and appellate jurisdiction vested in the High Court. It does not deal with the revisional or extraordinary jurisdiction which is vested in the Court by section 15 of the Act and by various Acts of the Legislature of this country. If we were to hold that there was an appeal from the order of a single Judge refusing to call for a civil case, we should equally have to hold that there was an appeal from an order calling for a case or calling for a return, or from any other act done in the performance of revisional or extraordinary jurisdiction. It seems to us that the Letters Patent provide for an appeal only from a judgment passed in the original and appellate jurisdiction of this Court. As the order in question does not fall within that description, there is no appeal therefrom. We dismiss the appeal.

**Ranade, J.**:—I concur. This application was made under section 25, Provincial Small Cause Courts Act, and prayed for the exercise of the revisional jurisdiction of this Court. That section by its very wording confers only a discretionary power, and if a Judge of this Court, exercising that discretion, declines to issue a rule *nisi*, I do not think that any order passed by him can be appealed against as a judgment or order passed by a single Judge within the scope of section 15 of the Letters Patent. [893] That section obviously refers, in the first place, to the judgments passed in civil suits in the exercise of the original civil jurisdiction of the Court. It also refers to the orders passed by a single Judge disposing of the original and appellate work of this Court under rules made under section 13 of the Act relating to this Court.

The order passed in this application falls under neither category. It is not a judgment, and it does not come within the scope of the work disposed of by a single Judge in accordance with rules framed under section 13. It is, moreover, as observed above, a discretional jurisdiction, and, therefore, no appeal lies from such an order under paragraph 15 of the Letters Patent. There has been no precedent before where any such appeal was allowed, and we must, therefore, dismiss this appeal.

*Appeal dismissed.*

**NOTES.**

[In (1905) 28 All., 133 this was followed; but it was held in (1914) 89 M.L.J., 12 F.B., (Madras Letters Patent); (1914) 41 Cal., 328 (Calcutta L.P.) that the order of a single Judge made under sec. 115, C.P.C., 1908, was appealable.]

[22 Bom. 893]

# APPELLATE CIVIL.

*The 13th September, 1897.*

PRESENT:

SIR C F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Kantheppa Raddi............(Original Plaintiff) Appellant

*versus*

Sheshappa and another............(Original Defendants) Respondents.*

*Limitation Act (XV of 1877), Sch. II, Art. 139—Landlord and tenant—Lease—Tenant overholding on expiration of lease—Nature of holding—Tenant by sufferance—Adverse possession—Limitation.*

*Semble*—Under article 139† Schedule II, of the Limitation Act (XV of 1877) time begins to run against a landlord when the period of a fixed lease expires, when there is no evidence from which a fresh tenancy can be inferred, and not at some indeterminate date after that period.

Where a tenant holds over after the expiration of his lease without further agreement, such holding over, though by English law styled a tenancy by sufferance, is wrongful. Slight evidence, however, will suffice to change his position into that of a tenant-at-will.

SECOND APPEAL from L. Crump, Assistant Judge of Dharwar.

Suit for possession. This suit was filed in 1893. The defendants pleaded (*inter alia*) that the plaintiff's claim was barred by limitation.

[894] The house in question had originally belonged to the defendants' father Gurlingapa. In 1871 he sold it to one Shivamurtaya, but retained possession as Shivamurtaya's tenant. On 16th February 1873, he passed a rent-note to Shivamurtaya under which he was to hold the property for a year as tenant to Shivamurtaya and then give up possession.

The material part of the rent-note was as follows:—"The house within these boundaries is let to me by you for (my) residence. I have made an agreement of rent Rs. 6 per year. I will remain for one year, pay the rent of Rs. 6, and at the end of one year from this date make over your house to you. To this effect I have duly given this rent-note to you."

It did not appear that Gurlingapa had vacated the house at the end of the year, in accordance with the rent-note. The only fact proved at the hearing with reference to possession was that the defendants (his sons) had been in physical possession of the house for fifteen years prior to suit.

Shivamurtaya, however, in 1890 sold the house to the plaintiff and in 1893, as above stated, the plaintiff brought this suit for possession.

The lower Court held that the possession by the defendants and their father Gurlingapa had been adverse to the plaintiff and his vendor and that the suit was barred by limitation. In his judgment the Judge said:—

"The evidence for the defendants clearly shows that the defendants have been in physical possession of these two houses for some fifteen years.

* * * * * * * * * * * *

"As soon as the year's tenancy elapsed, the possession of the defendants' father was *ipso facto* inconsistent with the subsistence of his landlord's title, as he had agreed to vacate at

* Second Appeal, No. 150 of 1897.

† [Art. 139:—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| By a landlord to recover possession from a tenant. | Twelve years. | When the tenancy is determined.] |

the end of the year; nor is it shown that his tenancy was renewed. This is not a case of mere non-payment of rent, as would have been the case had the lease been continued until within twelve years of the filing of the suit * * * As soon as the year for which the lease was to run terminated, the possession of the defendants' father ceased to be consistent with the ownership of the plaintiff's vendor."

The plaintiff appealed. The question was whether on the expiration of the year 1873, for which the above rent-note was given, the possession became adverse under article 139 of the [895] Limitation Act (XV of 1877), or, as stated in the judgment, whether a tenancy is determined upon the expiration of a lease for a defined period.

*Sitanath G. Ajinkya* for the Appellant (Plaintiff).

*Narayan V. Gokhale* for the Respondents (Defendants).

The following authorities were referred to:—*Gangabai* v. *Kalapa*, I. L. R., 9 Bom., 419; *Rungo Lall* v. *Abdool Guffoor*, I.L.R., 4 Cal., 314; *Adimulam* v. *Pir Ravuthan*, I. L. R., 8 Mad., 424; *Sayaji* v. *Umaji*, 3 Bom. H. C. Rep., 27 (A. C. J.); *Alima* v. *Kutti*, I. L. R., 14 Mad., 96; *Faki Abdulla* v. *Babaji*, I. L. R., 14 Bom., 453; *Dharm Singh* v. *Hur Pershad*, I. L. R., 12 Cal., 38; Woodfall on Landlord and Tenant, p. 715.

**Farran, C. J.**:—This appeal raises a question which, having regard to the state of the authorities, is one of difficulty.

On the 26th August 1871, the father of the defendants by Exhibit 48 sold the two houses in suit and some lands to one Shivamurtaya. On the 13th September 1878, Shivamurtaya mortgaged, and subsequently on the 28th August 1890, sold the whole property to the plaintiff.

The plaintiff filed the present suit in 1893 to eject the defendants from the two houses. As to one house, both the lower Courts rejected the plaintiff's claim as being time-barred, and no question now remains as to that house. As to it we dealt with the arguments of the learned pleader for the appellant without calling upon the other side. As regards, however, the tiled house, it is contended that the plaintiff's claim is not time-barred, in as much as the defendants' father Gurulingapa in 1870 and 1873 passed rent-notes to Shivamurtaya in respect of it. The former document, which was in the same terms as Exhibit 50, we need not further allude to, as it necessarily ceased to have any operation when the later rent-note (Exhibit 50) was executed. This latter bears date the 16th of February 1873, and omitting recitals; runs thus:—"My private tiled house is situate in the village of Kallapur; the boundaries thereof are * * The house within these boundaries is let to me by you for [896] (my) residence. I have made an agreement of rent of Rs. 6 per year. I will remain for one year, pay the rent of Rs. 6, and at the end of one year from this date make over your house to you. To this effect I have duly given this rent-note to you.'

The plaintiff put in evidence a further alleged rent-note said to have been passed to him by the defendants after the plaintiff's purchase in respect of this tiled house as well as of the other house. Both the Lower Courts have regarded it as unproved. The learned pleader for the appellant has contended that we ought to reject that finding and hold that the document is established, because the Judges in the lower Courts have not specifically noted that the stamp upon it purports to have been issued to the plaintiff and the defendants. We are not at liberty thus to set aside a finding of fact, or to assume that the lower Courts did not consider this circumstance. If the plaintiff intended, when he purchased the houses, to prepare and put forward a false rent-note as having been passed to him by the defendants, he would doubtless represent to the stamp officer that the defendants joined him in purchasing the stamp. The argument, if we were at liberty to consider it, is of little value.

Except that the evidence shows that the defendants have been in physical occupation of the two houses for some fifteen years, and that the above rent-notes were passed by the defendants' father to Shivamurtayya there appears to have been no further fact as to the possession of the house proved in the case. The Subordinate Judge held the suit in respect of the tiled house to be in time. The Assistant Judge held the possession of it by the defendants' father and the defendants to have been adverse, and dismissed the suit. "As soon as the year for which the lease was to run terminated, the possession of the defendants' father ceased" (he says) "to be consistent with the ownership of the plaintiff's vendor." We have to consider whether that view is correct.

Article 139 of the Limitation Act prescribes the period of twelve years "by a landlord to recover possession from a tenant" from the time "when the tenancy is determined." The question is whether the tenancy is determined upon the expiration of a lease for a defined period. The Madras High Court in *Admu-*[897]*lam* v. *Pir Ravuthan*, I.L.R., 8 Mad., 425, has held that a lessee holding over after the expiration of his lease is a tenant on sufferance and that such tenancy continues until it is determined by some act upon either side, and that it lies upon the person resisting the land-lord's claim for possession on the ground of limitation to show that the tenancy is determined. The cases of *Dadoba* v. *Krishna*, I. L. R., 7 Bom., 34, and *Tatia* v. *Sadashiv*, I. L. R., 7 Bom., 40, do not shed any light upon this question, as in the former case the defendant held possession under an indeterminate agreement and the latter was the case of a yearly tenant. The case of *Ramchandra* v. *Sadashiv*, I. L. R., 11 Bom., 422, was that of one mortgagor redeeming for the common benefit, it is presumed, of himself and his co-mortgagors. That also does not assist us. *Gangabai* v. *Kalapa*, I. L. R., 9 Bom., 419, was again the case of a yearly lease. There appears to be no Bombay decision upon the construction of article 139 as applied to a lease for a fixed period. All that the Bombay cases decide is that non-payment of rent by a tenant does not of itself extinguish the relation between him and his landlord. In *Rungo Lall* v. *Abdool Guffoor*, I. L. R., 4 Cal., 314, the tenancy was an annual one and the law as to non-payment of rent was laid down in it in the same terms as in the Bombay rulings. The passage at p. 417 of the judgment in *Modho* v. *Tekait Ram Chunder*, I. L. R., 9 Cal., 411,—beginning "We think it is clear"—is rather opposed to the Madras decision we have referred to, as it treats for the purpose of article 139 the expiration of a lease for a fixed time and the termination of tenancy as synonymous.

We are inclined to think that the termination of the period of a fixed lease, *where nothing further occurs*, is the time from which limitation begins to run against the landlord within the meaning of article 139 of the Limitation Act. The law laid down in section 111 of the Transfer of Property Act is this: "A lease of immoveable property determines by efflux of the time limited thereby." To constitute the creation of a fresh relation of landlord and tenant between the parties, section 116 assumes that there must be an assent by the landlord to the tenants continuing in possession evidenced by his acceptance of rent or in some [898] other way. It must be borne in mind that under English law the possession of a tenant holding over after the expiration of a lease for a fixed period without the assent of his landlord, though such holding over was styled a "tenancy by sufferance" was wrongful. "A tenant by sufferance is he who enters by lawful demise or title and afterwards wrongfully continues in possession * * so any one who continues in possession after a particular estate is ended without agreement." Com. Dig. Tit Estates—Tenant by sufferance. Similarly on the determination of a tenancy by will a tenancy by

sufferance arises—*Barry* v. *Goodman*, 2 M. and W., 768. The difference between a tenant at will and a tenant on sufferance is this: the former is always in by right, but the latter holds over by wrong—Woodfall's Landlord and Tenant, p. 242, Ed. 1889. A tenant by sufferance is liable to be sued in ejectment without notice or demand—*Barry* v. *Goodman* (*supra*). There is no substantial difference between his position and that of a trespasser as he is sometimes so styled: see *Roe* v. *Ward*, 1 H. Bl., 96. Slight evidence will, as the above case of *Barry* v. *Goodman* shows, suffice to change the position of a tenant by sufferance into that of a tenant at will, as receipt of rent will change it into an annual tenancy; but in the absence of such evidence the original tenancy having determined, the tenant holding over occupies the position of a trespasser. Hence we think that under article 139 of the Limitation Act time begins to run against a landlord when the period of a fixed lease expires, when there is no evidence from which a fresh tenancy can be inferred, and not at some indeterminate date after that period. This is the view taken by Mr. Starling in his useful edition of the Limitation Act. See page 281, edition of 1895. It is not necessary for us, however, actually to decide the point in this appeal, as the highest at which the appellant's case was rested was that the defendants' father became a tenant by sufferance after the expiration of the lease of 1873. This relation between the parties, even according to the Madras decision, ceased upon his death, and the defendants since then have been holding adversely to the plaintiff. We confirm the decree with costs.

*Decree confirmed.*

NOTES.

[The tenant's possession does not become adverse *until* the expiration of the term, (1902) 25 Mad., 507; but *from* that time, limitation begins to run, notwithstanding that the holding over may be described as a tenancy by sufferance, unless there is a new lease, either express or implied, relating thereto:—(1900) 24 Bom., 504; (1903) 5 Bom. L.R, 956; (1907) 31 Mad. 163; (19 9) 31 All. 514; (1907) 7 C.L.J. 615; (1910) 37 Cal. 674; (1909) 6 N.L.R. 95.]

## [899] ORIGINAL CIVIL.

*The 14th July, 1898.*

PRESENT:

MR. JUSTICE TYABJI.

Perosha Cursetji Parakh............Plaintiff

*versus*

Manekji Dossabhoy Watcha........ Defendant.*

*Contract—Wagering contract—Contract Act (IX of 1872), Sec. 30—Bombay Act III of 1865—Broker—Suit by, for differences paid in respect of contracts made by him for defendant.*

Act III of 1865 (Bombay) is still in force and has not been repealed by the Contract Act (IX of 1872).

*Dayabhai* v. *Lakhmichand*, I. L. R., 9 Bom., 358, followed.

As between the original parties a promissory note which has for its consideration a debt due on a wagering contract is void and, therefore, not binding in the hands of the original payee.

*Oulds* v. *Harrison*, 10 Exch. 572, distinguished.

In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences. In order to ascertain the real intentions of

* Suit No. 51 of 1898.

the parties the Court must look at all the surrounding circumstances and will even go behind a written provision of the contract to judge for itself whether such provision was inserted merely for the purpose of concealing the real nature of the transaction.

*Tod* v. *Lakhmidas*, I. L. R., 16 Bom., 441; *Eshoor* v. *Venkatasubba*, I. L. R., 17 Mad., 480, and *Universal Stock Exchange* v. *Strachan*, (1896) Ap. Ca., 166, referred to.

The defendant employed the plaintiff from time to time as a broker to purchase Government paper and shares of the Manekji Petit Spinning and Weaving Company. The plaintiff did so to the extent of many lakhs of rupees. No delivery was given or taken, but the differences only between the contract price and the price at the date of settlement (the *Vaida* day in each month) were paid or received by the defendant. The plaintiff now sued the defendant on two promissory notes given to the plaintiff by the defendant in respect of differences due by him in respect of the contracts thus made on his behalf. The defendant pleaded that he was not liable, the contracts being wagering contracts. It appeared from the evidence that the practice in the bazar, (which was followed in this case), was for brokers to enter into such contracts in their own name and not to disclose the principals. The brokers became liable to give or take delivery. The defendant stated that he did not know the persons to whom the plaintiff sold or from whom he purchased.

[900] *Held* (1) on the evidence, that the defendant authorized the plaintiff as his broker to contract on his behalf, but in the plaintiff's own name, on the understanding that the defendant would indemnify the plaintiff and pay him brokerage in respect of the transactions entered into by him on behalf or for benefit of defendant. Accordingly the plaintiff did enter into contracts in his own name with third parties. The defendant was not directly a party to them, nor did his name appear anywhere in the contracts themselves.

(2) That the plaintiff was entitled to recover from the defendant the losses which he paid to third parties in respect of the contracts made by the plaintiff on the defendant's behalf and that such losses were a valid consideration *pro tanto* for the notes sued upon No doubt, so far as the defendant was concerned, all the contracts were merely wagering or gambling transactions, but there was no evidence to show that, so far as the third parties were concerned, they were otherwise than genuine. The plaintiff was not, as between himself and the defendant, the principal in the transactions. He was merely the broker with a personal liability to the third parties. There was nothing to show that as between himself and the third parties the contracts were not perfectly genuine. The non-delivery and payment of differences on hand was a matter of subsequent arrangement. If he was liable to be called upon to receive or make actual delivery, then, in the absence of any express agreement to the contrary, a similar liability rested on the defendant himself, whatever might have been the defendant's own intentions. As the contracts between the plaintiff and the third parties were not void, so the contracts between the defendant and the plaintiff to indemnify the plaintiff in respect of these contracts were also valid.

The mere fact that the plaintiff, knowing the defendant's position and means, must have inferred that he did not mean or intend to perform the contracts in specie, was not, *per se*, without more, sufficient to render the contracts invalid and not binding on the defendant. The inference of the plaintiff would not be, *per se*, a binding agreement.

SUIT to recover from the defendant the sum of Rs. 6,852-6-1 due on two promissory notes payable on demand, one dated 21st December 1897, for Rs. 5,788, and the other dated 30th December 1897, for Rs. 1,000. The residue of the sum claimed, *viz*., Rs. 64-6-1, was for interest.

The suit was filed as a summary suit under Chapter XXXIX of the Civil Procedure Code (Act XIV of 1882). The defendant filed an affidavit setting forth his defence, and obtained leave to defend. His affidavit was taken as a written statement.

His defence was that the plaintiff acted as his broker in buying and selling Government paper and shares of the Manekji Petit Spinning and Weaving Company; that the contracts made on his [901] behalf were mere wagering

contracts, and that it was never intended that either the Government paper or the shares should be actually delivered, but merely that the differences in price should be paid or received, in fact, that there was an express agreement to that effect between them, and that the notes sued on were given by him to the plaintiff for money due in respect of such differences. He stated that the aggregate amount of dealings which resulted in the debt sued for, amounted to over nine lakhs of rupees. He pleaded further that there was no consideration for the promissory notes.

The issues raised at the hearing were the following:—

(1) Whether there was any valid consideration for the two promissory notes?

(2) Whether the promissory note for Rs. 5,788 was passed to the plaintiff for the amount of differences claimed by the plaintiff in respect of wagering contracts and interest?

(3) Whether the note for Rs. 1,000 was passed to the plaintiff in substitution of another note for the same amount dated 21st December 1897?

(4) Whether the note of 21st December 1897, was passed by the defendant for the amount of differences claimed by the plaintiff in respect of wagering contracts and interest?

(5) Whether the plaintiff is entitled to recover the amount claimed or any part thereof?

*Rivett-Carnac* (with *Lang*, Advocate-General), for Plaintiff:—He cited section 30 of Contract Act (IX of 1872); Bombay Act III of 1865; *Dayabhai* v. *Lakhmichand*, I. L. R., 9 Bom., 358 at p. 362; *Oulds* v *Harrison*, 10 Exch., 572; *Tod* v. *Lakhmidas*, I. L. R., 16 Bom., 441; *Thacker* v. *Hardy*, 4 Q. B. D., 685.

*Lowndes* (with *Macpherson*), for Defendant:—He cited *Trikam* v. *Lala Amirchand*, 8 Bom. H. C. Rep., 131 (A. C. J.); *Eshoor* v. *Venkatasubba Rau*, I. L. R., 17 Mad., 480: I. L. R., 18 Mad., 306; *Anupchand* v. *Champsi Ugerchand*, I. L. R., 12 Bom., 585; *Tatam* v. *Reeve*, (1893) 1 Q. B., 44; *Universal Stock Exchange* v. *Strachan*, (1896) Ap. Ca., 166.

**Tyabji, J.** :—This suit was originally filed as a summary suit to recover the sums of Rs. 5,788 and Rs. 1,000 and interest upon two promissory notes dated, respectively, the 21st and 30th [902] December 1897. Leave was, however, granted to the defendant to defend the suit, which was accordingly heard before me as an ordinary long cause. As the points involved were of some importance, not only to the parties themselves, but to the public in general, I thought it right to take time to consider my judgment.

The principal defence is that the two notes in question (Exhibits A and B) were given for wagering contracts, and are, therefore, void under section 30 of the Indian Contract Act (IX of 1872) and under Bombay Act III of 1865. The *onus* lay clearly upon the defendant, and evidence was first led on his behalf.

A preliminary point was taken by Mr. Rivett-Carnac on behalf of the plaintiff that Bombay Act III of 1865 was no longer in force and must be taken to have been repealed by implication, in as much as it forms part of Act XXI of 1848, which is expressly repealed by the Indian Contract Act. This contention, however, seems to me to be untenable, as the contrary has been expressly ruled by BIRDWOOD and WEDDERBURN, JJ., in *Dayabhai* v. *Lakhmichand*, I. L. R., 9 Bom., 362.

It was also contended for the plaintiff, on the authority of *Oulds* v. *Harrison*, 10 Ex., 572, that the promissory notes having been admittedly passed by the defendant, the Court ought not to go behind them and enquire whether the consideration for the notes was the loss sustained by the defendants in respect of wagering contracts. That was, however, a suit by the endorsee and not by the original holder of the bill of exchange, and it has been expressly decided by WESTROPP, C. J., and GIBBS, J., in *Trikam* v. *Lula Amirchand*, 8 Bom. H. C.

Rep., 131, that as between the original parties, a promissory note which has for its consideration a debt due on a wagering contract is void and, therefore, not binding in the hands of the original payee.

The main question, therefore, is whether the consideration for the two notes in question was the loss sustained by the defendants in respect of wagering contracts. Now I take it to be well [903] established by a long series of authoritative decisions that in order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences—*Tod* v. *Lakhmidas*, I. L. R., 16 Bom., 441; *Eshoor* v. *Venkatasubba*, I. L. R., 17 Mad., 480: I. L. R., 18 Mad., 306. In order to ascertain the real intentions of the parties the Court must look at all the surrounding circumstances and would even go behind a written provision of the contract to judge for itself whether such provision was inserted merely for the purpose of concealing the real nature of the transaction—*Universal Stock Exchange, Limited* v. *Strachan*, (1896) Ap. Ca., 166.

Now the facts of the present case may shortly be summed up as follows:—The defendant is a comparatively young man who inherited property worth about Rs. 3,000 on the death of his father in 1889. He seems to have become acquainted with the plaintiff, who is a confirmed stock broker, in 1893-94 according to the plaintiff and in 1895 according to the defendant. It is proved to my satisfaction that he sold some miscellaneous shares through the plaintiff in September and October 1894. In 1895, 1896 and 1897, however, the defendant launched into an enormous number of speculative contracts both in Government paper and in shares of the Manekji Petit Spinning and Weaving Company, Limited, to the extent of many lakhs of rupees. The magnitude of these transactions, in all of which the plaintiff was the broker, and the fact that the defendant did not in any single case take or give delivery of a single scrap of Government paper, or of a single share, coupled with the fact that no written demand was ever made upon the defendant for the performance of a single one of his numerous contracts, but that on the contrary "differences only" were received or paid, proves to my mind conclusively that, as far as the defendant is concerned, he had no intention of performing a single contract which was entered into through the plaintiff. So far as the defendant is concerned, therefore all these contracts were merely wagering or gambling transactions.

The next question is, whether the other party to the contracts also entered into such contracts with no intention of receiving [904] or giving delivery, but simply with the intention of receiving or paying differences;—in other words, was their intention the same or different from that of the defendant? Now in this connection it is material, in the first place, to ascertain exactly who "the other party" to the contracts was so far as the defendant is concerned. In one sense it was the plaintiff, in another sense the parties with whom the plaintiff, acting as broker for the defendant, made the contracts. The position of the plaintiff in this case was peculiar. He is a stock broker. He acted as such for the defendant and received his brokerage in respect of every contract made by him for the defendant. The course of dealing between the parties is described by the defendant as follows. He says:

"After I commenced to deal in Government paper through plaintiff, whenever I wanted Government paper I used to instruct plaintiff to go and buy at the market rate. Sometimes plaintiff used to communicate the result through Ardeshar Hormasji Major. Sometimes by letter, and sometimes by telephone, that he had bought. Afterwards I made a note in my memo. book according to what plaintiff told me. When I wanted to sell the notes purchased through plaintiff, I used to tell plaintiff directly or through Ardeshar. I did not give him the market rate, but used to tell him to sell at the bazar rates. Plaintiff used to inform me,

either by letter or through Ardeshar, that he had sold. This was always done before the *Vaida* day. I did not know to whom the plaintiff sold the notes or from whom he purchased them. I simply knew the plaintiff and I had to pay to or receive from him. Whether he had to pay to or receive from others, I cannot say. The course of dealing through plaintiff in Manekji Petit shares was the same."

The account given by the plaintiff is substantially the same. He says:—

"It is true that defendant gave me orders to purchase at the bazar rate or at the rate which he liked. I had entered into contracts in the bazar to purchase, and after entering into the transactions I informed defendant that I had done so. In the case of sales, a similar practice was followed. This was the way the business was conducted both in the case of Government paper and Manekji Petit shares. When I bought Government papers for the defendant I entered into a contract in my own name in the bazar. Such contracts were entered into with the broker of the party selling."

The broker Jetha Indrajit describes the general practice in the bazar as follows:—

[905] "The practice is when the broker gets an order to buy or sell Government paper he enters into the contract in his own name. By so doing he becomes liable to take or give delivery. The broker looks to his customer to guarantee him against such liability. It is the practice in the market not to disclose the names of the principals. The same practice is followed in the case of Manekji Petit and other shares."

Now in this case no less than twenty-eight written contracts for Government paper (Exhibit D) and no less than seventy-eight contracts for Manekji Petit shares were produced. All these contracts are with the plaintiff on the one hand and with some other party on the other hand. The defendant is not directly a party to them, nor does his name appear anywhere in the contracts themselves. Having regard, therefore, to the evidence before me and to the general practice in the bazar and the course of dealing adopted by the parties to the suit, I must hold that the defendant authorized the plaintiff, as the defendant's broker, to make the contracts in the bazar on defendant's behalf, but in plaintiff's own name, on the understanding that the defendant would indemnify the plaintiff and would pay him brokerage in respect of the transactions entered into by the plaintiff on behalf or for the benefit of the defendant.

Now there is no evidence before me to show that the transactions thus entered into by the plaintiff on behalf of the defendant were otherwise than genuine, so far as the third parties were concerned. There is nothing from which I can gather that such third parties did not, at the time they entered into the contracts, intend to receive or give delivery. The contracts on the face of them are regular, formal contracts in the usual form for the sale or purchase of Government paper and shares. They are made with different parties at different times and for different amounts. Under these circumstances if the contest had been between the plaintiff and the defendant on the one hand and these third parties on the other hand, I could not, upon the evidence before me, hold that the transactions were gambling contracts so far as these third parties are concerned. They knew nothing about the defendant or his means or his intentions. They merely made the contracts in the ordinary course of business through a recognised broker and they were engaged to enforce them. If, therefore, this had been a suit by those third parties against the plaintiff [906] or against the defendant, a decree must necessarily have gone in their favour upon the principles so lucidly explained by our present Chief Justice in *Tod* v. *Lakhmidas*, I. L. R., 16 Bom. 441.

Does it, then, make a difference that this suit is filed not by the third parties but by the plaintiff for the losses in respect of those contracts? I have already said that, in my opinion, the plaintiff was not, as between himself and

the defendant, the principal in the transactions. He was merely the broker with a personal liability to the third parties. There is nothing to show that, as between himself and the third parties, the contracts were not perfectly genuine. It is true that he admits that except in one or two cases he never made or received actual deliveries under the contracts and that he almost always settled them by paying the differences. But that was a matter for subsequent arrangement. If, then, he was liable to be called upon to receive or make actual delivery, it seems to me that, in the absence of any express agreement to the contrary, a similar liability rested on the defendant himself, whatever might have been the defendant's own intentions. I must hold, therefore, that as the contracts between the plaintiff and the third parties were not void, so the contract between the defendant and the plaintiff to indemnify the plaintiff in respect of these contracts must also be held to be valid.

But it is alleged by the defendant that there was an express arrangement between him and the plaintiff that the plaintiff should only enter into *sutta* contracts for the defendant, and that the defendant should only be called upon to pay or receive differences to or for the plaintiff, whatever might be the nature of the plaintiff's own liability to third parties. I do not think that this express agreement has been established by the defendant. It is true that there is nothing inherently improbable in it, and that it is not inconsistent with the main facts proved in the case. It is, however, an agreement which can be easily invented and set up for the purpose of getting rid of one's legal liability. Moreover, the evidence in support of it is not only not satisfactory, but inconsistent. The defendant swears that that agreement was made at his house near the Grant Road Station in 1895. His witness, Ardeshar Framji Major, however, contradicts him and [907] swears that the agreement was made in the "Friendly Union Club" in Church Gate Street, Fort. This seems to me such a glaring discrepancy as to throw doubt upon the defendant's story. Moreover, the defendant swears that he did not know the plaintiff before 1895 at all, and that he was introduced to him for the first time in that year by Ardeshar when the agreement was made; and he denied all knowledge of having sold shares through the plaintiff in 1893-94. I have, however, no hesitation in accepting the plaintiff's evidence on this point and I think it proved that he knew the plaintiff before 1895 and that the defendant did at least sell through the plaintiff in October 1894, the two shares in David Mills Company, Limited, as proved by the transfers (Exhibit P). I, therefore, look upon the express agreement of 1895 as a myth. No other express agreement at any other time or place is set up.

It is true, as I have already said before, that, so far as the defendant is personally concerned, he entered into these contracts as merely gambling transactions. It is more than probable that the plaintiff could guess the defendant's real intentions. He must have known the defendant's position and means. He could have had no difficulty in thinking or inferring that the defendant did not mean or intend to perform the contracts *in specie*. His accounts and his course of dealing with the defendant are consistent with the supposition, on plaintiff's part, that the defendant only meant to pay or receive differences. But I cannot hold that such supposition or inference on the plaintiff's part is, *per se*, without more, equal to a binding agreement. The consent on his part was wanting. It stated both to pay and receive the differences. The plaintiff acquiesced in settling the contracts in that way. But there is nothing to show that he never possessed the right to call for the actual performance of the contracts if at any time he chose to do so. In other words, it has not been shown that these speculative contracts were also wagering contracts.

I have accordingly come to the conclusion that the plaintiff is entitled to recover from the defendant the losses which he paid to third parties in respect of the contracts made by the plaintiff on the defendant's behalf and that such losses form a valid consideration *pro tanto* for the notes now sued upon.

**[908]** It is not necessary for me to discuss, in detail, the evidence relating to the adjustment of the accounts between the parties and the execution by the defendant of the two original notes for Rs. 5,788 (Exhibit A) and Rs. 1,000 (Exhibit 4). I accept, in the main, the evidence of the plaintiff and his witness Nowroji Darasha Reporter upon this point. I think that the loans of Rs. 300 plus 150 plus 40 and interest at 9 annas per cent. per mensem formed a portion of the consideration for the two notes. The difference on this point is far more consistent with the actual facts and figures than the evidence of the defendant himself. As to the execution of the substituted note (Exhibit B), it is immaterial to inquire into the motives of the plaintiff for taking it in lieu of the original note (Exhibit 4). It may be that he thought, as the defendant suggests, that it would be safer for him to substitute a different date so as to dissociate it from the adjustment of the 21st December 1897, in respect of the contracts in question. As, however, in my opinion, the original note (Exhibit 4) was not void for want of a valid consideration, so equally the note now sued upon (Exhibit B), which was taken in substitution for it, is also valid.

I accordingly hold that there was full and valid consideration for both the notes, and that the plaintiff is entitled to recover the amounts due upon them.

I now proceed to record my findings upon the issues :—

(1) In the affirmative and for the plaintiff.

(2) In the negative and for the plaintiff.

(3) In the affirmative.

(4) In the negative and for the plaintiff.

(5) In the affirmative; and I pass a decree for the plaintiff for Rs. 6,788 with interest at 8 per cent. per annum upon Rs. 5,788 from the 21st December 1897, and upon Rs. 1,000 from the 30th December 1897, till this day and costs. Further interest on judgment at six per cent. per annum till payment.

Attorneys for the Plaintiff :—Messrs. *Jehangir and Seervai*.

Attorneys for the Defendant :—Messrs. *Ardesir, Hormasji and Dinsha*.

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**NOTES.**

[See likewise the decisions in 23 (1901) 23 All., 160; (1911) 33 All., 519 (commission). As regards the effect of the Bombay Act, 1865, see also (1903) 5 Bom. L. R., 503; 769; (189) 24 Bom., 227; (1899) 1 Bom. L. R., 262.]

## [909] ORIGINAL CIVIL.

*The 12th July, 1898.*
PRESENT:
MR. JUSTICE STRACHEY.

Hirjibhai Cursetji Bhandupwala............Plaintiff
*versus*
Barjorji Sorabji Ashburner and others............Defendants.*

*Parsis—Intestate succession among Parsis—Parsi Succession Act (XXI of 1865), Sec. 7, Sch. II, Cl. 2—Construction—Next of kin.*

One Jerbai, a Parsi widow, died intestate and without issue, her father, mother, three brothers and two sisters having predeceased her. Two of her brothers and one sister had left children. Some of these children had also predeceased her, leaving children (grand-nephews and nieces of Jerbai). Two of this last mentioned class had also predeceased her, leaving children (great-grand-nephews and nieces of Jerbai).

*Held*, that Jerbai's property should, in the first instance, be divided into three shares, *i.e.*, one for each of the two predeceased brothers who left children, and one for the predeceased sister who left a child. Each brother's share to be two-fifths and the sister's one-fifth. These shares to be sub-divided among the descendants of the two brothers and the sister respectively, no descendant being entitled to share concurrently with his or her ancestor and, on each division and sub-division, each male taking double the share of each female standing in the same degree of propinquity.

In article 2 of the second schedule of the Parsi Succession Act (XXI of 1865) the gift to lineal descendants is substitutional in the sense that they take nothing if the head of their branch of the family is living, whereas if he is dead, they stand in his place and take the share which he would have taken. In distributing an estate, therefore, "among brothers and sisters and the lineal descendants of such of them as have predeceased the intestate," the primary division must be *per stirpes*. If there are surviving brothers and lineal descendants of a predeceased brother, then each surviving brother will take equal shares with the lineal descendants collectively. If all the brothers are dead, then the share which each would have taken, had he survived, will be taken by his lineal descendants. If in either case the predeceased was a sister, her lineal descendants will take her half-share only.

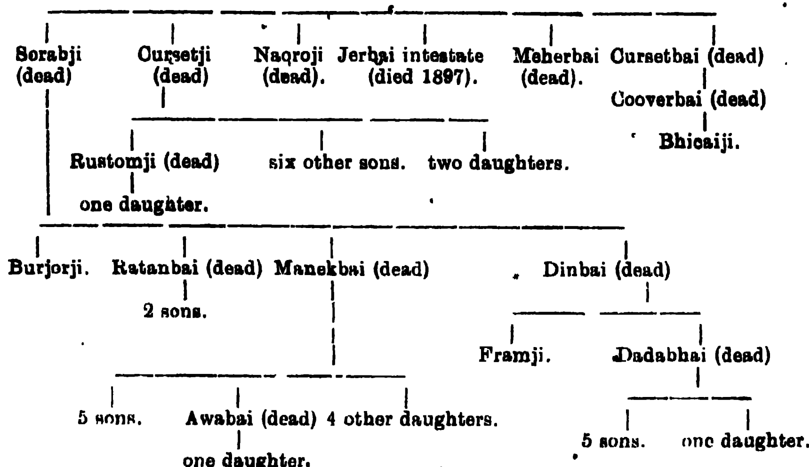
In both sections 6 and 7 of the Parsi Succession Act the words "next-of-kin" and "relatives" are synonymous, and are collective names for the persons mentioned in the first and second schedules respectively.

ORIGINATING summons (under rule 82 of the High Court Rules) taken out by the plaintiff in order to ascertain the mode in which the estate of an intestate Parsi should be distributed, having regard to the provisions of the Parsi Intestate Succession Act.

[910] One Jerbai, a Parsi widow, died intestate and without issue, in April 1897, leaving considerable property. Her father and mother, and brothers and sisters, were all dead. She left, her surviving, a number of nephews and nieces (children of her predeceased brothers Sorabji and Cursetji). Other nephews and nieces had predeceased her, leaving children (*i.e.*, grand-nephews and grand-nieces of Jerbai), and some also of these grand-nephews and grand-nieces had died in Jerbai's life-time and had left children. There were thus three generations of claimants to the estate, *viz.*, nephews and nieces, grand-nephews and nieces, and great-grand-nephews and nieces.

* Suit No. 101 of 1898.

The annexed table sufficiently shows the family. Those who are stated to be dead therein had died in the life-time of Jerbai.




Jerbai's eldest brother Sorabji had left a son Burjori and three daughters, *viz.*, Ratanbai, Manekbai and Dinbai. The daughters predeceased Jerbai, but all of them left children, and two of them (Manekbai and Dinbai) both children and grand-children.

Jerbai's second brother Cursetji left a large family of children. One of his sons (Rustomji) had predeceased Jerbai, but had left a daughter.

Jerbai's sister Cursetbai left a daughter who predeceased Jerbai, but had left a daughter Bhicaiji.

Thus it appeared that some of Jerbai's nephews and nieces survived her and some had already died. Those who had died had [911] left children (both sons and daughters); and two nieces (Manekbai and Dinbai) had left both children and grand-children.

The plaint was filed in March 1898, by Hirjibhai, who was one of the nephews of Jerbai (son of her brother Cursetji) and the administrator of her estate.

The second paragraph of the plaint stated the names of the surviving nephews (seven in number) and nieces (two in number) of the deceased Jerbai, being the children of her two brothers Sorabji and Cursetji.

The third paragraph stated that others of her nephews and nieces had died in her life-time, leaving children whose names were set forth.

The fourth paragraph set forth the names of the great-grand-nephews and nieces of Jerbai.

On the day the plaint was filed, an originating summons was also filed by the plaintiff stating the following questions for the Court: —

(1) Whether the persons named in paragraph 2 of the plaint herein (*i.e.*, nephews and nieces) are not the only persons entitled to share in the estate of Jerbai, deceased, in the plaint mentioned.

(2) Whether the persons named in paragraph 3 of the plaint, or any of them (*i.e.*, grand-nephews and nieces) are entitled to any share in the said estate.

(3) Whether the persons named in paragraph 4 of the plaint or any of them, (*i.e.*, great-grand-nephews and nieces, are entitled to any share in the said estate.

(4) Into what shares the said estate is to be divided among those declared to be entitled to it.

The questions raised depended on the construction of section 7 and clause 2 of the second schedule of the Parsi Succession Act (XXI of 1865), which are as follows :—

"7. When a Parsi dies leaving neither lineal descendants nor a widow or widower, his or her next-of-kin, in the order set forth in the second schedule hereto annexed, shall be entitled to succeed to the whole of the property as to which he or she shall have died intestate.

"The next-of-kin standing first in the same schedule shall always be preferred to those standing second, the second to the third, and so on in succession : provided that the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity."

[912] "Article 2, Schedule 2 :—Brothers and sisters and the lineal descendants of such of them as shall have predeceased the intestate."

It was (*inter alia*) contended that the words "next-of-kin" in the above section meant *nearest* of kin and that by the section it was intended that those members of the various classes of relatives mentioned in the schedule who were the nearest of kin to the intestate should take the estate, the effect being in this case that the estate would go to the surviving nephews and nieces to the exclusion of their children and grand-children.

On the other hand, it was contended that under the above article of the second schedule all the lineal descendants of the intestate's predeceased brothers and sisters were entitled to a share of the estate.

*Starling* for the Plaintiff.

*Lang* (Advocate General), *Anderson*, *Rivett-Carnac*, *Scott*, *Raikes* and *Lowndes* appeared for the various Defendants.

STRACHEY, J. :—This originating summons raises an important question of the law of intestate succession among Parsis, upon which there is no authority. It relates to the construction of section 7 and article 2 of the second schedule of the Parsi Succession Act, XXI of 1865, and to the distribution of the property of a Parsi dying intestate whose nearest living relatives are the lineal descendants, in different degrees, of predeceased brothers or sisters. The question arises in this way. Jerbai, a Parsi lady of Bombay, the widow of Pestonji Hormusji Suntoke, died intestate in 1897, leaving property of considerable value. She left her surviving no lineal descendant, father or mother, brother or sister. There had predeceased her three brothers, Sorabji, Cursetjee, and Naoroji, and two sisters, Meherbai and Cursetbai. Naoroji and Meherbai died without issue. Sorabji left a son now living and three daughters who predeceased the intestate. Of the first daughter the issue now living are two children, of the second nine children and a grand-child by a deceased daughter, of the third a child and six grand-children by a deceased son. Cursetji left eight children now living and a son who predeceased the intestate, leaving a daughter who survives her. Cursetbai left a daughter who predeceased the intestate, leaving a daughter still living. I understand that some of [913] these living nephews and nieces, grand-nephews and grand-nieces, great grand-nephews and great-grand-nieces of the intestate have issue born before the intestate's death, so that the genealogical table (Exhibit A) which has been accepted as correct by all parties, but which does not mention any one whose father or mother is alive, is not a complete statement of all the persons now living who are lineally descended from the intestate's brothers and sisters. This summons has been taken out by the administrator of Jerbai's estate, who is a son of her brother Cursetji, for the purpose of determining who are the persons entitled to share in the estate, and into what shares it is to be divided among them. The defendants represent all the persons other than the plaintiff

who could be entitled to share in the estate as lineal descendants of the brothers and sisters of the intestate.

The questions to be determined depend, first, on section 7 of Act XXI of 1865, which provides for the case of a Parsi who dies intestate leaving neither lineal descendants nor a widow or widower. In that case,

"His or her next-of-kin in the order set forth in the second schedule hereto annexed shall be entitled to succeed to the whole of the property as to which he or she shall have died intestate. The next-of-kin standing first in the same schedule shall always be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity."

The second schedule consists of eighteen sub-divisions or articles, the first of which is "father and mother," and the second, on which this case depends, "brothers and sisters and the lineal descendants of such of them as shall have predeceased the intestate."

Before dealing with these words, it is necessary to understand section 7 with which they must be read. That section refers to the schedule by providing that the persons entitled to succeed are the "next-of-kin, in the order set forth in the second schedule." It has been argued that this means that, in determining the persons entitled, one must look not only to the order in which the articles of the schedule stand, but also to differences in respect of nearness of kin within the particular articles themselves, [914] so that although article 2, for instance, includes in one general class all lineal descendants of predeceased brothers and sisters, a nephew, being nearer of kin to the intestate, should be preferred to a grand-nephew, a grand-nephew to a great-grand-nephew, and so on. It has been contended that, on this principle, a grand-nephew or grand-niece can never share with nephews and nieces, and that, therefore, the only persons entitled to share in Jerbai's estate are her nephews and nieces to the exclusion of all remoter descendants of her brothers and sisters. I do not agree with this construction of the word "next-of-kin." As used in section 7, it appears to me to be merely a collective name for all the persons and classes enumerated in the schedule. It merely incorporates the schedule in the section, and the effect is exactly as if the Legislature had said that, in the case of a Parsi dying intestate without lineal descendants or widow, his next-of-kin should be entitled to succeed to his property, and that in reckoning his next-of-kin his father and mother, if living, should be deemed nearest, the relatives mentioned in the second article next, and so on throughout the schedule. The argument with which I am dealing is inconsistent with the principle, which was admitted on all hands, that, under article 2, surviving brothers or sisters would not exclude but would share with the children of a predeceased brother or sister. Again, section 7 and the second schedule must be construed, as far as possible, upon principles which are in harmony with section 6 and the first schedule. Both sections deal with the case of a Parsi dying intestate without leaving lineal descendants, the difference being that, in the case of section 6, he leaves a widow who takes a moiety, so that only a moiety has to be distributed among his next-of-kin, while, in the case of section 7, he leaves no widow, and the next-of-kin take the whole. The first schedule is substantially, though not verbally, identical with the first six articles of the second; so that the moiety which the next-of-kin take where there is a widow, and the whole estate which they take where there is none, descend in the same way, except that in the former case, if there are no relatives on the father's side, the widow, and not the maternal relatives, takes the whole. It is, therefore, improbable that the words in section 7 "next-of-kin in the order set forth in

[915] the second schedule" were intended to introduce into the articles of that schedule any principle of priority or exclusion which is absent from section 6 and the first schedule. But in the third paragraph of section 6, the words used are "the intestate's relatives on the father's side in the order specified in the first schedule," from which no preference as between the lineal descendants mentioned in any article of the first schedule can be deduced. In the fourth paragraph of section 6, just as in the second paragraph of section 7, the word "next-of-kin" and not "relatives" is used, and then in the last paragraph the word used is again "relatives." Mr. Starling pointed out that the word "relatives" could not have been accurately used in section 7, as the son's widow mentioned in article 10 of the second schedule and the brother's widow mentioned in article 11 not being related to the intestate by blood are not, in strictness, his relatives. Exactly the same objection, however, applies to the use of the word "next-of-kin," for the son's or brother's widow is no more "of kin" to the intestate in the strict sense than "related" to him. I draw the inference that in both sections the word "next-of-kin" is used as synonymous with relatives, and as a collective name for the persons mentioned in the first and second schedules respectively. So far, then, section 7 affords no reason for supposing that under article 2 of the second schedule nephews or nieces exclude grand-nephews or grand-nieces of the intestate. Taking next the second paragraph of the section, the words down to the proviso only mean that all persons mentioned in the first article of the schedule must be dead before any person mentioned in the second article can succeed, and so on throughout the schedule. The only preference or exclusion suggested is as between persons mentioned in different articles; none is indicated as between persons mentioned in the same article *inter se*. But then comes the proviso to the section: "provided that the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity." This does undoubtedly imply some distinction between the different degrees of propinquity to the intestate, and it is necessary to see what the distinction is. A "degree of propinquity" does not mean an article of the schedule, and standing in the same degree of propin-[916]quity does not mean included in the same article. If that were the meaning, the words would be superfluous, as exactly the same result would follow if they were left out of the section. A "degree of propinquity," then, can only refer to nearness of blood to the intestate, so that, within a particular article, such as article 2, there may be persons of different degrees: nephews and nieces are of one degree, grand-nephews and grand-nieces of another, and so on. But the proviso does not, like section 41 of the Indian Succession Act (X of 1865), say or suggest that a nearer degree of propinquity is to exclude or be preferred to a more remote. All that it says is that, in any given degree, each male is to take double the share of a female, a brother double the share of a sister, a nephew double the share of a niece. As between different degrees the rule of each male taking double the share of each female does not apply: a grand-nephew does not necessarily take double the share of a niece, nor a great-grand-nephew double the share of a grand-niece. Nor does the section say that all males *inter se* or all females *inter se* standing in the same degree of propinquity, must necessarily take equal shares. It is consistent with its terms that some nephews may take larger shares than others, and the same as regards nieces.

Therefore, in construing the schedule, section 7 so far helps us as to show (1) that where it was intended that any class of relatives should, if living, absolutely exclude any other, they were placed within a separate article; (2) that, within the particular articles, differences in propinquity of blood are so far

recognised that each degree constitutes a class, not for the purpose of excluding or being preferred to any other, but for the purpose of giving each male double the share of each female with it; (3) that all males within a particular article, or even within a particular degree of propinquity, do not necessarily take equal shares. Apart from section 7, there are no other legal provisions which appear to me to throw much light on the construction of article 2. It would not, in my opinion, be safe to base any inferences regarding the article upon the provisions of the English law or those of the Indian Succession Act in reference to the distribution of on intestate's property. At XXI of 1865 was enacted for the express purpose of withdrawing the Parsis from the English law [917] of intestate succession, which until then had governed them. Section 8 was enacted for the express purpose of exempting them from parts III, IV and V of the Indian Succession Act, which was passed in the same year. I am not aware of any usage, as distinct from law, existing among Parsis prior to 1865, upon which article 2 may have been based or which might throw light upon its construction. There is no decided case on the subject. There are somewhat analogous cases in the law of testamentary succession--decisions upon the construction of gifts expressed in words more or less similar to article 2—explaining what gifts are to be construed as substitutional and what as concurrent, in what cases parties take *per stirpes* or *per capita*, and so on. Some of these cases have been cited. Perhaps there is something to be gained in conceiving of the provisions of a law of intestate succession as a sort of testamentary directions provided by the Legislature where the deceased has left none of his own, and in this connection it should be remembered that the law of testamentary succession contained in the Indian Succession Act, and the English decisions upon which it is chiefly based, are fully applicable to Parsis. But the difference between construing a will and construing an Act is so great that the usefulness of analogies of this kind is extremely small.

The article, read with the section, gives the estate to "brothers and sisters, and the lineal descendants of such of them as shall have predeceased the intestate." In this case there are no brothers or sisters, but there are lineal descendants in different degrees of two predeceased brothers and one predeceased sister. The words used are capable of more than one construction. Is the estate to be divided *per capita* among all persons within the description of lineal descendants of a brother or sister, in equal shares, subject to the rule that each male is to take double the share of each female standing in the same degree of propinquity? If it is to be divided *per capita*, can you exclude grand-nephews or great-grand-nephews either on the ground that others are nearer of kin to the intestate, or on the ground that no one can be deemed the lineal descendant of a brother unless every intermediate ancestor is dead? Is the estate to be divided not *per capita* but *per stirpes*, and if so, what *stirpes* are to be taken as the basis of division? These [918] are the questions which have been discussed. The second can be disposed of in a few words. If the division is to be *per capita*, I have already stated why, in my opinion, the word "next-of-kin" in section 7 affords no reason for preferring nearer lineal descendants to more remote. That disposes of one of Mr. Starling's arguments for the plaintiff Nor, if the division is to be *per capita*, can I agree with Mr. Raikes that the children or remoter issue of his clients or of other living descendants should be excluded. I think that, in the case supposed, they would take concurrently with their parents. I think that the expression "lineal descendants" is used in the schedule in the same sense as in section 86 of the Indian Succession Act, and I can see no ground for the view that the grand-son of a deceased brother is not a lineal descendant during his own

father's life-time but becomes one for the first time upon his father's death. Article 2 clearly implies the contrary, for otherwise it would have said merely "and their lineal descendants," and the remaining words would be surplusage. If, therefore, the division is to be *per capita*, I think that all lineal descendants whatever of predeceased brothers and sisters must be entitled to share, the most remote equally with the nearest, children and grand-children taking concurrently with their parents and grand-parents.

The question is, whether the division is to be *per stirpes* or *per capita*. Now, in considering article 2, the most obvious point is that the lineal descendants entitled are exclusively those of brothers and sisters who have *predeceased* the intestate. Lineal decendants of surviving brothers or sisters are entirely excluded. Suppose the case of an intestate having four brothers, all of whom survive him having numerous children and grand-children. The brothers take the whole estate in equal shares : none of their children or grand-children take anything. The Legislature thought that the families would be sufficiently provided for by giving the estate to their heads, the brothers. Now suppose that, instead of all four brothers surviving, one of them dies a day before the intestate, leaving five sons and five grandsons. It is common ground that, in such a case, the three surviving brothers would not exclude, but would share with the deceased brother's family. If the division is to be *per capita*, the [919] result of the one brother's death a day before the intestate's is that each of the surviving brothers, who in the event of the deceased having lived a day longer, would have taken one-fourth of the estate, now gets only a one-thirteenth share for himself and his family—a family which is as closely connected with the intestate as that of the deceased brother, which may be far more numerous, but which is absolutely excluded from the division. Each member of the deceased brother's family—son, grandson, or great-grandson—by reason of that brother's death at that particular time is placed on an equal footing with each surviving brother of the intestate, and on a superior footing to every member of the surviving brothers' families. If each of the families of the surviving brothers is larger than that of the deceased brother, then the practical effect of that brother predeceasing the intestate may be to give the smallest family a much greater portion of the estate than is taken by the three larger families put together. These results are still more singular if the predeceased, instead of being a brother was a sister of the intestate, who, if she had survived him, would have taken only half as much as each of her brothers, that is, one-seventh of the estate. By reason of her death a day before the intestate, a division *per capita* distributes among her branch of the family ten-thirteenths of the whole, each male member, near or remote, sharing equally with her brothers. These consequences would necessarily flow from a division of the estate *per capita*. Other results equally anomalous were pointed out by Mr. Scott and Mr. Lowndes. I do not think that such a method of division can have been intended by the Legislature. I think that the gift to lineal descendants is substitutional, in the sense that they take nothing if the head of their branch of the family is living, whereas, if he is dead, they stand in his place and take the share which he would have taken. The object is to provide for a branch of the family which has lost its natural head, not to diminish the provision for the heads of other branches, nor to give a smaller branch a greater portion than a larger one merely because its head has predeceased the intestate. I think, therefore, that in distributing the estate among "brothers and sisters and the lineal descendants of such of them as shall have predeceased the intes- [920] tate," the primary division must be *per stirpes*. If there are surviving brothers, and lineal descendants of a predeceased brother, then each surviving

brother will take equal shares with the lineal descendants collectively. If all the brothers are dead, then the share which each would have taken had he survived, will be taken by his lineal descendants. If, in either case, the predeceased was a sister, her lineal descendants will take her half share only. I do not think that this construction does violence to the language of section 7 and article 2. The Act provides that the lineal descendants of deceased brothers and sisters shall, in certain events, succeed to the property of the intestate, and succession *per stirpes* is as consistent with such terms as succession *per capita*, and is, I think, more consistent with the context and with the probable objects of the Legislature.

But if the primary division is *per stirpes*, what is the secondary division? The lineal descendants of a predeceased brother are to take the share which he would have taken, but how are they to take it? Is the division among them also to be *per stirpes*, or is it to be *per capita*? I think that it must be *per stirpes*. If the Legislature intended the lineal descendants to take *per stirpes*, I do not think that you can stop at the first or any other generation, and say that those following are to take *per capita*, I think, to use the words of Lord ROMILLY in *Gibson* v. *Fisher*, L. R., 5 Eq., 51, "that the rule of the *stirpes* must run through every descent, considering that *per stirpes* is an expression which means that all the persons who are to take are to take *per stirpes*, and that this must run through the whole range of the descents." The only difficulty to my mind is to reconcile this mode of division with the proviso to section 7, that the property must be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity. If, for instance, there were a division *per stirpes* among the children of two predeceased brothers, of whom one left a son and a daughter and the other six sons, it is obvious that the intestate's niece would take one-sixth of the estate, or twice as much as each of her male cousins. The only way to get over this difficulty is to read the proviso as if the words "within the same *stirpes*" or similar [921] words were added. That would, for instance, make the proviso applicable as between the children of Cursetji *inter se*, but not as between the children of Cursetji and the children of Sorabji. No doubt a construction which requires words to be read into a section is objectionable if it can be avoided. But what is the alternative? If the division is to be *per capita*, it will be found that the words "standing in the same degree of propinquity" are wholly superfluous. You cannot, in such a division, give every nephew double the share of every niece without also giving him double the share of every grand-niece, nor without giving every grand-nephew or great-grand-nephew double the share of every niece, so that what you do is really to give every male double the share of every female, irrespective of differences in degree of propinquity altogether. Yet the words "standing in the same degree of propinquity" were clearly enacted with some object; and a construction which ignores words is as objectionable as a construction which inserts them. There is, however, no other alternative. On the other hand, a division *per stirpes* does give effect to the distinction contemplated by the proviso, if the proviso is read in a sense which, on the assumption of such a division, is reasonable.

The conclusion at which I have arrived is that the intestate's property should be divided according to the principle explained in *Gibson* v. *Fisher*; the first division being into three shares corresponding with the predeceased brothers Sorabji and Cursetji and the sister Cursetbai. What may be called Sorabji's share is two-fifths of the estate, Cursetji's share also two-fifths, and Cursetbai's one-fifth. These shares will be sub-divided among the lineal descendants of Sorabji, Cursetji and Cursetbai, respectively, no descendant

being entitled to share concurrently with his or her ancestor, and, on each division and sub-division, each male taking double the share of each female standing in the same degree of propinquity.

The answer to the first question stated in the summons is in the negative.

The answer to the second and third questions is that all the living persons named in the third and fourth paragraphs of the plaint are entitled to share in the estate.

[922] The answer to the fourth question is as follows:—The whole of Cursetbai's one-fifth share will go to her grand-daughter, the third defendant Bhicaiji. Cursetji's two-fifths share will be divided among his children, each son taking double the portion of each daughter, the defendants Nos. 6 and 7 taking the portion of their assignor Hormusji (without prejudice to any question which may hereafter be raised with reference to the assignment), and Ratanbai taking the portion of the deceased Rustomji. Sorabji's two-fifths share will be divided so that a two-fifths portion goes to the first defendant Burjorji. A one-fifth portion of the same share will be taken in equal parts by Bapuji and Bomonji, the sons of Ratanbai. Another one-fifth portion of the same share will be taken by the children of Maneckbai, each son taking double the portion of each daughter, and the grand-child Pirozbai taking the portion of the deceased Awabai. Of the remaining one-fifth portion of Sorabji's share, Framji, the son of Dinbai, will take a moiety, and the other moiety will be taken by the children of Dadabhai, each son taking double the portion of Goolbai. The costs of all parties to this summons will be paid out of the estate. The plaintiff's costs to be taxed as between attorney and client.

Attorney for the Plaintiff:—Mr. *F. P. Pavri.*

Attorneys for the Defendants:—Messrs. *Pestonji, Rustim and Kola*; *Crawford, Brown and Co.*; *Mansukhlal, Damodhar and Jamsedji*; *Ardesir, Hormasji and Dinsha*: and *Wadia and Ghandy.*

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[22 Bom. 922]

ORIGINAL CIVIL.

*The 29th and 30th August, 1898.*

PRESENT:

MR. JUSTICE CANDY.

Balaram Bhaskarji and another..........Plaintiffs

*versus*

Ramchandra Bhaskarji and others...........Defendants.*

*Jurisdiction—Partition—Property in different jurisdictions—Suit for partial partition—Suit for land—Letters Patent, 1865, Cl. 12—Practice—Procedure—Joint family—Onus of proof—Evidence of separate acquisition.*

The plaintiff sued for partition of certain property, alleging it to be joint family property. It consisted of a house in Bombay and certain fields at Vavla [923] in the Thana District, outside the jurisdiction of the Court. The parties were all resident in Bombay.

* Suit No. 64 of 1897.

*Held*, that as to the Vavla property the Court had no jurisdiction, the plaintiff not having obtained leave to sue under clause 12 of the Letters Patent, 1865, but that the suit might proceed as regards the property in Bombay.

*Punchanun* v. *Shib Chunder*, I. L. R., 14 Cal., 835, followed.

As to the house in Bombay, the first defendant alleged that it was his self acquired property; that he had purchased it in his own name in 1863 out of his private funds; that there were no family funds and that neither his father nor his brothers (the latter of whom were then very young) were in a position to contribute anything towards the purchase; that by his invitation his father and brother had lived with him in the house; that his father had died then and that one of his brothers had subsequently left the house and with his family had gone to reside elsewhere; that the plaintiff (the youngest brother of the first defendant) had continued to occupy a room in the house by the first defendant's permission up to the date of suit. The plaintiff, on the other hand, relied on the facts that the house was purchased and used as a family residence while the father and sons were all living in union; that it was bought in the name of the eldest son (defendant No. 1), who was then the manager of the family; that the father lived and died there; and that he himself (the plaintiff) and his family had continued to live there, even after he had separated in food from his brother (defendant No. 1).

*Held*, that the house was liable to partition. No doubt the *onus* of proof was upon the plaintiff. The facts, however, proved by him or admitted by the first defendant raised a strong presumption that the house was family property and against it there was only the first defendant's statement that the house was bought with his own money. But there was nothing to show that he kept a private fund apart from the family funds. He was the manager of the family and he kept no separate accounts.

SUIT for partition. The plaintiff was the third son of one Bhaskarji Bhikaji, who died intestate in 1867 leaving, him surviving, four sons and three daughters.

The first defendant was the eldest son and he was in possession of the property in dispute. The property consisted of—

(*a*) a house in Khattargalli in Bombay alleged by the plaintiff to have been purchased in 1863 out of family funds, but in the name of the first defendant, who as eldest son was then the manager of the family;

(*b*) certain fields at Vavla in the Thana District (outside the [924] jurisdiction), some of which the plaintiff alleged had descended from his grandfather and some had been purchased in his father's life-time out of family funds, but in the first defendant's name;

(*c*) other fields, also in the Thana District, purchased after his father's death by the first defendant in his own name, but out of the family funds.

The plaintiff in his plaint claimed partition of all the above property.

The first defendant denied that the plaintiff was entitled to partition. He alleged that all the above property, with the exception of one field in class (*b*), was his own self-acquired property purchased by himself out of his own earnings. He denied that there had ever been any common family funds.

At the hearing it was (*inter alia*) contended on behalf of the first defendant that the suit should be dismissed on the grounds (1) that the suit was a suit for land partly within and partly outside the jurisdiction of the Court, and, therefore, leave to sue under clause 12 of the Letters Patent, 1865, was necessary, but had not been obtained; (2) that the suit having thus been improperly brought, the plaintiff could not now elect to abandon or postpone his claim to the property outside the jurisdiction and proceed as to part of his claim, nor could the Court hear the suit so altered; (3) that the rule was that there could not be a suit for partial partition; that the plaintiff must claim complete partition, and that the law having provided a procedure for so doing when the

property lay in different jurisdictions, that procedure must be followed or the plaintiff must fail.

The arguments and authorities cited appear from the judgment.

*Bahadurji* and *Jina*, for the Plaintiffs.

*Kirkpatrick* and *Setlur*, for the first Defendant.

In addition to the authorities mentioned in the judgment, the following cases were also referred to. As to jurisdiction in cases of partition, *Ramacharya* v. *Anantacharya*, I. L. R., 18 Bom., 389. As to suing for partial partition, *Radha Churn* v. *Kripa Sindhu*, I. L. R., 5 Cal., 474. As to *onus* of proof, [926] *Dhunookdharee* v. *Gunput*, 10 Cal. W. R., 122; *Phoolbas Kooer* v. *Lall Juggessur*, 14 Cal. W. R., 340; *Pran Kristo* v. *Sreemutty Bhageerutee*, 20 Cal. W. R., 158; *Obhoy Churn* v. *Gobind Chunder*, I. L. R., 9 Cal. 237 at p. 241; *Nanabhai* v. *Achratbai*, I. L. R, 12 Bom., 122; *Toolseydas* v. *Premji*, I. L. R., 13 Bom., 61; *Ahmedbhoy* v. *Cassumbhoy*, I. L. R., 13 Bom., 534 at p. 545; *Denonath Shaw* v. *Hurrynarain Shaw*, 12 Beng. L. R., 349.

**Candy, J.**:—In this suit the plaintiff claims partition of land and immoveable property situated in Bombay and at Vavla in the Thana District. The parties all live in Bombay. The preliminary question arises as to the jurisdiction of the Court to try such a suit.

This question depends upon the construction of clause 12 of the Letters Patent of this Court (His Lordship read the clause and continued). The uniform practice of the three High Courts at Bombay, Calcutta and Madras has apparently been to read that clause as if it ran as follows:—

"The said High Court in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description if

"(*a*) in the case of suits for land or other immoveable property, such land or property shall be situated either wholly, or, in the case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if

"(*b*) in all other cases the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits."

I confess, were the matter *res integra*, I should be inclined to doubt the correctness of the above construction, but there are obvious difficulties in whatever way we regard the clause, and I am not prepared after this lapse of time to question the uniform practice of all the Courts.

As authorities for the proposition that the words as to leave being first obtained apply both to suits for land or other immoveable property, and also to all other cases, I may refer to the judgment of NORMAN, J., in *Prasanna Mayi Dasi* v. *Kadambini* [926] *Dasi*, 3 Beng. L. R., (O. C.) 85 at p. 87, followed by PHEAR, J., who alluded to the uniform practice in *Jagadamba Dasi* v. *Padmamani Dasi*, 6 Beng. L.R., 686, and by Sir A. COLLINS, C.J., PARKER, J., and SHEPHARD, J., in *Seshagiri Rau* v. *Rama Rau*, I.L. R., 19 Mad., 448, and by WEST, J., in *Jairam Narayan Raje* v. *Atmaram Narayan Raje*, I. L. R., 4 Bom., 482. The words "in all other cases" in clause 12 mean those suits in which immoveable property is not involved—per WEST, J., in *Jairam* v. *Atmaram*, *supra*.

As authorities for the proposition that the condition as to defendant's residence or carrying on business relate solely to all other cases, and not to suits for land or other immoveable property, I may refer to the judgment of

MACPHERSON, J., in *Bibi Jaun* v. *Meerza Mahomed Hadee*, 1 Ind. Jur. (N. S.), 40, where it was held that as the land was not within the local jurisdiction, the suit could not be entertained by the Court merely on the ground that defendant was personally dwelling in Calcutta; and to the judgment of PHEAR, J., in *Khalut Chunder Ghose* v. *Minto*, 1 Ind. Jur. (N. S.), 426, where it was held that as defendant dwelt within the local limits the Court had jurisdiction unless it was a suit for land not within the local limits. Further support for this proposition may be obtained from the fact that it has never been apparently contended that a defendant residing in Bombay could be sued in the Bombay High Court for land, say in Calcutta, simply because the defendant resided in Bombay. That a suit for partition of landed property is a suit for land, there can be no doubt. (See judgment of PHEAR, J., in a former stage of the above noticed case, *Padmamani* v. *Jagadamba*, 6 Beng. L. R., 134 at p. 140).

Applying the above law to the present case it is seen that it is a suit for land partly in Bombay and partly at Vavla in the Thana District. No leave of the Court has been obtained under clause 12 of the Letters Patent. Therefore this Court has no jurisdiction to entertain the suit as regards the property at Vavla.

So much cannot be denied; but Mr. Kirkpatrick for the first defendant goes further, and says that, as this suit is a suit for [927] partition, it must include all the property alleged to be liable to partition, and as it cannot be so framed without the leave of the Court having been first obtained, the suit is in its inception bad, and should be dismissed. I held that the suit could proceed as regards immoveable property in Bombay, and my reasons for so holding were as follows: –The case of *Punchanun Mullick* v. *Shib Chunder Mullick*, I. L. R., 14 Cal., 835, was a suit on all fours with the present one. TREVELYAN, J., held that the suit was not liable to be dismissed on the ground that partial partition of a property cannot be granted, but the claim might be decreed as far as the property within the jurisdiction was concerned. Mr. Mayne says (5th edition, Sec. 452): "Every suit for a partition should embrace all the joint family property, unless different portions of it lie in different jurisdictions, in which case suits may be brought in the different Courts to which the property is subject." And though all the cases quoted by Mr. Mayne in his note to the above passage do not apparently entirely support his proposition, one of them (*Subba Rau* v. *Rama Rau*, 3 Mad. H. C. Rep., 376), is strongly in favour of it. That case had reference to sections 11 and 12 of Act VIII of 1859; and SCOTLAND, C. J., and ELLIS, J., pointed out that the right of suit would no doubt have been absolute, and not, as it is, conditional on the leave of a superior Court, if the provision had been intended to be imperative. So here it is optional with the plaintiff to obtain the leave of the Court to bring the Vavla property within the jurisdiction of the Court. He has not done so, therefore the suit as regards the Vavla property is bad, but as regards the Bombay property it remains good. No doubt cases may be easily imagined in which it might be inconvenient for separate suits to be brought. Mr. Justice NORMAN alluded to this in the judgment [*Prasannamayi* v. *Kadambini*, 3 Beng. L. R., (O. C.), 85], quoted above. He said: "Partition suits are in all cases necessarily expensive enough. It would be most unfortunate if in all such cases we were obliged to say that two suits must be brought, one in the mofussil and one within the local jurisdiction. The expenses would be doubled, and the decree would necessarily be far less satisfactory than that which would be arrived at when all the facts are before a single Judge in the [928] same suit." Here the facts connected with the Vavla property are quite distinct from those connected with the Bombay property. The former was acquired at a different time and under different circumstances. In *Hari Narayan Brahme* v. *Ganpatrav*

*Daji*, I. L. R., 7 Bom., 272, at p. 278, KEMBALL, J., said: "No doubt the rule that every partition suit shall embrace all the joint family property has been held to be subject to certain qualifications, as, for instance, where different portions of it lie in different jurisdictions . . . but I am not aware of any authority for the proposition that a member who sues for partition of property in the hands of the defendant can refuse to bring into the hotchpot any undivided property held by himself on the ground that it is situated within another jurisdiction. . . It is obvious that when a plaintiff seeks to recover a share of property in the hands of the defendant, it is necessary for the Court to decide whether, under the circumstances of the case, he is entitled to that partition." So here: The plaintiff seeking partition is not refusing to bring into hotchpot any undivided property held by himself. Defendant does not assert that the Vavla property is undivided and liable to partition; he strongly asserts the contrary. Similarly in the Calcutta case (*Padmamani* v *Jagadamba*, 6 Beng. L. R., 134) quoted above, PHEAR, J., said: "I find nothing to make me think that the plaintiff must necessarily bring a suit, if he brings a suit at all, for partition of the whole of the joint property. . . . If on the part of his client (the defendant) he (the Advocate-General) can go further than he has done, and would give me ground for thinking that a fair and equitable division of the joint property could not be come to without bringing in the Mofussil property, and making that the subject of division together with the Calcutta property, I think I might possibly consider it right to stay the proceedings in this suit upon his undertaking to file a plaint within a reasonable time, embracing the whole of the property, and of course to ask for the necessary leave for that purpose." So here I could stay proceedings for the same object, or to enable plaintiff to file a suit in the Thana Court for the Vavla property, and to then apply to this Court under clause 13 of the Letters Patent for a removal of that suit to this Court, when both suits could be consolidated [929] and disposed of by one Judge. But there is no necessity for such a course. The question as to the Vavla property stands on its own footing quite apart from the Bombay property. Plaintiff wishes this suit as to the Bombay property to be disposed of on its own merits. He is willing to run the risk of his suit in a Thana Court for the Vavla property, if he files such a suit, being met with the plea that he relinquished his claim for the Vavla property, when he could have legally sued for the same by first obtaining the leave of the Court, and that, therefore, his second suit is bad. I express no opinion on such a plea. I have simply to deal with the Bombay property.

As to that property on the merits, the following facts are admitted or proved beyond doubt. Many years ago Bhaskar left his relatives and whatever family property there was at Vavla and came to earn his living in Bombay. This was at any rate before his eldest son (Ramchandra, the first defendant) was born in 1833. Bhaskar was then living with his wife in Vithalwadi, where also his younger sons were born—*viz.*, Sitaram about 1849, Balaram (plaintiff) about 1850, and Srikrishna about 1853 There were also three daughters. Bhaskar was a customs pass-writer, and apparently earned from Rs. 30 to Rs. 60 a month for eight months at least in a year. The eldest son, Ramchandra, it will be noticed, was much older than his brothers, and of course he became capable of earning a salary long before they did. In 1858 he was married, and in that year he also began to earn a regular salary, which, though small at first (Rs. 10) gradually increased till in 1881 he was earning Rs. 88; and in 1882 he retired on a pension of Rs. 41 odd. In 1861 or 1862, Bhaskar's wife, the mother of these sons, died. From that time the eldest son, Ramchandra, managed the family affairs. His wife was the senior lady

in the house, and the father, Bhaskar, was getting old. In December 1867, he died; but prior to that in 1863, he and his family had removed from Vithalwadi to the Khattargalli house, the subject of the present suit. It was purchased in the name of Ramchandra in partnership with one Sakharam, whose share was subsequently partitioned off. In Ramchandra's share he and his father and brothers all lived together. Four months after his father's death, *i.e.*, in 1868, **[930]** Sitaram (who had been married in 1864, and who in 1866 began to earn a salary, all or most of which he handed over to the family manager) left the Khattargalli house, and with his wife resided separately from the other members of the family. With his own earnings he subsequently purchased a house for Rs. 800, which, after his death in 1881, his widow, Savitribai [third (*sic*) defendant], sold. He left two sons, the third and fourth defendants. One of these now lives with his uncle, Ramchandra, the first defendant; the other lives with his mother. It is admitted that the house purchased by Sitaram, after he had separated in residence from his brethren, was his self-acquired property and not joint. It is also admitted that if the Khattargalli house is liable to partition, then defendants Nos. 3 and 4 are entitled to one-third share therein. Savitribai would also be entitled to residence. Srikrishna, the fourth son, was married in 1878, and he lived in the Khattargalli house till his death in 1886. He did not earn any fixed salary. His widow is Radhabai, the second defendant. These defendants (second, third, fourth, and fifth) have taken no active part in the present suit.

There remains the third son, Balaram, the present plaintiff. He was a youth of thirteen when the family moved to the Khattargalli house in 1863. In 1872 he was married, and in that year also he began to earn a fixed salary, which has risen from Rs. 20 to Rs. 35 in 1882. This he asserts he paid over almost entirely to his eldest brother. He also asserts that he published a book in 1877, the profits of which were taken by his eldest brother or by the wife of the latter. This latter assertion is not denied. Ramchandra also admits that plaintiff paid him monthly Rs. 15, and from 1877 Rs. 20. In 1885, Balaram had a dispute with his brother Ramchandra, and from then ceased to take food with him; but he has continued to occupy a room in the house.

These are the main facts, and on them the question is, whether plaintiff is entitled to say that the Khattargalli house is joint property. In the arguments at the Bar stress was laid on the burden of proof, and various dicta were quoted from several cases. But I agree with Mr. Mayne that it is impossible to lay down an abstract proposition of law which will govern every case, **[931]** however different its facts (5th edition, section 267). Of course the *onus* is primarily on the plaintiff. He comes into Court and asserts that the house is joint family property. It is for him to show *primâ facie* that it is so. He points to the fact that it was purchased as a family residence while the father and his sons were all living in union; it was bought in the name of the eldest son, Ramchandra, who was then the manager of the family; the father lived and died there. Balaram and his family have continued to live there, even after he has separated in food from his brother. If defendant's witness is to be believed, Ramchandra tried to eject Balaram, and the latter refused to go.

What has Ramchandra got to show against the strong presumption from those facts? He says that he purchased the house with his own private funds. Rs. 50 were paid by him as earnest-money and Rs. 50 by Sakharam. Then each paid Rs. 450 when the deed of sale was signed. Then each paid Rs. 20 a month for seven years, after which there was a balance paid in a lump sum. All this is, no doubt, perfectly true, but what is there to show that these moneys were paid by Ramchandra from his private purse quite

apart from the family funds? No separate accounts were kept, that is admitted. Sakharam, to support his former partner says that to procure the Rs. 450, in his presence Ramchandra's wife took the ornaments off her person and handed them to him for sale—a story hardly worthy of credit. The ornaments are said to have been sold to a person whose son is alive, and who could have been called with the accounts to show the sale. The facts that Ramchandra subsequently raised Rs. 1,000 by a mortgage of this house (partly he says to make additions to this house and partly to pay for the marriage expenses of his brother, the plaintiff), which sum was repaid by instalments, as also were three bonds (one for Rs. 200 in October 1869, one for Rs. 450 in November 1870, and one for Rs. 100 in March 1873), point to the conclusion that Ramchandra treated the house as joint family property. He was evidently a generous eldest brother, educating two of his sisters' sons, and making due arrangements for raising funds for the marriages and other ceremonial expenses of his brothers and their families, without plunging the family into debt.

[932] It no doubt seems hard that he, the eldest and largest wage-earner in the family, should, when partition takes place, be in no better position than the youngest member of the family. But that is just one of the paradoxes to be met with in the system of the Hindu joint family. Of course, if Ramchandra could establish the fact that he kept a separate private purse, apart from the family funds which were used for the maintenance of all the members of the family, and if he could show that he purchased the house from the private purse, and always treated the house as his own separate property, then the fact that he let his father and brothers live in the house with him—possibly from love and affection—would not show that he had waived his separate rights as owner. But I have no doubt that, as so often is the case, Ramchandra had no thought of separate ownership apart from the other members of the family. Now that he has quarrelled with the plaintiff he, not unnaturally, is loth to agree to partition. Hence the suit, fostered possibly by the touts who wrote the lawyer's letters which are the cause of more than half the litigation in this Court.

I find that the Khattargalli house is liable to partition. There must, therefore, be a decree for the plaintiff, and the case will go to the Commissioner to effect a partition, and if necessary under the Partition Act to sell the same. The costs of effecting partition will come out of the estate, but costs of plaintiff up to date must be borne by first defendant, as he has practically caused the suit. This will not include costs (if any) connected with the Vavla property. The plaintiff must bear all those. Defendants Nos. 2 to 5 have incurred no costs. The Commissioner will make due provision for the maintenance and residence of the ladies Radhabai and Savitribai.

Attorneys for the Plaintiff :- Messrs. *Captain and Vaidya.*

Attorneys for the Defendant :—Messrs. *Jehangir and Seervai.*

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NOTES.

[See also (1904) 29 Bom., 249 (suit for declaration of title) ; (1903) 27 Mad., 157 (sale of lands mortgaged by deposit of title deeds) ; (1904) 28 Mad., 216 (partition); (1903) 31 Cal., 214.]

## [933] CRIMINAL REFERENCE.

*The 9th September, 1897.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Queen-Empress

*versus*

Babaji Laxman.*

*Cattle Trespass Act (I of 1871), Sec. 11—Forest Act (VII of 1878). Sec. 69—Cattle straying in a reserved forest—Seizure by a forest officer of such cattle.*

Section 11 of the Cattle Trespass Act (I of 1871) having been applied to forests by section 69 of the Indian Forest Act (VII of 1879), the seizure by a forest officer of cattle found straying in a reserved forest is legal, even though no damage has actually been done.

REFERENCE under section 438 ot the Code of Criminal Procedure (Act X of 1882).

The facts, as found by the District Magistrate of Poona, were as follows :—

"The accused, Babaji Laxman, a forest guard, and Shankar Balvant Kulkarni were tried for illegal seizure of cattle (20 sheep and 5 goats) belonging to the complainant. The complainant alleged that his cattle did not trespass into the forest, but went by a public road. The evidence, however, showed that the cattle were grazing inside the forest. The Magistrate on personal inspection, though he found that the place where the cattle were alleged to have been grazing was forest, seems to have thought that it was not far enough from the road to justify their being impounded."

On these facts the Magistrate passed an order to the following effect :—

"As the forest guard has illegally impounded the cattle, I direct that he should pay to the complainant Re. 1-9-0 on account of cattle-pound fees and Re. 1-9-0 on account of court-fee expenses, &c."

The District Magistrate, being of opinion that this order was illegal, referred the case to the High Court.

The High Court issued notice to the complainant to show cause why the Magistrate's order awarding compensation should not be set aside.

*Sadashiv R. Bakhale*, for the Complainant.

There was no appearance for the Accused.

[934] **Parsons**, J. :—The Magistrate has adjudged the seizure of the cattle in question illegal and awarded compensation to the owner under section 22 of the Cattle Trespass Act, 1871, because he was of opinion that they had done no damage even if they had strayed into the reserved forest in which it is alleged they were found straying, and were seized by the accused who was the forest officer in charge of the reserved forest. The Magistrate has apparently lost sight of the words "or found straying thereon" which occur in section 11 of the Cattle Trespass Act, 1871, which is applicable to forests by section 69 of the Indian Forest Act, 1878. If the cattle were found straying in a reserved forest, as alleged by the accused, the seizure would be legal even if no damage had actually been done. There is no finding, that we can see, by the Magistrate on this point. We reverse the order and remand the case for retrial.

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* Criminal Reference, No. 112 of 1897.

[ 22 Bom. 934 ]

## CRIMINAL REFERENCE.*

*The 16th September, 1897.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Queen-Empress
*versus*
Sakar Jan Mahomed.*

*Criminal Procedure Code (Act X of 1882), Sec. 560—Compensation for vexatious complaint—Compensation illegal where the complainant is a police officer.*

Section 560 of the Criminal Procedure Code (Act X of 1882) does not authorize a Magistrate to pass an order for compensation to be paid by the complainant to the accused, where the complaint is instituted by a police officer.

*Ramjeevan Koormi* v. *Durga Charan Sadhu Khan*, I. L. R., 21 Cal., 979, followed.

THIS was a reference by R. B. Steward, District Magistrate of Nasik, under section 438 of the Criminal Procedure Code (Act X of 1882).

The reference was in the following terms :—

"The complainant, Abdul Sheikh Rahmia, Constable of the Nasik District Police, filed a complaint against Sakar Jan Mahomed and three others of committing an affray.

[935] "The Magistrate discharged all four accused, and considering that the complaint against the fourth accused, Rasul Habibulla, was vexatious, fined the complainant Rs. 5, which he awarded to Rasul as compensation under section 560 of the Criminal Procedure Code.

"I would submit the following points for their Lordships' consideration:—

"(a) The complainant was a public servant acting in his official capacity.

"(b) It is admitted by the Magistrate that there was public loud abuse and a crowd collected.

"(c) There is nothing whatever to show that complainant was actuated by any wrong motives in making the complaint.

"At the most, there is a want of sufficient evidence against accused No. 4, who is admitted to be a man of means and position. The witnesses all appear to have said as little as possible. I think this fine is wrongfully inflicted on the facts, and it is contrary to the interests of justice and good administration."

This reference came on for hearing before a Division Bench (PARSONS and RANADE, JJ.).

There was no appearance for the Crown or for the Complainant.

*Per* CURIAM :—Following the decision in the case of *Ramjeevan Koormi* v. *Durga Charan Sadhu Khan*, I. L. R., 21 Cal., 979, we reverse the order passed under section 560 of the Code of Criminal Procedure (Act X of 1882).

* Criminal Reference, No. 63 of 1897.

## [936] CRIMINAL REVISION.

*The 16th September, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Chotalal Mathuradas.*

*Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction to prosecute—Departmental inquiry into the misconduct of a revenue officer—Judicial proceeding—Bombay Land Revenue Code (Bom. Act V of 1879) Secs. 196, 197.*

A Collector, on receiving information that his Deputy Chitnis had attempted to obtain a bribe, ordered his Assistant Collector to make an inquiry into the matter, with a view to taking action under section 32 of the Bombay Land Revenue Code (Bom. Act V of 1879). The Assistant Collector found, on inquiry, that the charge of bribery was unfounded, and gave a sanction to prosecute the informant and his witnesses for giving false evidence. This sanction was revoked by the Collector. The Chitnis appealed to the High Court against the order revoking the sanction.

*Held*, that the inquiry made by the Assistant Collector was a departmental inquiry, and not a judicial proceeding, and that the Assistant Collector, while holding the inquiry, was not a Court. No sanction for prosecution was, therefore, necessary under section 195 of the Criminal Procedure Code (Act X of 1882).

APPLICATION under section 435 of Act X of 1882.

The applicant, Chotalal Mathuradas, was the Deputy Chitnis of the Collector of Kaira.

The Collector received information that Chotalal had attempted to obtain a bribe from one Dungar Garud in respect of an official act.

The Collector thereupon ordered the Assistant Collector to make an inquiry into the matter with a view to his taking action under section 32 of the Bombay Land Revenue Code (Bom. Act V of 1879).

The Assistant Collector found, on inquiry, that the charge of bribery was entirely unfounded, and was made maliciously. He, therefore, gave sanction to prosecute the informant and his witnesses for giving false evidence.

On appeal to the Collector the sanction was revoked.

[937] Against this order of revocation, the Deputy Chitnis, Chotalal, made the present application to the High Court under its Revisional Jurisdiction.

*C. H. Setalvad* for Applicant:—The Collector had no power to revoke the sanction. The only authority that could revoke the sanction was the Sessions Judge or, failing him, the High Court—section 195 of the Code of Criminal Procedure (Act X of 1882). The Collector's order is, therefore, *ultra vires*. Refers to *Sheo Prasad Singh* v. *Kastura Kuar*, I. L. R., 10 All., 119 at p. 121; *In re Parsotam Lal* v. *Bijai*, I. L. R., 6 All., 101.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown:—The order of revocation was right, for the sanction is unnecessary and was erroneously granted. The inquiry in the course of which the informant is alleged to have committed perjury was a departmental inquiry and not a judicial proceeding. There are certain inquiries under the Land Revenue Code which are expressly declared to be judicial proceedings. Section 196 of the Code shows what those inquiries are. They are called "formal or summary" inquiries. The inquiry in the present case is not either a formal or summary inquiry. It

* Criminal Revision, No. 198 of 1897.

is an ordinary departmental inquiry falling under section 197 of the Code. As such, it is not a judicial proceeding, and the officer who held the inquiry is not a Court. The distinction between a judicial and an administrative inquiry is pointed out in *Queen-Empress* v. *Tulja*, I. L. R., 12 Bom., 36.

*Gokaldas K. Parekh* for Accused :—This Court has no jurisdiction to interfere in revision with the Collector's order. The proceedings before the Collector cannot be treated as a judicial inquiry. And the Collector did not profess to act as a judge, in revoking the sanction granted by his Assistant. The sanction itself was not granted under section 195 of the Criminal Procedure Code. Under the Land Revenue Code, orders passed by the Assistant Collector are appealable to the Collector. See sections 9 and 203 of the Code. The Collector had, therefore, authority to revoke the sanction in appeal.

[938] **Parsons, J.** :—Several important points have been raised and argued in this case, but the only one with which we propose to deal is whether the office of the Assistant Collector before whom the evidence alleged to be false was given was "a Court" within the meaning of the word as used in section 195 (*b*) of the Code of Criminal Procedure (Act X of 1882).

We think that there can be no doubt that it was not. The facts are these. The Collector received information that his Deputy Chitnis, Chotalal, had been trying to obtain a bribe from one Dungar, and after examining him and certain other persons he ordered the case against Chotalal to be sent to the Assistant Collector for inquiry under the Land Revenue Code. It was in the inquiry held by the Assistant Collector in pursuance of this order that the alleged false evidence was given and it is material to ascertain if his office at the time of holding the inquiry was a Court or not; for if it was not, then no sanction will be necessary for a prosecution.

Apparently there is some difference of opinion among the High Courts in India as to the meaning to be attached to the word "Court" as used in section 195, but we are not concerned with that in the present case. We consider that the Legislature has in the Bombay Land Revenue Code decided that point for us. Section 196 of that Code declares that "a formal summary inquiry under this Act shall be deemed to be a 'judicial proceeding' within the meaning of sections 193, 219 and 228 of the Indian Penal Code, and the office of any authority holding a formal or summary inquiry shall be deemed a Civil Court for the purposes of such inquiry."

The mention of these inquiries in this section excludes all other inquiries and the authority holding them, and section 197 makes an express provision how these latter inquiries are to be conducted. It is clear that the inquiry held in the present case was one that the Act did not require to be either formal or summary. When the Code requires a formal or summary inquiry it says so in plain language (see sections 59, 87, 91, 93, 118, 125, 129). The present inquiry, if provided for at all by the Code, can only be so under the implied authority given by [939] Chapter IV. It was a mere departmental inquiry held in order to ascertain whether there was any truth in the charge of bribery laid against Chotalal such as would justify the Collector in taking action under section 32 of the Code. If a formal or summary inquiry was intended, such would certainly be stated in section 33, but neither that section nor any other section of this chapter mentions the nature of the inquiry. It must, therefore, be held to be an ordinary inquiry falling within the provisions of section 197. As such, it would not be a judicial proceeding and the office of the authority holding the inquiry would not be a Court.

No sanction, therefore, for prosecution is required under section 195 (*b*) of the Code of Criminal Procedure.

We dismiss the application and return the papers in all the three cases and the applications will be struck off as dismissed.

NOTES.

[See also, 26 Bom., 150 F. B.]

[22 Bom. 939]

## APPELLATE CIVIL.

*The 20th September, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Shivjiram Sahebram Marwadi............(Original Plaintiff) Appellant

*versus*

Waman Narayan Joshi............(Original Defendant) Respondent.*

Lis pendens—*Mortgage—Decree on mortgage—Sale of mortgaged land pending proceedings in execution of decree.*

On the 22nd August 1882, Yesu and Krishna mortgaged certain land to the plaintiff by an unregistered mortgage. On the 17th May 1884, Yesu alone mortgaged the same land to the defendant. This mortgage was duly registered. Subsequently to the date of the defendant's mortgage the plaintiff sued Yesu and Krishna on his mortgage, and on 26th August 1884, he got a decree for the sale of the mortgaged property. On 1st November 1884, he applied for execution of his decree, and in August 1885, the execution sale took place and the property was sold to one Dagdu, who was the plaintiff's nominee. Meanwhile, however, and pending the plaintiff's execution proceedings, Yesu and Krishna on the 14th March 1885, sold the property to the defendant by a registered deed of sale. The plaintiff now sued the defendant for possession.

*Held* (1) that the sale to the defendant on the 14th March 1885, pending the plaintiff's execution proceedings was a sale *pendente lite* and void as against the plaintiff.

[940] (2) That the plaintiff as purchaser at the Court's sale in August 1885, took the property subject to the defendant's mortgage of Yesu's share to the defendant in 1884, but free from the effect of the subsequent sale by Yesu and Krishna to the defendant.

(3) As this was a suit for possession, and as Yesu's share had been mortgaged to the defendant with possession, the plaintiff was only entitled to joint possession of the property with the defendant. He could file a separate suit to redeem defendant.

SECOND APPEAL from the decision of Rao Bahadur D. G. Gharpure, Additional First Class Subordinate Judge of Nasik, with appellate powers, reversing the decree of Rao Saheb L. K. Nulkar, Joint Second Class Subordinate Judge.

Suit for possession of land. Yesu and Krishna were the original owners of the land; and on the 22nd August 1882, they mortgaged it to the plaintiff for Rs. 50 by an unregistered mortgage.

On 17th May 1884, Yesu alone mortgaged the land to the defendant for Rs. 50 with possession. This mortgage was registered on the 12th June 1884. As to Yesu's interest it, therefore, took priority under section 50 of the Registration Act (III of 1877).

Subsequently to the date of the defendant's mortgage the plaintiff sued Yesu and Krishna on his mortgage. On 26th August 1884, he got a decree, and the mortgaged property was ordered to be sold.

* Second Appeal, No. 401 of 1897.

On the 1st November 1884, the plaintiff applied for execution of his decree, and after some delay in the proceedings the property was sold in August 1885, to one Dagdu, who was the plaintiff's nominee.

Meanwhile, and pending the execution proceedings which resulted in the sale of the property under the plaintiff's decree; Yesu and Krishna on 14th March 1885, sold the property to the defendant by registered deed of sale.

The plaintiff now sued the defendant for possession.

The lower Court dismissed this suit.

The plaintiff preferred a second appeal.

*Manekshah J. Taleyarkhan*, for the Appellant (Plaintiff).

*Mahadeo V. Bhat*, for the Respondent (Defendant).

[941] **Farran, C. J.** :—The plaintiff, who is the transferee of one Dagdu, the purchaser at a Court's sale of the land in question, sued to recover possession of it from the defendant.

The original owners of the land were Yesu and Krishna. On the 22nd of August 1882, they mortgaged it to the plaintiff for Rs. 50. This mortgage was unregistered. On the 17th May 1884, Yesu alone mortgaged the land to the defendant for Rs. 50, and his (the defendant's) mortgage was registered on the 12th June following. This mortgage, which the Subordinate Judge considered to have been sham and colorable and passed without consideration to defeat the plaintiff's mortgage, has been upheld by the appellate Court as genuine and *bonâ fide*, and we must deal with it as such. It had, therefore, so far as Yesu's interest in the land is concerned, priority over the plaintiff's mortgage under section 50 of the Registration Act, 1877.

Some time about the date of the defendant's above mortgage—the Lower Appellate Court thinks after its execution—the plaintiff brought a suit upon his mortgage against Yesu and Krishna for the purpose of bringing the mortgage property to sale and realising his mortgage-debt. A decree was passed in that suit for the plaintiff on the 26th August 1884, in the usual form, and the mortgaged property was ordered to be sold. On the 1st November 1884, the plaintiff applied by darkhast for execution of his decree, and the usual proceedings ensued. Some delay occurred in bringing the property to sale, but it was eventually sold on the 22nd or 25th August 1885 (the actual date is not clear) to Dagdu, the plaintiff's nominee.

Meanwhile, during the period when the plaintiff was engaged in bringing the property to sale, Yesu and Krishna on the 14th March 1885, sold the property to the defendant. The deed of sale was subsequently registered.

It is objected that the defendant could take nothing under that sale, for two reasons :—

(1) Because the plaintiff's decree came under section 50 of the Registration Act (III of 1877) in competition with, and being prior in point of time defeated, the defendant's subsequent sale-deed.

[942] (2) Because the plaintiff's suit against Yesu and Krishna in respect of this property was, at the date of the sale by them to the defendant, still pending, and the defendant took the property under his sale-deed subject to the ultimate result of the plaintiff's suit.

The law upon the subject of *lis pendens* was considered by SARGENT, C. J., in *Venkatesh Govind* v. *Maruti*, I.L.R., 12 Bom., 217. The ground of the actual decision in that case was that when a decree had been obtained upon an unregistered mortgage, directing that the plaintiff should recover the mortgage-debt "on the liability of the lands mentioned in the plaint," and no steps were

taken under the decree for several years, the *lis pendens* was at an end. In the previous case of *Kanu Khandu* v. *Krishna Bhulaji*, 5 Bom. H. C. Rep. A. C. J., p. 147; it had been decided that a decree obtained upon an unregistered mortgage did not operate to give such instrument priority over a subsequent purchaser at a Court's sale with possession. That decision was, however, passed in reference to the registration law as it existed prior to the Registration Act of 1864, and the doctrine of *lis pendens* was not relied upon in it.

In neither of the above cases was the question actually decided whether the doctrine of *lis pendens* applied to protect a plaintiff actively seeking to bring the mortgaged property to sale under a decree which he has obtained upon his mortgage, from the effect of an alienation by the judgment-debtor. If in taking such steps the property is attached, section 276 of the Civil Procedure Code (Act XIV of 1882) effectually secures the plaintiff, but in the present case though the plaintiff sought to have the property attached, the Court considered that such action was unnecessary, as the decree directed a sale in default of payment of the mortgaged property, and no attachment in consequence was levied upon the land. The plaintiff has, therefore, to rely upon the *lis pendens* doctrine.

Now the general rule of law is that the *lis pendens*, except in administration suits and suits for an account and in suits of a similar nature in which the decree is the inception of subsequent proceedings, ends with the decree. This was laid down by [943] Lord HARDWICKE in *Worsely* v. *Earl of Scarborough*, 3 Atk., 392, and was recognised by Sir CHARLES SARGENT, C. J., in the above cited case of *Venkatesh* v. *Maruti* (*supra*). In *Kinsman* v. *Kinsman*, 1 R. and M., 617, Lord LONDHURST says: "After decree and before execution it was not pretended that *lis pendens* could any longer exist." The question would, therefore, seem to come to this. Do the execution proceedings in a case like the present, revive or give continuance to the *lis pendens*? That question was answered in the affirmative in *Raj Kishen Mookerjee* v. *Radha Madhub*, 21 Cal. W. R., 349. The dates there were as follows:– The defendant sued upon his mortgage bond in December 1871, and obtained a decree upon it for sale of the mortgaged property in February 1872. A few days before the 18th April 1872, the property mentioned in the mortgage was attached under the defendant's decree and it was sold in the month of May 1872, when the defendant himself purchased it. That was the defendant's title. A creditor of the mortgagor attached the same property on the 7th November 1871, under a money decree, and on the 18th of April 1872, brought it to sale, when the plaintiff became the purchaser. It was held that the plaintiff's purchase was a purchase *pendente lite*. I have stated the above dates and facts partly from the above report and partly from the judgment of the Privy Council in the case next to be referred to. That is the case of *Radhamadhub* v. *Manohur*, L. R., 15 Ind. Ap., 97, and though the decision in it proceeded upon another ground, their Lordships expressed their concurrence in the judgment of the Calcutta High Court in the above cited decision in unequivocal language. Sir RICHARD COUCH in his judgment in *Raj Kishen Mookerjee* v. *Radha Madhub*, while admitting that there was no English precedent for his decision, considered that the principle laid down in *Bellamy* v. *Sabane*, 1 De G. and Jo., 566, that "the doctrine (of *lis pendens*) is not founded upon any peculiar tenets of a Court of equity as to constructive notice, but prevails alike in law and equity resting on this foundation that it would be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail," was applicable to proceedings to [944] realize a mortgage after a decree for sale. This case was followed in *Jharoo* v. *Raj Chunder*, I. L. R., 12 Cal., 299 at p. 302.

These Calcutta authorities apply to the case before us, and we think that we ought to follow them approved, as in principle they have been approved, by their Lordships of the Privy Council. Though they are not entirely consonant with the remarks of SARGENT, C. J., in the earlier portion of his judgment in *Venkatesh* v. *Maruti*, they are quite consistent with the decision in that case. They were, moreover, not brought to the notice of the Court in that case and were not considered by it.

Having come to this conclusion upon the second of the above objections to the decree, it becomes unnecessary for us to consider the first objection. Had we to determine it, we should probably have felt it desirable to refer the matter to a Full Bench.

The result is that the plaintiff as purchaser at the Court's sale takes the property subject to the defendant's mortgage over Yesu's share, but free from the effect of the subsequent sale by Yesu and Krishna to the defendant. As this is only a suit for possession, and as the defendant's mortgage is with possession, plaintiff is entitled only to joint possession with the defendant Waman. He can, if so minded, file a separate suit to redeem the defendant Waman. The decree will be drawn up accordingly.

Decree varied as above with costs in the Lower Appellate Court, and each party to bear his own costs in this Court.

*Decree varied.*

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**NOTES.**

[Similar decisions as regards *lis pendens* were given in (1904) 28 Bom., 361 ; (1906) 2 All., 76 ; (1906) 2 C. L. J., 288 ; (1905) 32 Cal., 891.]

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## [945] APPELLATE CIVIL.

*The 20th September, 1897.*

PRESENT :

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Maganlal............(Original Defendant No. 3) Appellant

*versus*

Shakra Girdhar............(Original Plaintiff) Respondent.*

*Registration—Unregistered* san-*mortgage—Sale—Subsequent unregistered mortgage of same property—Decree on latter mortgage and sale in execution—Sale certificate registered—Priority—Interest passing on sale of mortgaged property in execution of a money decree and of a decree on mortgage.*

One Harilal and his sons Baji and Chhagan executed a *san*-mortgage of certain ancestral property in plaintiff's favour in 1885. The mortgage was unregistered. In 1886 the same property was mortgaged by Chhagan alone by a deed which was also unregistered. In 1889 Chhagan's mortgagee obtained a decree on his mortgage for sale of the mortgaged property, and in execution put up the property to auction in 1892, when defendant purchased it. Defendant got his sale-certificate registered.

In 1894 the plaintiff brought this suit to enforce his mortgage-lien by sale of the mortgaged property. The defendant contended that, as to Chhagan's share, his certificate of sale having been registered, his claim had priority to the plaintiff's unregistered mortgage.

*Held*, that the plaintiff was entitled to a decree. His claim was superior to the defendant's. The defendant had purchased the interest which Chhagan had mortgaged in 1889.

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* Second Appeal, No. 877 of 1896.

But that mortgage was unregistered and was, therefore, subject to the plaintiff's mortgage, which although also unregistered was earlier in date. The defendant by registering his certificate of sale could not enlarge the estate which the certificate conveyed to him.

By a sale of mortgaged property in execution of a decree obtained by a mortgagee against the mortgagor upon the mortgage, the interests both of the mortgagor and mortgagee passes to the purchaser. But by a sale of mortgaged property in execution of a money-decree obtained by the mortgagee against the mortgagor, the interest of the defendant (mortgagor) alone passes to the purchaser.

SECOND APPEAL from the decision of E. H. Leggatt, Assistant Judge of Ahmedabad.

The property in dispute belonged to one Haribhai and his sons Baji and Chhagan.

Haribhai and his sons executed a *san*-mortgage (mortgage without possession) for Rs. 50 in plaintiff's favour on 27th August 1885. The mortgage was unregistered.

[946] In 1886 the same property was mortgaged by Chhagan alone by an unregistered mortgage bond. Upon this bond the mortgagee obtained a decree against Chhagan in 1889, and brought the property to sale. Defendant No. 3 purchased the property at the Court-sale on 21st September 1892. The certificate of sale was registered.

In 1894 plaintiff sued to recover Rs. 84-4-0 due under his *san*-mortgage of 1885, by sale of the mortgaged property.

Defendant No. 3, who alone defended the suit, pleaded (*inter alia*) that the *san*-mortgage was false and fictitious, and could not, under any circumstances, prevail over his registered certificate of sale.

The Court of First Instance dismissed the suit, holding that the bond sued upon was not proved.

On appeal the Assistant Judge held the bond sued upon was proved, and that the defendant No. 3 purchased the property at the Court-sale subject to the plaintiff's *san*-mortgage.

The Assistant Judge, therefore, reversed the decree of the first Court, and directed the defendants to pay Rs. 84-4-0 to the plaintiff within six months, or in default the plaintiff was to recover the same from the *san*-mortgaged property.

From this decree defendant No. 3 preferred a second appeal to the High Court.

*Ganpat Sadashiv Rao*, for Appellant (Defendant No. 3):—Our certificate of sale being registered has priority over plaintiff's unregistered *san*-mortgage —Registration Act (III of 1877), section 50; *Jethabhai* v. *Girdhar*, I. L. R., 20 Bom., 158.

*R. V. Desai*, for Respondent (Plaintiff):—The registration of the certificate of sale cannot give it priority over the plaintiff's *san*-mortgage. The plaintiff's mortgage, though unregistered, is a valid charge. As a purchaser at a Court-sale the defendant bought the right, title and interest of Chhagan, the judgment-debtor, subject to all existing equities against the property sold—*Sobhagchand* v. *Bhaichand*, I. L. R., 6 Bom., 193.

[947] **Farran**, C. J.:—Haribhai and his sons Baji and Chhagan executed a *san*-mortgage in favour of the plaintiff in 1885. This mortgage was not registered. The mortgaged property—a house—is found by the Assistant Judge to have been the joint property of Haribhai and his sons. In 1886 Chhagan alone mortgaged the same property. The mortgage was not registered. In 1889 Chhagan's mortgagee having sued Chhagan upon his mortgage, obtained a decree for the sale of the mortgaged premises and the same were sold in execution by auction-sale in 1892 when the defendant No. 3, Maganlal, pur-

chased them. He caused his sale-certificate to be registered. The house appears to be in the actual possession of the defendants Nos. 4 and 5.

The plaintiff by the present suit seeks to have his *san*-mortgage realized by the sale of the mortgaged property. As to the shares therein of Haribhai and Baji, the plaintiff is clearly entitled to the relief which he seeks against the appellant (defendant No. 3), as that defendant has only purchased the share of Chhagan in the same. The substantial question in the appeal relates to Chhagan's interest which the defendant No. 3 has acquired under his registered sale-certificate. Had the plaintiff purchased at a sale held in execution of a money decree, the Full Bench decision in *Sobhagchand* v. *Bhaichand*, I. L. R., 6 Bom., 193, would have been conclusive in favour of the plaintiff's *san*-mortgage against the defendant No. 3 as purchaser at a Court-sale although the defendant No. 3's sale-certificate had been perfected by registration. "When the Court sells the right, title and interest of the judgment-debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell. He could honestly sell only subject to any equities existing against himself on the property; and if by concealment of a *san* mortgage or other mortgage, he sold property as free of that charge, he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sell only the right, title and interest of the judgment-debtor, subject to all existing equities against the property sold, the registration of the Court's conveyance (the certificate of sale) cannot enlarge the scope of that conveyance, and thus discharge [948] the property from any unregistered incumbrance, which was binding upon the judgment-debtor." Per WESTROPP, C. J., at p. 202. This must, we think, be taken now to be the settled law of this Court.

It is also clear that, if the mortgage by Chhagan had been registered when executed, the defendant No. 3 claiming under that mortgage would have had a preferential title to the plaintiff's claiming under an unregistered *san*-mortgage—*Jethabhai* v. *Girdhar*, I. L. R., 20 Bom., 158. This case was decided upon the language of section 50 of the present Registration Act (III of 1877).

The distinction between a decree for the sale of mortgaged property obtained by a mortgagee upon his mortgage, and a decree for the sale of such property under a money-decree, is that notwithstanding the form of the words used in the proclamation of sale in the former case, the respective interests both of the mortgagee and of the mortgagor (the respective interests both of the plaintiff and of the defendant) pass to the purchaser, while in the latter case the interest of the defendant alone passes—*Khevraj* v. *Lingaya*, I. L. R., 5 Bom., 2, and *Sheshgiri* v. *Salvador*, I. L. R., 5 Bom., 5. The defendant No. 3 consequently took under his purchase both the interest of Chhagan's mortgagee and that of Chhagan.

The mortgagee unaware of the plaintiff's *san*-mortgage would, it may be contended, commit no fraud in selling to the defendant No. 3 without informing him of the plaintiff's *san*-mortgage, and the Court, therefore, in selling the property would not be carrying out any fraud on the part of the mortgagee plaintiff; and hence the *ratio decidendi* in *Sobhagchand* v. *Bhaichand* (*supra*) does not apply.

The distinction is, we think, too fine and cannot be given effect to. It is clear that what the Court sells is the judgment-debtor's interest in the property as it existed at the date of the mortgage, *i.e.*, subject to all valid incumbrances existing at that date—*Kasandas* v. *Pranjivan*, 7 Bom. H. C. Rep., A. C. J., 146; *Mohan Manor* v. *Togu Uka*, I. L. R., 10 Bom., 224. The Court does not guarantee the property as having been [949] free from incumbrances at that time. The purchaser knows that he is purchasing under an unregistered mortgage and, therefore, subject to unregistered incumbrances of prior date.

Therefore it would appear to follow that he is in no better position than the mortgagee under whose mortgage he purchases. The root of his title is an unregistered mortgage. The Court conveys to him that title and no more, and the reasoning in *Sobhagchand* v. *Bhaichand* (*supra*) then applies. He cannot by registration of his Court's conveyance enlarge the scope of the estate which the Court has by its certificate conveyed to him.

We think, therefore, that the plaintiff's *san*-mortgage has priority over the purchase of the defendant No. 3, and that the decree appealed against should be confirmed. Decree confirmed with costs.

*Decree confirmed.*

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**NOTES.**

[ Dr. Rash Behari Ghosh in his Mortgages, Vol. II, (1914, IV Edn.), says: "The dictum in (1897) 22 Bom., 945 is opposed to all previous cases on the point. It is true there was an idea that the security did not pass to the purchaser upon a judgment on the covenant recovered on the original side of the High Court. But as the execution of such judgments was always limited to property not comprised in the mortgage, the mortgagee could not retain his security and at the same time sell the equity of redemption. Belchambers' Practice, 336, 337. A somewhat different view was taken in Allahabad and Madras on the effect of a sale by a mortgagee under a mere personal judgment against the mortgagor. Compare (1876) 1 All., 240; 236; 433 with (1881) 4 Mad., 1; but see (1879) 2 Mad., 108, 112. But all the Courts were agreed that a mortgagee could not enforce his mortgage against a purchaser without notice of it, whether he sold the property for the secured debt or for some other debt due to him. In such cases the mortgagee was held to be estopped from enforcing his mortgage. See (1869) 3 B. L. R., 407; (1875) 24 W. R., 263; (1876) 1 Bom., 314; (1884) 10 Cal., 609; (1888) 12 Bom., 678; (1897) 22 Bom., 686; (1899) 21 All., 309; dist. (1895) 20 Bom., 290."

See also (1903) 28 Bom., 153; (1904) 6 Bom. L. R., 1013; (1908) 2 I.C., 57 (Oudh); (1913) 38 Bom., 24.]

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[ 22 Bom. 949 ]

## CRIMINAL REVISION.

*The 27th September, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

### *In re* Harilal Buch.*

*Criminal Procedure Code (Act X of 1882), Sec. 96—Search warrant—Issue of search warrant illegal, in the absence of any inquiry, trial or other proceeding pending before Magistrate—Power of revision in criminal cases—Revision.*

Some treasure belonging to the Native State of Radhanpur was missing. The Administrator of Radhanpur sent a telegram to the District Superintendent of Police at Ahmedabad, stating that part of the missing treasure was in the possession of the accused, who was a resident of Ahmedabad, and asking that his house should be searched. In consequence of this telegram, the City Police Inspector applied for a search warrant to the City Magistrate of Ahmedabad. Thereupon the Magistrate issued a search warrant under section 96 of the Code of Criminal Procedure (Act X of 1882). In execution of this warrant the house of the accused was searched and the police seized and took away certain property belonging to the accused, to his wife, and to his servant. The accused was subsequently arrested under a warrant issued by the Political Superintendent of Palanpur under section 11 of the Extradition Act XXI of 1879, but he was admitted to bail by the District Magistrate of Ahmedabad. On the 12th [950] June 1897, the District Magistrate passed an order refusing to deliver up the property seized by the police to the Political Superintendent of Palanpur, but allowing

* Criminal Revision, No. 213 of 1897.

the police to retain the property for some time, as it was possible that a prosecution would be instituted in British India in respect of the stolen treasure. The Magistrate directed that, if no prosecution were instituted within two months, the property should be restored to the persons from whose possession it was taken.

The District Magistrate subsequently reversed this order as being erroneous, and passed a fresh order on the 3rd August 1897, directing the property to be delivered up to the Political Superintendent of Palanpur.

*Held*, that the City Magistrate had no authority to issue a search warrant under section 96 of the Code of Criminal Procedure (Act X of 1882), as at the time of issuing the search warrant there was no investigation, inquiry, trial or other proceeding under the Code pending before the Magistrate, for the purposes of which the production of the articles seized was necessary or desirable.

*Held*, also, that the search warrant being illegal and *ultra vires*, the subsequent orders relating to the detention and delivery of the property seized were also illegal and unjustifiable.

*Per* RANADE, J. :—The District Magistrate had no power to review his own previous order of the 12th June 1897, passed on full inquiry and after hearing both parties.

The power of revision in criminal cases is very strictly confined, and the same considerations which prevent Subordinate Courts from altering their judgments on review, hold good in respect of final orders which are of the nature of a judgment.

THIS was an application under section 435 of the Code of Criminal Procedure (Act X of 1882).

The following statement of the facts of this case is taken from the judgment of PARSONS, J. :—

"The facts so far as we have been able to obtain them from the papers on the record and the statements of the counsel for the applicant and the Government Pleader are as follows. Some treasure belonging to the Radhanpur State was missing, and on the 26th March 1897, the Administrator of the State, Major Lydo, telegraphed to the District Superintendent of Police, Ahmedabad, to say that 'the hidden treasure here has been discovered. Rani has given written document that from it she handed over thirty thousand rupees to Harilal Buch lately, probably more was handed over before. Please have the house [951] of Harilal Buch in Ahmedabad searched, and Harilal Buch watched. Am prepared to prove he knew that this money belonged to the State.' The City Police Inspector in consequence applied to the City Magistrate of Ahmedabad for a search warrant, and that officer on the 30th March issued a warrant, in these terms :

" '*Search Warrant, Criminal Procedure Code, Section* 96.

" ' To Rao Bahadur, City Police Inspector, Ahmedabad.

" ' Whereas information has been laid before me of the commission of the offence of the stolen treasure of the Nawab Saheb of Radhanpur having been brought to and kept at Ahmedabad, and whereas it has been made to appear to me that for the purposes of the investigation which is being made into the said offence it is essential to find out the said stolen treasure, as also to examine and produce in that connection account books of some traders, this is to authorize and require you to search, in order to find out the above, the house in which Harilal Buch lives, and such other houses which it may on enquiry be found necessary to search, to examine account books it may seem necessary to examine, and search the houses in which they may be, and in the event of the same being found produce them forthwith before this Court, and to return this warrant soon after it is executed, endorsing thereon what you may have done in virtue of the same. Given under my hand and the seal of the Court this day, the 30th of March, in the year 1897.

' DADABHAI DINSHAW,

' F. C. Magistrate.'

"In execution of this warrant the house of the applicant was searched, and the police seized and took away therefrom Rs. 300 belonging to the

applicant, Rs. 300 belonging to his servant Kamraj, the gold bangles of the wife of the applicant worth about Rs. 700, and all the private letters and papers of the applicant. They also made one Hathising Magan pay up the sum of Rs. 2,600 which he owed to the applicant, and took that money also (see the telegram of the 31st March). On the 7th May, Lieutenant-Colonel Jackson, the Political Agent, Palanpur, issued, under section 11 of the Extradition Act XXI of 1879, a warrant for the arrest of the applicant on a charge of theft in a dwelling-house and receiving stolen property committed at Radhanpur. The applicant was arrested under that warrant and released on bail to appear within five days before the Deputy Assistant Political Superintendent of Palanpur. The Political Agent appears then to have asked that the whole of the property [952] found and seized under the search warrant should be sent to him. The matter then came before the District Magistrate, we cannot say whether legally or otherwise, as we do not know under what circumstances he took cognisance of the case. After hearing the applicant he on the 13th May 1897, passed the following order:—

"'I will cause to be delivered up any property out of the property seized which can be reasonably suspected to be stolen property. I think in order to ascertain this it will be well if the Political Superintendent should send a man here. A list should meanwhile be made of the property, and the City Police Inspector by questioning the man sent (if sent) by the Political Superintendent, and inspecting any articles or documents to which his attention is drawn by such man, will satisfy himself as to what articles, including documents, if any, can be reasonably suspected to be stolen property; such articles can be delivered over to the Political Superintendent, Palanpur. All other articles, that is, all articles which cannot be reasonably suspected to be stolen property, should, for the present, be detained in the custody of the City Police Inspector. Before reading any document, or allowing the man sent by the Political Superintendent to read it, the City Police Inspector should be satisfied by questioning the man sent or otherwise that it has or may have connection with the present case.'

"The matter again came before the District Magistrate, and he after hearing both parties on the 12th June 1897, passed the following order:—

"'The only real question for decision is, can the provision under sections 94 and 96, Criminal Procedure Code, as to production of documents and things useful in evidence, be held to apply in case of proceedings or trials out of British India in cases in which the extradition of an accused has been demanded under the Extradition Act. As to the warrant, if the above is answered in the affirmative, any defect in the warrant might be rectified or on enquiry a fresh warrant issued. It is contended on behalf of the prosecution that section 8 of the Extradition Act brings a case in which accused is extradited under the Criminal Procedure Code, and rule 11 of the rules made by Notification 319 of 12th March 1875, by the Government of India is referred to. No precedents have been referred to on either side. Looking to the wording of section 8 it appears to me that it would be a straining of words to apply it to anything except the actual proceedings and trial in the Native State. It is clearly made for the production of the subject of Her Majesty living in a Native State. It is not made for the extension of the power of the officers demanding extradition. I do not see anything in rule 11 which supports the case for the prosecution. It might be contended that if there is no provision compelling the production of evidence, the object of the Extradition Act fails, as trials cannot be satisfactorily conducted without evidence. But this consideration did not cause the [953] Legislature to make provision for compulsory attendance of witnesses. These can, it is true, be examined by commission, but examination of witnesses by commission is much less conducive to satisfactory trial than is actual hearing of witnesses. In cases where evidentiary documents exist in British India respecting offences committed in Native States, it would, frequently, I imagine generally, be the case that some kindred offence (*e. g.*, disposal of stolen property) had been committed in British India. However that may be, the wording of the law cannot be strained on grounds of expediency. For the above reasons I refuse to deliver up the property seized. As I understand that it is possible a prosecution

will be instituted in British India in which this property may be used as evidence, I order that the property be for the present retained by the police. Copy to City Police Inspector; orders as to what shall be done with the property should be asked for after two months. Copy to Political Superintendent, Palanpur. If no prosecution is instituted within two months, then (unless this decision is reversed on appeal) the property will be handed over to the person or persons from whom it was taken.'

"The District Magistrate apparently was not satisfied with the correctness of this order, and he re-opened the matter by giving notice to the parties, and after hearing the applicant, who alone appeared, he, on the 3rd August 1897, passed the following order:—

"'On the first point I rule that the order made by me, which was merely an order in regard to procedure, is not such a judgment as is contemplated by section 369, Criminal Procedure Code. On the main question the real question is, does section 8 of the Extradition Act apply to procedure in British India previous to trial, and are the sections of the Criminal Procedure Code in regard to search for evidentiary documents applicable to offences tried out of British India, in regard to documents and things in British India? I ruled by my former order that it did not. There does not appear to be any authority one way or the other, and after hearing both parties, and giving my best attention to the case, I decided as I did. Certain arguments have now been brought to my notice why section 8 should apply and why the sections of the Criminal Procedure Code which are applicable should apply. My attention has been called to the preamble of the Act and to a judgment of the Bombay High Court, in which it was ruled that all questions of jurisdiction concerning British subjects must be dealt with with reference to the Criminal Procedure Code, and it has been pointed out that the same principle can be applied to procedure. It has also been contended that a trial in Palanpur would be a proceeding under the Criminal Procedure Code, so that section 94, Criminal Procedure Code, would directly apply. I hold, therefore, that my previous order was wrong, and I direct the delivery of all the property in the possession of the Ahmedabad Police and seized from Harilal Buch to the Political Superintendent, Palanpur. As, however, the opposite party have had no opportunity of meeting the arguments [954] in consequence of which I have made my order, I rule that the delivery shall not take place till after fourteen days, or, in the event of an application to the High Court being made on behalf of Harilal Buch, till the decision of the High Court is given. Inspection cannot be made till after the expiry of the above period or till after the order of the High Court is passed.'"

The accused applied to the High Court under its Revisional Jurisdiction to set aside the above order of the 3rd August 1897.

*Anderson* (with him *Gokaldas K. Parekh*), for Applicant:—The proceedings in this case have been altogether illegal and invalid. The search warrant issued by the City Magistrate was illegal and *ultra vires*. It purports to be issued under section 96 of the Criminal Procedure Code (Act X of 1882). But that section must be read with section 94, and it is clear that a search warrant can be issued only in the course of some inquiry, trial or other proceeding actually pending before a Magistrate. Here there was no proceeding of any kind pending before the Magistrate at the time of issuing the search warrant. There was no complaint nor information before the Magistrate upon which he could take cognizance of any offence under section 191 of the Code. The telegram to the District Superintendent of Police, upon which the Magistrate appears to have acted, cannot be treated as a complaint or information. No person appeared before the Magistrate as a complainant charging the accused with any offence. The Magistrate, therefore, acted without jurisdiction in issuing a search warrant. If so, all subsequent proceedings before the District Magistrate were also illegal and *ultra vires*. Further, the District Magistrate had no power to review his own previous order of the 12th June 1897.

Section 369 of the Code of Criminal Procedure lays down that no Court other than a High Court can alter or review its judgment after it is passed. The order of the 12th June 1897, is in the nature of a judgment. It was made after both parties had been heard, and after a full consideration of the merits of the case. If it was wrong, the High Court alone could set it aside either on reference or in revision. Refers to *Queen-Empress* v. *Fox*, I. L. R., 10 Bom., 176.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown :— It is stated in the City Magistrate's order for the [955] issue of a search warrant that information was actually laid before him of the commission of an offence. It is upon this information that he acted, as he had power to act under section 191 of the Code of Criminal Procedure. It is true that there was no regular inquiry or trial pending before him at the time. But he need not wait till an inquiry is held and witnesses are examined by the prosecution. If there is a complaint or information lodged before him, and he proceeds on such complaint or information to issue a search warrant under section 96 of the Code, his action would be perfectly legal and valid—*Queen-Empress* v. *Mahant of Tirupati*, I. L. R., 13 Mad., 18. As to the question, whether the District Magistrate had power to review his own previous order, I submit that section 369 of the Code applies to judgments of Criminal Courts, and not to orders of the kind passed in the present case, relating to the retention or delivery of property suspected to be stolen. It is admitted that there was no inquiry, and no trial. There was, therefore, no judgment either convicting or acquitting the accused. This being so, it was open to the Magistrate to reconsider his previous order, and pass a fresh one for the delivery of the property to the proper authorities.

**Parsons**, J. (after stating the facts as given above) :—The applicant has now applied to this Court, and his counsel has called in question the legality of the whole of the proceedings, and has contended, first, that the search warrant was issued by the City Magistrate without authority; 2nd, that the search warrant issued was bad in form; 3rd, that the search warrant only authorized the seizure of what was suspected to be stolen treasure; and 4th, that there was no power in the District Magistrate to order delivery to the foreign State of the property seized, or at any rate that the power, if it existed at all, only extended to what was reasonably suspected to be stolen treasure. We deal with the first of these contentions only, as upon it we are able to dispose of the case.

The question that has to be decided is, whether the City Magistrate had authority to issue the search warrant in the present case. The warrant purports to be issued under section 96 of the [956] Code of Criminal Procedure. This section relates back to section 94, and authorizes the issue of a search warrant by the Court for the purposes of an investigation, inquiry, trial, or other proceeding under the Code of Criminal Procedure by or before such Court as is expressly stated in section 94. It is necessary, therefore, in order to justify the issue of a search warrant by a Magistrate, that there shall be some investigation, inquiry, trial, or other proceeding under the Criminal Procedure Code, pending before him. This is practically the decision of the Madras High Court in *Queen-Empress* v. *Mahant of Tirupati*, I. L. R., 13 Mad., 18, where the Judges say that the Magistrate need not, before issuing a search warrant, wait until evidence has been recorded. He can act upon information which he considers credible, provided it is based upon a complaint, and the complainant is examined upon solemn affirmation according to law. The form of a search warrant, No. VIII in Schedule V, also makes this clear: "whereas," it says, "information has been laid (or complaint has been made) before me of the

commission (or suspected commission) of the offence of——and it has been made to appear to me that the production of ——is essential to the inquiry now being made (or about to be made) into the said offence." The City Magistrate follows the wording of this form, but as a matter of fact the wording he uses is inaccurate. No legal information had been laid before him of the offence of stolen treasure of the Nawab Saheb of Radhanpur having been brought to and kept at Ahmedabad. A telegram is not information. The only information upon which a Magistrate can act under the Code is set out in section 191. It is, first, a complaint as to which see the definition of complaint in section 4 (*a*) and the provisions of section 200. No complaint in the present case was made to the Magistrate with a view to his taking action under the Code of Criminal Procedure that the applicant had committed an offence. Had there been, the Magistrate would have issued a summons for the attendance or a warrant for the arrest of the applicant. There was merely a request for a search warrant on the strength of the telegram. Secondly, it is a police report as to which see section 173. There is no police report in the present case. It is not [957] alleged that the Magistrate acted upon his own knowledge or suspicion, which is the third kind of information.

Again, if we assume that there had been the offence committed of bringing into Ahmedabad the treasure stolen at Radhanpur, the City Magistrate was not holding any inquiry, investigation, trial, or other proceeding under the Code of Criminal Procedure in respect of it. The only inquiry that was being made was being made at Radhanpur by the Political authorities there. This is clear from the record and from the order of the District Magistrate of the 12th June, wherein he says: "As I understand that it is possible a prosecution will be instituted in British India." For this reason, therefore, namely, that at the time of issuing the search warrant there was no investigation, inquiry, trial, or other proceeding under the Code of Criminal Procedure pending before the City Magistrate for the purposes of which the production of the articles seized was necessary or desirable, we hold that his order in issuing a search warrant was *ultra vires* and illegal, and we reverse it and all subsequent orders dealing with the property seized, and we direct the return of the whole of it to the several persons from whose possession it was taken.

**Ranade, J.**:—The applicant is a native Indian subject resident at Ahmedabad, and he was suspected of being concerned in the offence of theft and of receiving stolen property belonging to the Radhanpur State, which is subordinate to the Political Superintendent of Palanpur, and is now under British management. The Political Superintendent of Palanpur issued a warrant, under section 11 of Act XXI of 1879, for his arrest and subsequent surrender, and the warrant was sent to the District Magistrate of Ahmedabad on 7th May 1897. The applicant was arrested on 10th May, and subsequently admitted to bail on his undertaking to appear before the Radhanpur authorities to stand his trial. Five weeks before this arrest was made, the City Magistrate of Ahmedabad had issued, on the application of the City Inspector of Police, a search warrant. The City Magistrate stated in his order that he had received certain information of the commission of an offence in regard to certain treasure belonging to the Randhanpur State, and that it was necessary for the [958] inquiry into the matter of this offence that a search should be made of applicant's among other houses for books of account, &c. This warrant was issued on 30th March 1897, and some property in cash and ornaments, and books of account and other papers, were seized by the City Police. The City Magistrate asked the Radhanpur authorities to send some one to recognise the alleged stolen property, but the applicant objected to his account books being so

inspected, and the books were not shown to the Radhanpur official. Then followed the applicant's arrest and his release on bail. After this it was proposed to send the property found in the search to Radhanpur, but applicant again objected, and on the 13th May the District Magistrate ordered the City Police Inspector that only such property, as was reasonably suspected to be stolen, should be sent to Radhanpur, and the rest retained at Ahmedabad. The Radhanpur official was not able to identify any particular property to be stolen property, and asked for permission to examine the account books. On the 12th June, the District Magistrate, after issuing notice to both parties, passed an order refusing to send any of the property found in the search to Radhanpur. After this the District Magistrate reviewed, *suo motu*, his own order on 3rd August 1897, and directed that the property should be sent to Radhanpur.

It is this last order of which the applicant complains, and the chief grounds on which revision is sought are—(1) that the District Magistrate could not review his own order; (2) and that the City Magistrate had no authority to issue the search warrant in connection with an inquiry or trial not held in British India.

The points in issue are thus:—(1) Whether the District Magistrate could *suo motu* review his own order of the 12th June, and set it aside in the way he has done? (2) Whether the search warrant was properly issued in this case? On the first point I am inclined to hold that the District Magistrate had no power to review his own previous order passed on full inquiry, and after hearing both sides. It is true section 369 only refers in express terms to judgments under Chapter XXVI, but it is clear that the principle laid down therein applies to final orders which are of the nature of a judgment. It has been expressly ruled that [959] an order for compensation is a part of the judgment. An order discharging a rule in detention cases under Chapter XXXVII is a judgment. Appeals from orders are expressly allowed under section 89, or under section 118. The power of revision is very strictly confined, and it is quite plain that the same considerations, which prevent Subordinate Courts from altering their judgments on review, hold good in respect of final orders passed by them. If the District Magistrate in this case had returned the property to the applicant as the result of his first order, it is plain he could not have compelled its reproduction. It was a mere accident that the property was retained in police custody, and so the second order could operate upon this property. The only course open to the District Magistrate was to make a reference to the High Court, and have his own first order cancelled if he thought that order was erroneous.

This point, however, was not pressed by the counsel for the applicant, as he chiefly laid stress on the illegality of the original proceeding, which led to the issue of the search warrant. It thus becomes necessary to consider the second point noted above. The search warrant in the present case was admittedly issued under section 96. The question to be considered is, whether the City Magistrate had authority to issue such a warrant? I shall assume for the purpose of this argument that sections 94, 96, which must be read together, apply to proceedings taken at the instance of political officers of Native States acting under the Extradition Act. It is plain, however, that before a Magistrate in British India can issue a summons under section 94, or a warrant under section 96, he must be satisfied in regard to certain points. There must be an inquiry, investigation, trial, or proceeding *under the Code* by or before such Court, or before a police officer, for the purposes of which the production of the document is desirable. There is nothing on the record of the case to show that there was any such inquiry or investigation under the Code going on in

the City Magistrate's Court or before the City Inspector at the time it issued the warrant. The arrest of the accused took place long after the issue of the warrant. The Government pleader, after the conclusion of the argument put in a paper which shows that the City Police [960] Inspector made what is called a complaint to the City Magistrate on or about 30th March. The Political Agent's letter, dated 9th April 1897, however, shows clearly that it was not till that date that he made up his mind to make a specific charge against the applicant. It is, therefore, not at all likely that the City Inspector could have made any specific complaint before the City Magistrate issued his search warrant on the 30th March 1897. He appears to have done this, as the warrant itself states, upon some vague information communicated by the police. That information did not relate solely to the applicant, but it prayed for a general search of a number of houses for the purpose of finding out evidence to be used hereafter in certain contemplated proceedings at Radhanpur. It is quite clear that the issue of such a warrant at this stage was clearly *ultra vires*. It is not, therefore, necessary to discuss the further question suggested by the points noticed by the District Magistrate in his conflicting orders of 12th June and 3rd August 1897. I may, however, note that section 8 of the Act of 1879 as also Rule 11 in the notification of March 1875, have obvious reference to the law and procedure to be followed by the Courts out of British India in dealing with British subjects who are made over to them for trial. The laws of British India are, as far as possible, to be followed in such trials. The rules of the notification of March 1875, have no operation under a later notification of October 1875, in respect of Native States directly administered by British officers, such as Radhanpur now is. Neither the Act nor the Rules were intended to regulate the action of the regular British Courts in India, which must follow the Code of Criminal Procedure. In this view of the matter, I am inclined to think that the District Magistrate's first order was correct in the circumstances of this case. We reverse both the orders and direct that the property should be returned to the applicant.

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**NOTES.**

[See also (1908) 35 Cal., 1076; (1905) 29 Mad., 126 F. B.]

## [961] APPELLATE CIVIL.

*The 21st September, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Bhanabhai............(Original Plaintiff) Appellant

*versus*

Chotabhai............(Original Defendant) Respondent.*

*Civil Procedure Code (Act XIV of 1882), Sec. 337A—Lunatic—Arrest of a lunatic in execution of a decree—Court's power to order the arrest of a lunatic discretionary—Lunacy a good ground for disallowing application for his arrest.*

Under the Code of Civil Procedure (Act XIV of 1882), a Court is not bound to order the arrest of a lunatic in execution of a decree passed against him. The power to order his arrest is discretionary.

The lunacy of a judgment-debtor is good cause within the meaning of section 337A of the Code for disallowing an application for his arrest.

APPEAL from the order of Rao Bahadur V. V. Paranjpe, First Class Subordinate Judge of Surat.

On the 9th April 1895, plaintiff obtained an *ex parte* decree against the defendant on the Original Side of the High Court.

The decree was transferred for execution to the Court of the First Class Subordinate Judge of Surat.

The decree-holder applied for the execution of the decree by the arrest and imprisonment of the judgment-debtor.

The Court issued a notice under section 245B of the Code of Civil Procedure (Act XIV of 1882), requiring the judgment-debtor to show cause why he should not be committed to jail in execution of the decree.

Thereupon the judgment-debtor's wife appeared in Court, and stated that her husband had been adjudged a lunatic under Act XXXV of 1858 by the Joint Judge of Ahmedabad, and was, therefore, unable to pay the decretal amount.

The Subordinate Judge dismissed the application, holding that as the judgment-debtor was a lunatic, the application for his arrest and imprisonment could not be granted.

Against this order of dismissal the decree-holder appealed to the High Court.

[962] *Shivram V. Bhandarkar* and *N. G. Chandavarkar*, for Appellant.

*Daji Abaji Khare*, for Respondent.

**Parsons, J.** :—The Subordinate Judge was right in saying that the darkhast in the form in which it was presented to him, *viz.*, against the judgment-debtor personally, could not be proceeded with, because the judgment-debtor had been declared a lunatic under the provisions of Act XXXV of 1858, and his wife and father had been appointed managers of his estate and guardians of his person by the District Judge of Ahmedabad. Under the provisions, however, of section 443 of the Civil Procedure Code, which are applied to the case of lunatics by section 463, it was the duty of the Court to have appointed a guardian for the suit for the lunatic. This we have done, and we have now to determine the question whether, under the Civil Procedure Code, a Court is bound to order the arrest

* Appeal No. 10 of 1897.

of a lunatic in execution of a decree passed against him. We think that it is not. There is no provision of the Code which expressly exempts lunatics from arrest as there is in the case of women (245A), but it is clear that the power to order an arrest at all is discretionary. Section 245B allows the Court to issue a notice calling on the judgment-debtor to appear to show cause why he should not be committed to jail in execution of the decree. Section 337 A provides that on such appearance if it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree, the Court may make an order disallowing the application for his arrest and imprisonment. In the present case such a notice was issued, and the wife of the judgment-debtor appeared and showed the cause of her husband's lunacy and consequent inability to pay the amount of the decree, and the Subordinate Judge accepted this cause and rejected the darkhast. We see no reason to interfere with this exercise by the Subordinate Judge of his discretionary powers. There ought never to have been a decree passed against the judgment-debtor personally. Had the Judge of the High Court on its Original Side been aware that the defendant had been declared a lunatic in March 1895, he would not, in April 1895, have passed an *ex parte* decree against the [963] defendant personally. It was by concealment of this fact that the decree-holder obtained the decree, and we are not disposed to assist him in the execution thereof. If there is any property of the lunatic in the hands of his managers and guardians, he can proceed against that, but we think that the lunacy of the judgment-debtor is good cause within the meaning of the Code for disallowing an application for his arrest. Authorities have been cited to us showing that, under the old English law, a lunatic could be arrested. These are to be found collected in Phillips on Lunatics, page 37, but we do not think that they apply to this case which has to be decided under the provisions of the Code of Civil Procedure. We dismiss the appeal with costs.

*Appeal dismissed.*

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[ 22 Bom. 963 ]

## APPELLATE CIVIL.

*The 4th October, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Shet Kavasji Mancherji............(Original Defendant) Appellant

*versus*

Dinshaji Mancherji............(Original Plaintiff) Respondent.*

*Jurisdiction—Appeal—Administration suit—Suit filed in Second Class Subordinate Judge's Court—Decree in such a suit—Appeal from such decree to District Court—Practice—Procedure—Bombay Civil Courts Act (XIV of 1869).*

The plaintiff filed an administration suit in the Court of a Subordinate Judge of the Second Class, valuing the relief claimed at Rs. 130. The Subordinate Judge found that the

* Appeal, No. 31 of 1897 from order.

property in suit was worth over a lakh of rupees, that the liabilities came to Rs. 5,729, and that the defendant was indebted to the estate in the sum of Rs. 15,199. He drew up a preliminary decree, directing (*inter alia*) that the defendant should pay this amount into Court within two weeks. Against this order the defendant appealed to the District Court. The District Judge returned the appeal for presentation to the High Court, on the ground that the subject-matter exceeded Rs. 5,000.

*Held*, reversing the order of the District Judge, that the appeal lay to the District Court.

APPEAL from the decision of T. D. Fry, Acting District Judge of Ahmedabad.

The plaintiff filed this suit for the administration of the estate of his deceased father Mancherji and for the recovery of his share of the property.

[964] Plaintiff valued his claim at Rs. 130, and expressed his willingness to pay the Court-fee on any larger amount that might be awarded to him.

The suit was filed in the Court of the Joint Subordinate Judge of the Second Class at Ahmedabad.

The Subordinate Judge, after referring the case to two Commissioners for taking accounts, found that the estate of the deceased Mancherji consisted of properties worth over a lakh of rupees, that the liabilities amounted to Rs. 5,729, and that the defendant was indebted to the estate in the sum of Rs. 15,199.

The Subordinate Judge thereupon passed an interlocutory order, directing the defendant to pay into Court the said sum of Rs. 15,199 within two weeks.

Against this order defendant appealed to the District Court.

The Acting District Judge returned the appeal for presentation to the High Court, holding that the subject-matter exceeded Rs. 5,000.

The defendant appealed from this order to the High Court.

*C. H. Setalvad*, for Appellant.

*Wadia*, with *Lallubhai A. Shah*, for Respondent.

**Parsons, J.**:—The suit out of which the present appeal arises, was brought for the administration of the estate of the deceased Mancherji and for the recovery of the share of the residue of the property of the said Mancherji to which the plaintiff might be found entitled. The plaintiff valued the relief claimed at Rs. 130, expressing his willingness to pay Court-fees on any larger amount that might be awarded to him. The suit was filed in the Court of a Subordinate Judge, Second Class, the value of the claim being within his jurisdiction.

The Subordinate Judge on the 22nd March last recorded findings that the estate of Mancherji consisted of certain properties (the value of which admittedly is over a lakh of rupees), that the liabilities came to Rs. 5,729, and that there was due to the estate by the defendant No. 1 a sum of Rs. 15,199, and he drew up a kind of preliminary decree, one of the orders in which was that the defendant should pay this amount into Court within two weeks. [965] The defendant appealed against the decree to the District Court. The Judge of that Court passed the following order:—"I return this appeal for presentation to the High Court, holding that the subject-matter exceeds Rs. 5,000."

The defendant has now appealed against this order, and he has also presented an appeal from the decree to this Court, and we have either in our appellate or revisional jurisdiction to determine whether the appeal lies to the District Court or to the High Court. We have no doubt that it lies to the District Court. Section 8 of the Bombay Civil Courts Act, 1869, enacts that "except as provided in sections 16, 17 and 26, the District Court shall be the Court of appeal from all decrees and orders passed by the Subordinate Courts from which an appeal lies under any law for the time being in force." Sections

16 and 17 refer to Assistant Judges. Section 26 provides that "In all suits decided by a Subordinate Judge of the First Class in the exercise of his ordinary and special original jurisdiction of which the amount or value of the subject-matter exceeds five thousand rupees, the appeal from his decision shall be direct to the High Court." The present is not a suit decided by a Subordinate Judge of the First Class. It is decided by a Subordinate Judge of the Second Class. The District Court is, therefore, the Court of appeal from a decree or order passed in it.

The principle of the ruling in *Ibrahimji* v. *Bejanji*, I. L. R., 20 Bom., 265, has apparently been accepted by another Division Bench of this Court: see *Gangadhar* v. *Vinayak*, P. J., 1896, p. 417. I have some doubt of its correctness, and would point out what seems to me an anomaly, *viz.*, that though a plaintiff is allowed to place any value he pleases on his claim in order to select the forum in which he may file his suit, the permission does not extend beyond decree, the forum of appeal being governed not by that value but by the value decreed. No difficulty arises when the suit is filed in the Court of a Subordinate Judge of the First Class, and he passes a decree for a sum exceeding Rs. 5,000, but a difficulty may arise when in a suit valued at above Rs. 5,000 he passes a decree for a less sum, and when, as here, the suit is filed in the Court of a Subordinate [966] Judge of the Second Class, whose jurisdiction is limited to claims not exceeding Rs. 5,000 in value, the question will be sure to arise whether he can pass any decree or order for a sum exceeding that amount. We have not, however, now to deal with these questions.

We reverse the order of the District Judge returning the appeal, and direct him to admit it and dispose of it according to law We make all costs in this appeal costs in the cause.

**Ranade, J.**:—In this case the respondent's counsel raised a preliminary objection that the order passed by the District Judge was not a decree, and no appeal lay therefrom. The rulings he cited no doubt support this contention—*Mahabir Singh* v. *Behari Lal*, I. L. R., 13 All., 320; *Bindeshri Chaubey* v. *Nandu*, I. L. R., 3 All., 456. Appellant's pleader did not much contest this point, and in fact asked this Court to interfere in its extraordinary jurisdiction. We think this is a fit case for the exercise of that jurisdiction.

The District Judge has returned the appeal filed before him on the ground that he had no jurisdiction to entertain it, as the value of the subject-matter exceeded Rs. 5,000. This value, however, has not been determined yet finally by the Subordinate Judge. He has only passed what is virtually a preliminary order, and the value of Ardesir's share has yet to be determined. As the original suit was valued at Rs. 130, and was tried by a Subordinate Judge of the Second Class, no appeal lies to this Court. Section 26 of Act XIV of 1869 is quite clear upon this point. We understand that the District Judge had heard other appeals from previous orders passed in this case, and that his orders were confirmed on second appeal.

We must reverse the order of the District Judge, and direct him to admit the appeal on his file, and dispose of it according to law.

*Order reversed.*

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**NOTES.**

[ See also (1904) 6 O. C. 255 (Oudh); (1913) 21 I. C., 783 (Bom.). ]

## [967] APPELLATE CIVIL.

*The 10th December, 1896 and 14th October, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Bapujirao and another............(Original Defendants) Appellants

*versus*

Fatesing Shahaji Bhosle............(Original Plaintiff) Respondent.*

*Civil Procedure Code (Act XIV of 1882), Sec. 331—Execution—Resistance to execution by third party—Such party may prove title against the decree-holder—Possession—Evidence—Burden of proof.*

The plaintiff had obtained a decree for possession of certain land against his tenant Bayaji. On proceeding to execute his decree he was obstructed by the defendants. He, therefore, filed a claim against them for possession under section 331 of the Civil Procedure Code (Act XIV of 1882) which was duly registered as a suit. The lower Court found as a fact that the plaintiff through his tenant Bayaji had been in possession of the land. The defendants pleaded that the land had belonged not to the plaintiff but to one Jotyaji, on whose death they were entitled to it.

*Held*, that in a proceeding under section 331 of the Civil Procedure Code where possession is shown to have been with the plaintiff, the defendants are not, without showing title in themselves, at liberty to impeach the plaintiff's title, or to set up a *jus tertii*. The *onus* of proving a better title than the plaintiff's rests with them, and they may prove their title as a defence.

SECOND APPEAL from the decision of T. D. Fry, Assistant Judge of Satara, reversing the decree of Rao Saheb K. H. Kirkire, Subordinate Judge of Khatav.

Proceeding in execution under section 331 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff had obtained a decree for possession of certain land against his tenant Bayaji.

On proceeding to execute his decree he was resisted by the defendants, who alleged that they were entitled to the land as the nearest heirs of the last owner, one Jotyaji.

The plaintiff thereupon filed an application against these defendants to remove the obstruction, &c. This application was, under section 331 of the Civil Procedure Code (Act XIV of 1882), registered as a suit. On investigation the Subordinate Judge dismissed the suit, holding that the plaintiff's title was not proved.

On appeal the Judge held that the plaintiff was in possession of the land as against the defendants, and that they had failed to [968] prove a better title than the plaintiff. He, therefore, reversed the decree and awarded the claim.

Defendants preferred a second appeal.

*Balaji A. Bhagavat*, for the Appellants (Defendants).

*Gangaram B. Rele*, for the Respondent (Plaintiff).

**Farran, C. J.**:—It is found as a fact by the Assistant Judge in this case that Bayaji was the tenant of the plaintiff and that the plaintiff through his said tenant had been in possession of the land in suit (which is deshmukhi

* Second Appeal, No. 414 of 1896.

vatan) for a long time claiming to hold under an alienation by one Jotyajirao. This possession for the purpose of section 331 of the Civil Procedure Code is, as held by the Assistant Judge, as good as actual possession—*Bhyrub Sircar* v. *Sham Manjee*, 15 Cal. W. R., 70.

The plaintiff obtained a decree for possession against his tenant Bayaji, but when he proceeded to execute it he was obstructed by the present defendants. He accordingly filed an application against them, which was registered as a suit under section 331 of the Civil Procedure Code, to remove the obstruction and to recover possession.

We agree with the Assistant Judge that in such a suit, when possession is shown to have been with the plaintiff, the defendants are not, without showing title in themselves, at liberty to impeach the plaintiff's title, or to set up a *jus tertii*. The only successful defence, which they can urge, is that they are the owners of the land, or, as the Assistant Judge puts it, the *onus* of proving a better title than the plaintiff's will rest upon them—*Rakhal Churn* v. *Watson & Co.*, I. L. R., 10 Cal., 50. If, however, the Assistant Judge meant to go further and say that, even if the defendants in such a case are in a position to prove that they are at time of suit brought entitled to the land, such a defence is not open to them, we cannot assent to that view. It is contrary to the ruling in *Moulakhan* v. *Gorikhan*, I. L. R , 14 Bom., 627, which, in our opinion, correctly expresses the law upon this subject. The suit under section 331 is to be tried in the same manner as if a suit had been instituted [969] by the decree-holder against the claimant under the provisions of Chapter V and is to have the same consequences.

The following passage in the judgment of the Assistant Judge leads us to doubt whether he considered that it was open to the defendants to effectually defend themselves by showing that on Jotyaji's death the land reverted to them as his nearest *bhaubands*, notwithstanding the alienation by Jotyaji to the plaintiff. "In this suit the plaintiff is in the advantageous position of having obtained a decree against Bayaji for possession of the land and, as remarked above, if it is proved that plaintiff or Bayaji was in possession as against the defendants, the *onus* of proving a better title will rest upon the latter, who will not be allowed to assail plaintiff's original title. That title can only be assailed by one suing plaintiff and not by those who are merely obstructing him in the execution of a decree."

Before us it is alleged that the defendants on the death of Jotyaji, who was in the position of a life-tenant, succeeded to the deshmukhi vatan land in dispute as his nearest *bhaubands*. To enable us effectually to dispose of the appeal we send down the following issue :—

"Are the defendants, as the nearest heirs of Jotyaji, entitled to succeed to his deshmukhi vatan property"?

Finding to be certified within two months. We adopt this course as, if they are, the determination of the present suit against them would be a bar to their hereafter asserting their claim to the land in that right—*Moulakhan* v. *Gorikhan*, I. L. R., 14 Bom., 627.

*Issue sent down.*

The Assistant Judge having recorded a finding in the negative on the issue sent to him for trial, the High Court on the 14th of October 1897, confirmed the decree appealed from, with costs.

**NOTES.**

[ This was followed in (1905) 27 All., 453 ; (1901) 25 Bom., 478.]

## [970] CRIMINAL REFERENCE.

*The 13th October, 1896.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Bholashankar.*

Panchnama—*Refusal to attend in order to make a* panchnama—*Police—Bombay District Police Act (Bom. Act IV of 1890), Secs. 53, Cl. 2 and 65.*

The accused refused to attend to make a *panchnama* regarding an obstruction to a public road caused by a grain-dealer by keeping his grain bags on the road. He was thereupon convicted under section 53, clause (2) and section 65 † of the Bombay District Police Act (Bom. Act IV of 1890).

*Held*, that the conviction was illegal. Non-attendance to make the *panchnama* in question was not an offence punishable under the Police Act.

REFERENCE under section 438 of the Code of Criminal Procedure (Act X of 1882.)

The accused was prosecuted for refusing to attend to make a *panchnama* regarding the obstruction to a public road caused by one Bhau Budmal by keeping his grain bags on the road.

The Second Class Magistrate of Karmala convicted the accused under sections 53, clause (2), and 65 of the Bombay District Police Act (Bom. Act IV of 1890), and sentenced him to pay a fine of Rs. 3.

The District Magistrate of Sholapur, being of opinion that the act of the accused did not amount to an offence under the Police Act, referred the case to the High Court.

The reference was heard by a Division Bench (PARSONS and RANADE, JJ.).

There was no appearance for the Crown or for the Accused.

*Per* CURIAM:—There appears to be no obligation on any person to attend to make such a *panchnama* as the one in question. Certainly non-attendance would not be an offence punishable under section 53 (2) or section 65 of the Police Act (IV of 1890).

The conviction under these sections is illegal, and we reverse it and the sentence.

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* Criminal Reference, No. 105 of 1896.

† Bombay District Police Act (Bom. Act IV of 1890):—

*Section* 53, *Cl.* 2:—"All persons shall be bound to conform to the reasonable directions of a police officer given in fulfilment of any of the said duties."

*Section* 65:—"Whoever . . . . (*b*) opposes or fails to conform to any direction given by the police under section 53 . . . . shall be punished with fine which may extend to fifty rupees."

## [971] APPELLATE CIVIL.

*The 9th November, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Gopal Gundapa Naik..........(Original Plaintiff) Applicant

*versus*

Vishnu Krishna Naik............(Original Defendant) Opponent.*

*Civil Procedure Code (Act XIV of 1882), Secs. 58, 62, 63, 64—Plaint registered—Copy extract from account books annexed—Books of account not produced for confirmation—Penalty for non-production of books—Practice—Procedure.*

On the 14th April 1897, a plaint was presented and was numbered and registered as a suit. Annexed to it was a copy of an extract from the plaintiff's account books. The matter was adjourned to the 2nd June 1897, for the production of the account books, in order that the copy might be compared and verified. On that day neither the plaintiff nor his pleader appeared with the books, whereupon the Subordinate Judge rejected the plaint, holding that no summons could be issued unless the copy extract annexed to the plaint was found to be correct.

*Held* (reversing the order) that the plaint having been registered on the 14th April, summonses ought to have been issued on the 2nd June. There was no provision in the Civil Procedure Code (Act XIV of 1882) justifying the rejection of the plaint. The penalty which the plaintiff incurred for not producing his original accounts was that prescribed in section 63, *viz.*, not being able to put in that account without the special leave of the Judge.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Rao Bahadur Gangadhar V. Limaye, First Class Subordinate Judge of Belgaum, in Small Cause Suit No. 279 of 1897.

On the 14th April 1897, being the last day of the sitting of the Court before the summer vacation, the plaintiff presented a plaint to recover the balance due on an account. Annexed to the plaint was a copy of an extract from plaintiff's account books. The plaint was duly numbered and registered under section 58† of the Civil Procedure Code and the matter was adjourned to

* Application, No. 139 of 1897, under the Extraordinary Jurisdiction.

†[Sec. 58:—The plaintiff shall endorse on the plaint, or annex thereto, a memorandum of the documents (if any) which he has produced along with it; and, if the plaint be admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief or remedy required, in the suit, in which case he shall present such statements.

Procedure on admitting plaint.

Concise statements.

If the plaintiff sues, or the defendants or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

The chief ministerial officer of the Court shall sign such memorandum and copies or statements if, on examination, he finds them to be correct.

The Court shall also cause the particulars mentioned in section 50 to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaint is admitted.]

Register of suits.

the 2nd June 1897, which was the first day of sitting after the vacation, for the production of plaintiff's account books in order that the annexed copy might be compared with the books (section 62). On that day neither the plaintiff nor his pleader being present in Court with the account books, the Subordinate Judge [972] rejected the plaint, holding that no summons could be issued to the defendant unless the copy of the extract from the books was found to be correct after comparison with the books themselves. Subsequently the plaintiff applied to the Court to have the suit placed on the file on the ground that he had been prevented by illness from attending the Court on the 2nd June and that his pleader was not bound to be present on that day as it was not the day of hearing. The Court rejected the application.

The plaintiff, therefore, applied to the High Court under its extraordinary jurisdiction, and contended that the order dismissing the suit was not warranted by any provision of the Civil Procedure Code (Act XIV of 1882), and that the Judge had no jurisdiction to make it. A rule *nisi* having been issued calling on the defendant to show cause why the suit should not be restored to the file,

*Balaji A. Bhagvat*, for the Plaintiff, appeared in support of the rule.

There was no appearance for the Opponent (Defendant) to show cause.

**Farran**, C.J. :—In this case there has apparently been no contumacious refusal by the plaintiff to produce his books, and there is no direct provision of the Code, that we can find, which justifies the action which the Subordinate Judge has adopted. The plaint having been registered under section 58 on the 14th April, the Subordinate Judge ought, on the 2nd of June, to have issued summonses. The penalty which the plaintiff incurred for not producing his original account on that day is that prescribed by section 63, *viz.*, not being able to put in that account without the special leave of the Judge.

We set aside the order dismissing the suit, and direct that the Subordinate Judge do issue summonses under section 64, and proceed with the hearing of the suit in due course. Costs, costs in the cause.

*Order set aside.*

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## [973] APPELLATE CIVIL.

*The 22nd November, 1897.*

PRESENT :

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Bai Nani............(Original Defendant) Appellant

*versus*

Chunilal............(Original Plaintiff) Respondent.*

*Hindu law—Adoption—Adoption of her brother's son by a Hindu widow—Validity of such adoption.*

Under the Hindu law a widow may adopt her brother's son.

SECOND APPEAL from the decision of T. D. Fry, Joint Judge of Ahmedabad.

The plaintiff sued as the adopted son of Jeyshankar Utamram to establish his title to a certain cash allowance annually received from the Government treasury of Daskroi.

Jeyshankar, the original recipient of the cash allowance, was a Brahmin. He died in 1881, leaving two widows and a daughter, the child of the senior widow, who was the defendant in the present suit

On Jeyshankar's death the allowance was transferred to the name of his elder widow.

On 9th October 1892, the elder widow died. Thereupon the allowance was entered in the name of the younger widow and was paid to her.

On the 29th May 1894, the younger widow adopted the plaintiff, who was her brother's son.

The younger widow died on 17th February 1895. Thereupon the allowance was entered in the name of the defendant (the daughter of the elder widow) and was paid to her. This led to the present suit.

The defendant pleaded (*inter alia*) that the plaintiff's adoption was illegal and invalid (1) because he was the brother's son of his adoptive mother, and (2) because the adoption was made from corrupt and capricious motives with the object of defeating the defendant's rights of succession and inheritance to her father's estate.

The Court of First Instance rejected the plaintiff's claim, holding that the adoption was made from improper motives for the [974] purpose of injuring and defrauding the defendant, and that the plaintiff's adoption (being the adoption by a sister of her brother's son) was invalid under the law of the Mayukha, which was the paramount authority in Gujarat.

This decision was reversed, on appeal, by the Joint Judge of Ahmedabad. He held, on the authority of *Sriramulu* v. *Ramayya*, I. L. R., 3 Mad., 15, that the plaintiff's adoption was not invalid under the Hindu law. He allowed the plaintiff's claim.

Against this decree the defendant appealed to the High Court

*Ganpat Sadashiv Rao*, for Appellant :—The question is, whether an adoption by a sister of her brother's son is valid under the Hindu law. The Dattaka Mimansa (sec. 4, pl. 33 and 34) lays down that such an adoption is invalid for the same reason that a sister's son cannot be adopted by a brother. The principle of adoption is that the son adopted should be the "reflection of a

* Second Appeal, No. 632 of 1897.

son." The rule originally laid down was accordingly that a legal marriage must be possible between the adopter and the mother of the adoptee. This rule was afterwards extended so as to cover a case like the present. And it was laid down that a legal marriage should also be possible between the adoptive mother and the natural father of the adopted son. See West and Bühler's Digest, p. 1032. The responses of the Shastris quoted at page 1033 of the Digest show that a Brahmin widow is not allowed by the Vyavahar Mayuka to adopt a brother's son. In *Girowa* v. *Bhimaji*, I. L. R., 9 Bom., 58, WEST, J., refers to the objection that might be taken to the validity of such an objection. *Vattas Kuar* v. *Lachman Singh*, 7 N.-W. P. 117, is a direct authority. It lays down that a widow cannot affiliate a brother's son. See also *Dagumbaree* v. *Taramonee* referred to in F. MacNaughten's Hindu Law, p. 170. The lower Court relies on *Sriramulu* v. *Ramayya*, I. L. R., 3 Mad., 15, but that case is not in point, as there the adoption was made not by a widow, but by the adoptive father.

[PARSONS, J.:—Suppose the plaintiff had been adopted by Jeyshankar, would the adoption have been illegal?]

[975] No. Jeyshankar was competent to adopt the plaintiff, because he could have legally married plaintiff's natural mother.

[PARSONS, J.:—Suppose the adoption had been made by Jeyshankar's senior widow. Would the adoption have been valid?]

I admit that in that case also the adoption would have been valid, and for the same reason, namely, that a legal marriage was possible between the senior widow and the real father of the adopted son. But no legal marriage could possibly take place between the junior widow and her own brother. It is on this ground we contend that the plaintiff's adoption by the junior widow is illegal.

*Goverdhan M. Tripathi*, for Respondent:—It is conceded that the plaintiff's adoption would have been perfectly valid, if it had been made by Jeyshankar himself. If so, why should the adoption be invalid when made by his younger widow? The widow did not adopt to herself, but to him. She acted under an implied authority from him. And if he was competent to adopt the boy, she was equally so. No doubt, it is now a well-established rule of law that the boy to be adopted must be one whose natural mother the adopter could have legally married; and according to this rule the daughter's son or sister's son is not eligible for adoption. But there is no foundation, in law, for the proposition that a legal marriage must also be possible between the adoptive mother and the natural father of the adopted son. The Dattaka Mimansa has been cited in support of this rule. But there is not a single text to support the statement in the Dattaka Mimansa. On the contrary both Mr. Mandlik and Mr. Mayne refuse to accept Nanda Pandita's authority on this point, and pronounce in favour of the validity of the adoption by a sister of her brother's son: see Mandlik's Hindu Law, pp. 479—481, and Mayne's Hindu Law, sec. 125. The case of *Sriramulu* v. *Ramayya*, I. L R., 3 Mad., 15, is conclusive on this question. It shows that there is no prohibition, in law, to the adoption of a wife's brother's son. Even if there were any prohibition, it is directory, not mandatory.

**Ranade, J.**:—The adoption of the respondent-plaintiff in this case was questioned in the lower Courts on various grounds, but, [976] in the appeal before us, the only ground on which its validity was disputed had reference to the fact that the respondent was the son of the brother of the adoptive mother, Bai Diwali. It was admitted that the adoption was made by the widow to continue the line of her husband Jeyshankar, who could have contracted a

valid marriage with the natural mother of the respondent. It was further conceded by Mr. Rao, the appellant's pleader, that if Jeyshankar had adopted the respondent, no valid objection could have been urged on this ground. It was, however, contended that Jeyshankar's widow could not validly receive in adoption her own brother's son, because of her natural relationship to her brother, for the same reason in fact that Jeyshankar could not have validly adopted his own sister's son.

The question thus raised is one which has never been formally decided in this Presidency. There was indeed an incidental reference made to it in the judgment of WEST, J., in *Giriowa* v. *Bhimaji*, I. L. R., 9 Bom., 58. The boy whose adoption was in dispute in that case was the son of the brother of the adopting widow, but no objection was taken on that ground to the validity of the adoption, presumably because the case arose in the Southern Maratha Country, where the prohibition of the adoption of daughter's and sister's son is not universally in force. As the present case comes from Gujarat, this reason does not hold good, and the appellant's pleader contended that Mr. Justice WEST'S *dictum* was an argument in his favour. He also relied upon the ruling in *Battas Kuar* v. *Lachman Singh*, 7 N.-W. P., 117, in which the adoption of her brother's son by a widow was held to be invalid. On the other side, much reliance was placed on a ruling of the Madras High Court which it was laid down that the adoption of a wife's brother's son was not invalid—*Sriramulu* v. *Ramayya*, I. L. R., 3 Mad., 15. These were the only decided cases cited on either side in the course of the argument before us, which have a direct bearing on the point more immediately under consideration. Mr. Justice WEST'S opinion is, however, only an *obiter dictum*. As regards the Allahabad case, it appears from the judgment of the Chief [977] Justice of Allahabad in *Bhagwan Singh* v. *Bhagwan Singh*, I. L. R., 17 All., 294, that the adoption referred to in *Battas Kuar* v. *Lachman Singh*, 7 N.-W. P., 117, was held to be invalid because the widow had adopted the boy without any authority from her husband. In the Madras case above referred to, the adoption was not made by a widow, but by the adoptive father, and it is conceded in this case that if Jeyshankar had adopted the respondent, no objection could properly have been urged. It will be thus seen that the three cases cited are not much in point, and we must decide the present dispute on a general consideration of the nature and force of the alleged prohibitions based on near relationship in the matter of adoption.

There is a general unanimity among the authorities that there is nothing in the Smruti texts, or in the commentaries of Mitakshara and Mayukha, chiefly in force in Gujarat, which suggests any such particular limitation in the matter of adoption.

The prohibitions based on near relationship had their origin chiefly in the Dattaka Mimansa, a work of Nanda Pandita, who relied solely upon the texts of Shaunaka and Sakala. The originals with translations of those texts will be found in Rao Saheb Mandlik's work, as also in the elaborate judgments of BANERJI, J., one of the dissenting Judges, and of the Chief Justice and a majority of the other Judges, in the Allahabad Full Bench case referred to above. These original texts expressly lay down, among negative prohibitions, the cases of the daughter's son, the sister's son, and the son of the mother's sister, as ineligible for adoption in the case of the three higher castes of Hindu society. Nanda Pandita further enlarged their scope by analogical reasoning, and expressed an opinion that for the same reason that a brother could not adopt his sister's son, a sister could not adopt a brother's son. It is on this latter extension of

the prohibitive texts that the contention of the appellant is based, and we have now to see how far this extension can be accepted as legitimate, and allowed weight not merely as directory, but as a mandatory rule.

[978] In so far as daughter's and sister's sons are concerned, it is now too late on this side of India to raise the question which has been solemnly settled for the three higher castes by this Court in a series of decisions—*Gopal* v. *Hanmant*, I. L. R., 3 Bom., 273; S. C. on review, I. L. R., 6 Bom., 107; *Bhagirthibai* v. *Radhabai*, I. L R., 3 Bom., 298, and otherwise for the Shudra caste in *Ganpatrao* v. *Vithoba*, 4 Bom. H. C. Rep., A. C. J., 130; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. Rep., 364.

These rulings indeed cover not only the case of the sons of daughters and sisters, and mother's sister, but also of any other woman whom the male adopter could not by reason of propinquity marry. This enlargement, however, does not cover the present case which falls under the extension of the analogy of the male adopter to his widow as suggested by Nanda Pandita. As far as sister's son, and daughter's son, and mother's sister's son are concerned, Nanda Pandita had the authority of express texts to support him, and his remarks in respect of them furnished only the reason of the rule. In respect of the further extension of the prohibition to the near relations of the adopting widow, there is no such textual authority, and the commentator cannot legitimately claim the functions of the Smruti writers.

Mr. Justice MUTTUSAMI AYYAR, in the Madras case cited above, has very properly observed that there is no foundation in the text of Shaunaka or Sakala, on which Nanda Pandita relies, for the rule he seeks to draw from it, namely, that the adopting mother must also be a person who might have legally married the natural father of the adopted boy. The rule only requires that marriage should be possible between the person for whom the adoption is made, and the natural mother of the adopted boy—*Minakshi* v. *Ramanada*, I. L. R., 11 Mad. 49; *Chinna Nagayya* v. *Pedda Nagayya*, I. L. R., 1 Mad., 62. The extension sought to be given by Nanda Pandita in the Dattaka Mimansa, and after him by the author of the Dattaka Chandrika, is clearly far beyond the scope of a commentator's functions; and unless such an extension has secured general adherence in the general consciousness or the habits and practices of the people, British Courts of justice, administering Hindu law, are not bound to give effect to it as part of the general law—*Collector of Madura* v. *Moottoo Ramalinga*, 12 Moore's I. A., 397 at p. 436.

[979] The logical unsoundness of the particular reasons assigned by Nanda Pandita for the view enunciated by him, is discussed at great length by the Chief Justice of Allahabad, who has in this matter largely endorsed the comments made by Rao Saheb Mandlik in his work.

For the purposes of the present appeal, it seems unnecessary to go into the question of the authority of the two works on adoption, the Dattaka Mimansa and Chandrika. Allowing them the full weight claimed for them, it is clear that they must be treated as only declaring the law, and not making it; and on this basis there is no ground for accepting the extension of the prohibition proposed by them to the widow's relations when it is not supported by express texts of the Smruti writers.

It must also be borne in mind that the adoption in this case was made by the widow to Jeyshankar, and not to herself. She acted under an implied authority from her husband. This husband had two widows, the elder and the younger Diwali. It must be a very far fetched construction of the law which would permit the husband or the elder widow to make a valid adoption of the

respondent, while denying this same validity to the act of the younger widow, solely because the boy's natural father happened to be her brother.

The Calcutta High Court has for similar reasons discouraged an extension of the principle of exclusion in another direction, when it was sought to hold that a grand-nephew could not be adopted as a son, because of the rule requiring the adopted son to be a reflection of a natural born son—*Haran Chunder* v. *Hurro Mohun*, I. L. R., 6 Cal., 41.

Lastly, it deserves notice that, for the reasons which led their Lordships of the Privy Council to rule in *Srimati Uma* v. *Gokoolanund*, L. R., 5 I. A., 40, that the positive restrictions laid down by Nanda Pandita were only directory and not prohibitive, even if this extension to the widow's near relations were permissible, the restriction would be at best directory only, and not mandatory, proper to be observed, but not obligatory and enforceable as positive law.

For these several reasons, we disallow the contention raised in this appeal and confirm the decree of the District Court with costs.

*Decree confirmed.*

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NOTES.

[The Privy Council settled the question in favour of the validity of such adoption:—(1915) 37 All., 359; see likewise (1904) 27 All., 417; (1899) 24 Bom., 473.]

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## [980] CRIMINAL REFERENCE.

*The 1st December, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

Municipality of Bombay

*versus*

Sunderji.*

*Municipality—Bombay City Municipal Act (Bom. Act III of 1888), Sec. 461 (d)—By-law—By-law restricting the height of buildings on a site previously built upon—Validity of such by-law.*

The Municipality of Bombay has power under section 461, clause (d) † of Bombay Act III of 1888 to make a by-law restricting the height of a new building erected on a site which has been previously built upon.

THIS was a reference under section 432 of the Code of Criminal Procedure (Act X of 1882) by W. R. Hamilton, Acting Chief Presidency Magistrate.

The following are the material clauses of the reference:—

"One Sunderji Shivji has been charged under section 353 of the Municipal Act for not carrying out the orders with reference to the height of his building. It appears he had pulled

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* Criminal Reference, No. 106 of 1897.

† Section 461 clause (d) provides—

"The Corporation may from time to time make by-laws, not inconsistent with this Act, with respect to the following matters (namely),

(d) The provision and maintenance of sufficient open space, either external or internal, about buildings to secure a free circulation of air, and of other means for the adequate ventilation of buildings.

down an old building and has rebuilt it to one and half times the width of the street on which it abuts. He was, therefore, ordered to reduce the height.

"2. The road is 25 feet 2 inches wide and the height of the house is 60 feet 7 inches (39'3"+21' 4").

"3. Section 461 (*d*) of the Municipal Act (Bom. Act III of 1888) empowers the Corporation to make by-laws to regulate 'the provision and maintenance of sufficient open space, either external or internal, about buildings to secure a free circulation of air and of other means for the adequate ventilation of buildings.'

"4. The by-laws published in the *Government Gazette* of the 3rd August 1892, provide as follows :—

'30. A person who shall erect a new building which abuts on a street of less than 50 feet in width or any part of which is within a distance of half the width of such street from a street of less width than 50 feet, shall not without the written permission of the Commissioner erect such building to a greater height than one and a half times the width between the point [981] at which such building approaches nearest to the street and the opposite side of such street.'

"5. The accused is charged with an infraction of this by-law. His solicitor contends that the by-law is *ultra vires*, because section 461 (*d*) does not give any power to regulate the height of a building. It does give power to secure sufficient open space round about a building, but it gives no power to restrict its height. The height is expressly regulated by section 348 (*e*), which restricts the height to one and a half times the width of the street it abuts on when the street is of a less width than 50 feet. And this section 348 applies to buildings newly erected on any site previously unbuilt upon, and it is implied that rebuilding on a site previously built upon cannot be restricted as to height. So that if a man had a house 100 feet high he might pull it down and rebuild it 100 feet high, although it may be in excess of the height of 1½ times the width of a narrow street.

"6. It was also argued that the height of the front part of the building is only 18 inches more than the 1½ times the width of the road, and that all the Municipality can insist upon (if they have the power under the by-law) is to reduce that height by 18 inches.

"7. The house then goes back 13 feet where there is an open terrace and rises by 21 feet 4 inches. It is contended that the by-law, if valid, does not apply to this part of the building, which in fact is distant from the street by 13 feet, which is more than half the width of the street.

"8. The solicitor for the Municipality contends that the by-law is not *ultra vires*. Section 348, he argues, applies to buildings on new sites. Whereas this is a building on an old site. The by-laws can regulate the height of buildings on old sites, and secure air to the neighbouring buildings by limiting the height. If houses could be built to any height, they would seriously interfere with the ventilation of smaller houses and the access of air to them. The words (sufficient open space' apply to the space above a building as well as to the space on the sides. The same object is secured in the model by-laws of the Local Government Board in England (Knight's Annotated Model By-laws, Section 54, on page 169), when the space to be left at the back of a building must not be less than 10 feet or 15 feet, if the opposite house is 15 feet higher, 20 feet if the opposite house is 25 feet high, and 25 feet if the opposite house is 35 feet high or more.

"9. He also contends that if any part of the house is within a distance of half the width of the street from the street, the by-law applied. The front part of this house abuts on the street, and the height of the whole house must be regulated by the by-law. It is not allowable to divide the house into two parts and restrict the height of the front part only and let the height of the back part be unrestricted.

"13. In my opinion, I believe that section 461 (*d*) does not give power to regulate the height of a building, and that the power to regulate open spaces about buildings applies only to lateral open spaces, and it may also apply to new [982] buildings on sites previously unbuilt upon. The by-laws cannot be inconsistent with the Act, and it would be inconsistent

**to restrict the height of a building by a by-law which was purposely left unrestricted by section 348.**

**14. As the question is one of considerable importance, I beg to refer the question for the favour of the opinion of the High Court, and to ask, whether the Municipality have the power under the by-law quoted to restrict the height of a new building on a site which has been previously built upon.**

The reference was argued before a Division Bench (PARSONS and RANADE, JJ).

*Inverarity*, for the Municipality.

*Lang*, Advocate-General, for the Accused.

**Parsons, J.**:—The Acting Chief Presidency Magistrate (Mr. W. R. Hamilton) has referred to this Court the following question, *viz.*, whether the Municipality have the power under by-law 30 to restrict the height of a new building on a site which has been previously built upon. By-law 30 is as follows: "A person who shall erect a new building which abuts on a street of less than fifty feet in width, or any part of which is within a distance of half the width of such street from a street of less width than fifty feet, shall not, without the written permission of the Commissioner, erect such building to a greater height than one and a half times the width between the point at which such building approaches nearest to the street, and the opposite side of such street. Provided that nothing herein contained shall debar any person from building up to the full height of any building (belonging to himself) which has stood within two years on the same site, and on which he has not been precluded from building by any injunction or order of a Court." It purports to have been passed under the authority conferred by section 461 of the City of Bombay Municipal Act, 1888 (hereinafter called the Act). Clause (*d*) of this section is as follows:—(*d*) the provision and maintenance of sufficient open space, either external or internal, about buildings to secure a free circulation of air and of other means for the adequate ventilation of buildings The Magistrate thinks that the by-law is illegal, as being inconsistent with the Act. Section 348 of the Act, he says, makes certain provisions in respect of buildings, which are to be newly erected on sites previously unbuilt on. Buildings already existing are left unprovided for **[983]** and unrestricted by section 348: a by-law, therefore, providing for the application to them of any of the matters or restrictions mentioned in section 348 is inconsistent with the Act. No doubt section 348 of the Act does deal with buildings to be newly erected on sites previously unbuilt on, and one of its clauses (*e*) regulates the height of such buildings. It may, therefore, be argued that there must be very clear words used elsewhere in the Act to enable the Municipality to make a by-law which shall affect buildings to be newly erected on sites already built on. The obvious reply, however, to this argument is that section 461 of the Act contains these very clear words. Except in clause (*c*) it deals entirely with already existing buildings, premises, and conditions of things. It could never be argued that because section 348 of the Act enacts certain regulations to be observed in the case of new buildings to be erected on new sites, there could be no power given elsewhere by the Act to make by-laws enjoining similar or even the same regulations to be observed in respect of buildings either already standing or to be erected on old sites. Undoubtedly, such a power could be given, and in our opinion section 461 clearly gives the power to make by-laws in respect of the matters mentioned in clause (*d*). There is nothing, therefore, illegal or *ultra vires* in the by-law.

The only point mentioned by the Magistrate which remains for decision is whether clause (*d*) allows of a by-law which restricts the height of a building.

The Magistrate thinks that it does not, but that it only applies to lateral open spaces. We cannot see the distinction. We assume that the word "buildings" means the building that is standing or is being erected, in respect of which a circulation of air and ventilation is required to be provided. It seems to us that the result is exactly the same whether the regulation be, for example, that if a house is 20 feet high a space of 20 feet shall be left in front of it, or that the height of a house shall not be more than 20 feet, if the space left in front of it is only 20 feet wide. The model by-law quoted by the Magistrate shows this. It regulates the width of the open spaces by the height of the houses. It thus regulates the height of the houses just as the by-law in question here does. In the present case all that the accused has to do, if he wishes to [984] build his house 60 feet high, is to build it so far back from the road as to leave the necessary open space required by the by-law for that height "between the point at which the building approaches nearest to the street, and the opposite side of such street." We return the case with our answer to the question in the affirmative.

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[ 22 Bom. 984 ]

## APPELLATE CIVIL.

*The 6th December, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Anandibai............(Original Defendant) Appellant.

*versus*

Rajaram Chintaman Pethe............(Original Plaintiff) Respondent.*

*Civil Procedure Code (Act XIV of 1882), Sec. 266 (k)—Execution—Attachment*—Spes successionis—"*Expectancy of succession by survivorship*"—*Not attachable—Widow—Widow's estate.*

One Sadashiv Anant devised a house, which was his self-acquired property, to his widow (the defendant), and died leaving a son, Vasudev. The will did not expressly give the widow power to dispose of it. The plaintiff in execution of a decree against Vasudev sought to attach Vasudev's interest in the house. The lower Court held that as the interest taken by the defendant in the house under her husband's will was only a widow's estate, Vasudev as her husband's son had an interest in the house which might be attached by the plaintiff.

*Held* (reversing the decree) that Vasudev had no interest in the house. He had only a *spes successionis*—an expectancy of succession by survivorship, and such a hope or expectancy is not attachable under section 266 (k) of the Civil Procedure Code (Act XIV of 1882).

The entire estate was vested by the testator in the defendant. No doubt her estate was a widow's estate. Her estate in it closely resembled that of a married woman in England to whom property is given with a restraint against alienation. That being so, she was unable to dispose of it, but still she was its full owner. The whole property passed to her

* Second Appeal, No. 661 of 1897.

**from the testator. Nothing was left in him. But until she died it could not be known who would inherit the house.**

***Annaji* v. *Chandrabai*, I. L. R. 17 Bom., 503, distinguished.**

SECOND APPEAL from the decision of Rao Bahadur D. G. Gharpure, additional First Class Subordinate Judge of Nasik with appellate powers, reversing the decree of Rao Saheb L. K. Nulkar, Joint Subordinate Judge.

**[985]** The plaintiff sued for a declaration that a certain house belonged to his judgment-debtor Vasudev and was liable to be sold in execution of a decree against him. The defendant, who was Vasudev's mother, denied that Vasudev had any interest in the house. She claimed to be the owner, alleging that it had been the self-acquired property of her husband Sadashiv, and that he had left it to her by his will.

The Subordinate Judge dismissed the suit, holding that the house in dispute was not Vasudev's property, and that it was not liable to be attached in execution of the decree against him.

On appeal by the plaintiff the Judge reversed the decree and allowed the claim on the ground that Sadashiv's will did not convey absolute title to the defendant, but only a widow's estate.

The defendant preferred a second appeal.

*Mahadeo B. Chaubal*, for the Appellant (Defendant).

*Balkrishna N. Bhajekar*, for the Respondent (Plaintiff).

**Farran, C. J.** :—We do not entertain any doubt in this case that the document upon which the defendant Anandibai bases her title to the house in suit is a will, and that the deceased testator Sadashiv Anant by it validly devised the house to her. As the will does not expressly give the defendant Anandibai (who was the testator's widow) a power of disposing of the house, the question remains whether Vasudev, one of the testator's sons, had any attachable interest in it at the time when the plaintiff attached it, Anandibai being still alive. We are of opinion that he had not. The testator, when he devised the house to his widow, vested the entire estate in her. No reversion was left in the testator to descend upon his heirs as undisposed of estate. The Subordinate Judge, A. P., speaks of the estate which the widow Anandibai took in the house as a widow's estate, and in all essential particulars it is of that character. The law imposes upon her the disqualification of being unable to dispose of it, but still she is its full owner. Her estate in it closely resembles that of a married woman in England to whom property is given with a restraint against alienation. In the case of such a gift or bequest the whole estate in the property given passes from the **[986]** donor or testator. Nothing is left in him Until the defendant Anandibai dies, it cannot be known who will inherit the house. Vasudev, as one of her husband's sons, has only a *spes successionis*, "an expectancy of succession by survivorship," and such a hope or expectancy is not attachable under section 266 (*k*) of the Civil Procedure Code. The law upon which that exception is founded will be found in *Ram Chunder* v. *Dhurmo Narain*, 15 Cal. W. R., F. B. R., 17. The case of *Annaji* v. *Chandrabai*, I. L. R., 17 Bom., 503, was different. There it was expressly found that the donor only gave to the donee a life estate. The reversion expectant on the determination of the life estate given to the donee was left undisposed of, and consequently remained vested in the donor, and was, therefore, as such held to be attachable. The fact that the donor only gave a *life* estate to the donee was the *ratio decidendi* in that case.

The decree of the appellate Court is, for these reasons, reversed, and that of the Subordinate Judge restored with costs throughout on the plaintiff.

NOTES.

[In (1899) 1 Bom. L. R., 303, it was held that the reversion to result under a trust deed in favour of the settlor was attachable.]

[22 Bom. 988]

APPELLATE CIVIL

*The 23rd November, 1897.*

PRESENT:

MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

Govind Gopal............(Original Plaintiff) Applicant

*versus*

Balwantrao Hari............(Original Defendant) Opponent.*

*Promissory note—Express promise to pay.*

A document is not a promissory note if it does not contain an express promise to pay.

APPLICATION to the High Court under its extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts Act, IX of 1887) against the decision of Khan Bahadur M. N. Nanavati, Judge of the Court of Small Causes, at Poona.

Plaintiff sued in the Court of Small Causes, at Poona, to recover the sum of Rs. 351-12-0 alleged to be due on a khata account.

[987] The khata was in the following form:—

"Dated 15th April 1893, to Govind Gopal Phadke from Balwantrao Hari Raswadkar.

"(On debit side as follows):—Rs. 300 cash in Surat currency have been received: for them interest at eight annas per cent. per mensem, having made an agreement of five months, have been taken—three hundred."

The above was stamped with a one-anna stamp. On its being tendered in evidence, an objection was taken that it was insufficiently stamped.

The Court allowed the objection and rejected the document, holding that it was a promissory note and adequately stamped as such.

The plaintiff then applied for leave to amend the plaint and to sue for the amount as for money had and received. The Judge refused the application and dismissed the suit.

The plaintiff applied to the High Court and obtained a rule to set aside the order.

*Purshotam P. Khare*, for the Applicant (Plaintiff), in support of the rule.

*Gangaram B. Rele*, for the Opponent (Defendant), *contra*.

**Candy, J.**:—The document in question is headed "khata," that is, "account." Then it proceeds—"dated 15th April 1893, to Govind Gopal Phadke from Balwantrao Hari Raswadkar." Then on the debit side occur these words (literally translated):—

"Rs. 300 cash in Surat currency have been received: for them interest at 8 annas per cent. per mensem, having made an agreement of five months, have been taken—three hundred."

* Application, No. 177 of 1897 under Extraordinary Jurisdiction.

We are unable to hold that this document is a promissory note. There is no promise to pay; and there is no authority for holding that an implied promise is sufficient to constitute an instrument a promissory note. The document is a receipt or an acknowledgment or an agreement. In either case the plaintiff was entitled to proceed with the suit.

The rule must be made absolute and the case remanded for the Small Cause Court Judge to proceed with it according to law. Costs to follow the result.

**Fulton, J.**:—As the document in question does not contain any express promise to pay, I do not think it is a promissory note. It **[988]** appears to me to be simply an acknowledgment of liability, and as such to be sufficiently stamped with one anna. I would accordingly reverse the decision and remand the suit for retrial on the merits. A day should be fixed for the hearing, and the Judge, after taking such evidence as the parties may tender, should proceed to determine whether this money is justly due by the defendant to the plaintiff. For this purpose I do not think that any amendment of the plaint is necessary, but if it were, it seems to me to be a case in which it might properly be allowed. Costs should follow the result.

*Rule made absolute.*

NOTES.

[See also (1913) 21 I. C., 199 (Oudh)]

[22 Bom. 988]

## CRIMINAL REVISION.

*The 6th December, 1897.*

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE RANADE.

*In re* Maharana Shri Jaswatsangji Fatesangji.*

*Criminal Procedure Code (Act X of 1882), Sec. 133—River—Obstruction in a public river—Meaning of 'obstruction' as used in the section.*

Section 133 of the Code of Criminal Procedure (Act X of 1882) contemplates not only that the way, river, or channel where an unlawful obstruction is made, must be one of public use, but also that the obstruction must be of that public use.

Where a dispute arose between the proprietors of two talukdari villages situate on the banks of a river about the diversion of the course of the river by means of a dam and a trench made by one of them in the current of the river, and each talukdar claimed the river as his own private property,

*Held*, that the Magistrate had no jurisdiction to interfere under section 133 of the Criminal Procedure Code (Act X of 1882).

THIS was an application under section 435 of the Criminal Procedure Code (Act X of 1882).

The applicant was the Thakor of Limdi, and proprietor of the talukdari village of Wadbela in the Ahmedabad District.

The river Utavali separates the lands of this village from those of another talukdari village called Navda, which belongs to one Latifkhan. The river forms the boundary between these two villages for some distance. It then

* Criminal Revision, No. 297 of 1897.

bifurcates, one branch pass-[989]ing through Wadhela, the other through Navda, until both are lost in marshy swamps.

On the 20th April 1883, the Thakor obtained a decree establishing his right to have the water of the river Utavali flow freely at all times and in all seasons towards his village of Wadhela, and directing the Talukdar of Navda to remove the obstruction he had caused by erecting a dam across the river.

The proceedings in execution of this decree lasted till June 1896.

On the 28th September 1896, the Talukdar of Navda made a complaint to the Collector of Ahmedabad, stating that the Talukdar of Wadhela had dug a trench and erected a dam in the bed of the river, and thereby diverted the water from his channel, to the great injury of the people of Navda, who were his tenants. The material portion of this complaint was as follows :—

"My village of Navda is within the jurisdiction of the Dhandhuka Taluka. The river of that village is named Utavli, and its water is used for all purposes by the inhabitants of that village. No one has a right except myself to use the water of the river for crops and produce. Therefore, on payment to me of the fixed amount and obtaining my permission, people of the opposite side as well as others use it. In the meantime the Limbdi Darbar put us several times indirectly to great loss. The matter was many times enquired into and finally determined by the High Court. Several execution proceedings have taken place in the matter. The land on the opposite side of the river has been broken for cultivation. But as the current of the water is on this side, the water remains on this side. I have now received reliable information from my men that a number of men were engaged by the Limbdi Darbar, the land dug, and the earth therefrom thrown into the current of the river, and the flow of the water obstructed, and steps taken to divert it to the opposite side. By these means the persons residing in my village and my *giras* have undoubtedly suffered, and will suffer an immense loss. I bring all the facts to your notice and request your Honour to avert this loss."

On receipt of this complaint the Collector made an inquiry into the matter, and directed the Assistant Public Prosecutor to institute criminal proceedings against the Talukdar of Wadhela.

Thereupon the Public Prosecutor laid information against the talukdar before the First Class Magistrate of Ahmedabad, who issued the following notice to the accused under section 133 of the Code of Criminal Procedure :—

"The river Utavli flows towards Navda along the border of your village Wadhela. The people of Wadhela and other villages named in the margin have, by your [990] order, performed some digging in the current of that river, and, in order to stop the water flowing towards Navda, have raised a mound by filling in earth and thereby diverted the flow towards Wadhela; they have thus caused obstruction to the cultivators of Navda and other villages who maintained themselves by cultivation with the help of the water. It has been shown to me that the obstruction still continues.

"I hereby, therefore, do order and enjoin you that you should, within the period of 10 days, abstain from the work of diverting the flow of the water, remove the obstructions caused by you to the usual flow of water, and restore the channel to its original condition ; otherwise you should appear in my Court on the 5th July 1897, to show cause why the order should not be enforced."

In answer to the above notice, the Talukdar of Wadhela pleaded that the river was not a public river, but his private property so far as it flowed within the limits of his village; that he had caused no obstruction to the public and had done nothing so as to cause a public nuisance; that this was a private dispute between two neighbouring talukdars, and the Magistrate had no jurisdiction to interfere under section 133 of the Code of Criminal Procedure.

The Magistrate overruled these objections, and passed an order under section 140 of the Criminal Procedure Code (Act X of 1882) directing the Talukdar of Wadhela to remove the obstruction complained of.

In his judgment the Magistrate remarked as follows :—

"The principal contention of the respondents is that the place where the alleged obstruction has been caused, is not public, and that the river where the obstruction is said to have been caused is of the private ownership of the Talukdar of Wadhela, *i.e.*, the Limbdi Thakor. On this point also the evidence of the Talati of Navda, the Bandh Karkun the Aval Karkun, the Mamlatdar (R. S. Chagganlal,) and the late Mamlatdar of Dhandhuka and now Deputy Collector, Mr. Parmanandas Surajram, is corroborative throughout. They each and all allege that the river is public and that it does not belong to any particular individual. All the villages by which the river passes make use of the water, and in a survey map of Wadhela the Utavli river has not been shown at all, though it has been in the map of the village of Navda. The evidence of the above witnesses is quite consonant with the principle that every riparian holder has the right to use the water flowing past his land. He cannot, however, interfere, as the Talukdar of Wadhela (Limbdi Thakor) has done in the present case, with the rights of other holders in his neighbourhood and cause such a serious loss as that now inflicted upon the neighbouring Navda Talukdar.

[991] "The artificial filling and digging made by the Wadhela Talukdar forces the water in the direction of his village and checks its free flow towards Navda. No one in the present case disputes the right of the Wadhela Talukdar to use the water flowing naturally past his land, but he must remain content with that, and that only, and not try to get more by sensibly diminishing, by artificial means, the supply of water to his neighbours above and below the stream."

Under these circumstances the Talukdar of Wadhela made the present application to the High Court under its revisional jurisdiction to set aside the Magistrate's order under section 133 of the Code of Criminal Procedure.

*Anderson* (with him Rao Bahadur *Vasudeo J. Kirtikar* and *Ramdutt V. Desai*) for the Applicant :—The Magistrate had no jurisdiction to pass the order in question. The dispute is one of a purely civil nature between two neighbouring talukdars, each of whom claims the bed of the river to be his own private property. The obstruction complained of, affects the interests of the Navda Talukdar alone. It is on his complaint that the present proceedings were instituted. The public have no cause for complaint and do not complain of any public nuisance. The two talukdars have been disputing with each other in the Civil Court for years about this river. A dispute of a private nature relating to private property does not give jurisdiction to the Magistrate to proceed under section 133 of the Code of Criminal Procedure—*Empress* v. *Prayag Singh*, I. L. R. 9 Cal., 103; *Basaruddin* v. *Bahar Ali*, I. L. R., 11 Cal., 8; *Askar Mea* v. *Sabdar Mea*, I. L. R., 12 Cal., 137; *Luckhee* v. *Ram Kumar*, I. L. R., 15 Cal., 564. Where a *bonâ fide* question is raised as to whether the way, road or channel is public or private property, section 133 does not apply—*Queen-Empress* v. *Bissessur Sahu*, I. L. R., 17 Cal., 562. Here both the talukdars assert that the river where the alleged obstruction was caused is a private and not a public river. The river is neither a tidal nor a navigable river. We submit that the Magistrate has acted without jurisdiction.

*Lang*, Advocate General (with him *G. K. Parekh*) for the Opponent :—The Magistrate has found as a fact that the river is a public river and that the obstruction complained of affects a large [992] number of people. The whole evidence shows that the river does not belong to the rival talukdars or to any other private individual. All the villages by which it passes, use the water of this river. No member of the public can be restrained from using it. It is then a river "which is, or may lawfully be used by the public" within the

meaning of section 133 of the Code of Criminal Procedure, and it is this public user which has been obstructed by the dam erected across the river by the Thakor of Limbdi. His acts amount to a public nuisance. The Magistrate had, therefore, jurisdiction to interfere and remove the obstruction under section 133 of the Code.

**Parsons, J.**:—In this case the Magistrate has ordered the applicant, who is the Thakor of Limbdi and the owner of the village of Wadhela, to remove an obstruction from the river Utavli. The real point for our decision is whether the obstruction is such as could be the subject of an order under section 133 of the Code of Criminal Procedure. The river Utavli is said to have its rise in Kathiawar, to run through the lands of several villages, and after a course of some 25 miles to come to the villages of Wadhela and Navda. It forms their boundary for some short distance. It then bifurcates; and the two streams end by absorption into the soil of the respective villages. The Thakor of Limbdi has, to use the words of the Magistrate, performed some digging in the current of the river and has raised a mound by filling in earth, and has thereby diverted the flow towards Wadhela; in other words, he has, by means of a trench and a dam, diverted the course of the river, so that now the greater portion of the water of the river flows into Wadhela and little or no water runs into Navda, whereas before the water was pretty evenly distributed between the two. Navda is like Wadhela a talukdari village and was owned by one Latifkhan, who made the original complaint in the matter (Exhibit 8) on the 28th September 1896. There had been prior to this a long standing litigation between the two talukdars relative to the water of the river. In 1877, a suit was filed by the owner of Wadhela against the owner of Navda, because the latter had erected a dam which prevented the water flowing into Wadhela. It was decided in 1883 by this High Court, which declared the plaintiff entitled to have a [993] free flow of water into Wadhela. The proceedings in execution of this decree were not finally concluded till 1896. (See Printed Judgments, 1896, page 480.) It must have been very soon after this that the acts now complained of were done.

Section 133 of the Code deals only with an obstruction in a way, river, or channel which is, or may be, lawfully used by the public. These words seem to imply not only that the river or channel must be one of public use, but that the obstruction must be of that public use.

The questions, therefore, that arise are:—1. Whether the Utavli is a river which is, or may be, lawfully used by the public. 2. If so, whether there has been any unlawful obstruction caused to that use by the acts of the applicant. The best definition of the word "river" that I can find is given in the Tagore Law Lectures, 1889 (Riparian Rights), *viz.*:—"A running stream of water arising at its source by the operation of natural law and by the same law pursuing over the earth's surface a certain direction in a defined channel, being bounded on either side by banks, shores, or walls until it discharges itself into the sea, a lake or a marsh." This, however, says nothing about size, and, therefore, ought, I think, to be supplemented by the definition in Webster's Dictionary, *viz.*:—"A large stream of water flowing in a channel on land towards the ocean, a lake, or another river; a stream larger than a rivulet or brook." This so-called river, the Utavli, is scarcely shown to come within this definition. It seems to be merely a collection of rain water in hollow ground which has a certain flow owing to the low level and porous nature of the soil in Navda and Wadhela. There is no evidence of its condition in the dry weather, and no one says that it flows the whole year round. I do not even know whether it flows wholly in one direction. The map shows it to be

broadest in the middle part of its course and to dwindle away on each side. Further inquiry, however, would be necessary in order to be able to properly answer this part of the question. Assuming, however, that the Utavli is a river, it is clear that no user of it by the public, either actual or possible, is proved. Apparently it is nowhere even alleged to be a public river. At common law all rivers above the flow and reflow of the tide are *primâ facie* deemed **[994]** to be private. A public river would be one that was intended for the use of the public, subjected, that is to say, by law to a kind of servitude in favour of all members of the State. The Utavli is neither tidal nor navigable. It is not the property of the State. It is used by the inhabitants of the villages through which it runs, but they make no other use of it than that of ordinary riparian occupants, and the talukdars, who are the parties to this proceeding, expressly claim it as their private property, because it runs through their land. In his complaint, Latifkhan calls Navda his village, and says that "the river of that village is named Utavli and its water is used for all purposes by the inhabitants of that village. No one has a right, except myself, to use the water of the river for crops and produce. Therefore, on payment to me of the fixed amount and obtaining my permission, people of the opposite side as well as others use it." A similar claim was made in the civil suit by the Talukdar of Wadhela. Each riparian proprietor claims the stream as his own and the use of the water for his benefit alone. It is, therefore, impossible to answer the first question otherwise than in the negative.

2. The answer to the second question is given by the Magistrate himself. 'Every riparian holder,' he says, 'has the right to use the water flowing past his land. He cannot, however, interfere, as the Talukdar of Wadhela (Limbdi Thakor) has done in the present case, with the rights of other holders in his neighbourhood, and cause such a serious loss as that now inflicted upon the Navda Talukdar.' This, too, was the complaint of the Navda Talukdar, that his private rights as a riparian proprietor had been infringed. Just as in the former case the Wadhela Talukdar complained against his neighbour of Navda, so here the Navda Talukdar complains against him of Wadhela of an obstruction of his private rights as owner of property, a private injury causing private loss. I am of opinion that section 133 cannot extend to such an obstruction. My learned colleague agrees with me in this opinion, and, therefore, we reverse the order of the Magistrate.

**Ranade, J.** :—A series of decisions on section 133—*Queen-Empress* v. *Bissessur Sahu and another*, I. L. R., 17 Cal., 562 ; *Basaruddin* v. *Bahar* **[995]** *Ali*, I. L. R., 11 Cal., 8 ; *Askar Mea* v. *Sabdar Mea*, I. L. R., 12 Cal., 137 ; *Luckhee Narain Banerjee and others* v. *Ramkumar Mukherjee*, I. L. R., 15 Cal., 564,—clearly establish that the Magistrate has no jurisdiction under it where a *bonâ fide* dispute exists as to whether the place where the obstruction is made is public or private property, though at the same time the Magistrate has power to enquire and determine whether or not the objection is a *bonâ-fide* one. In the present case, the applicant raised the contention in the Court below that the river Utavli was not a public stream, but belonged to him, and it was urged for him by the Government Pleader that the place where the alleged obstruction was caused was not a public place, but belonged to the applicant. The evidence recorded before the Magistrate raises indeed some presumption that the river Utavli is a public stream. It takes its rise in Kathiawar, and after flowing for 20 miles past some fourteen villages in the Dhandhuka Taluka belonging some to Government and others to different talukdars and girassias, it loses itself in the *khari* or marsh of Bawaliari. Such a stream, not being over its whole length the property of any private owner, and being used by all, may

be assumed to have some of the characteristics of a public stream. In the view I have taken of the facts of the case, the point is not very material. Section 133 contemplates not only that the river should be public, but that the obstruction must be caused to some public right. The chapter under which this section occurs is headed "Public Nuisances," and the section itself requires that the obstruction to be removed must be in a way, river, or channel, which may be lawfully used by the public. The prosecution, though instituted by the Assistant Government Pleader, was the result of a complaint made by the Talukdar of Navda, who in his complaint claimed full and sole ownership of the river within the limits of his village. The former complaint was made some eight months after the alleged obstruction. The applicant, who is the Talukdar of Wadhela, a neighbouring village, also claimed the river at the place where the obstruction has taken place to be his property. The villagers of Navda have no independent rights to the use of the water in the river for irrigation purposes. The loss and advantage in this dispute is solely of the Talukdar of Navda or [996] of Wadhela. It was on the same footing that the two talukdars fought the previous suit in respect of the removal of a dam higher up the river which the Navda Talukdar had placed, and in which case this Court upheld the applicant's right to the unrestricted flow of water at all seasons into the channel of Wadhela. The present obstruction is in one sense the result of the full execution of that decree, the digging in the channel and the filling up of the bed of the river being intended to ensure a permanent flow of water in the channel.

It is thus clear that the obstruction is not a public nuisance and is not an invasion of a public right. The dispute is really, as before, between two neighbours, owners of private property, on the bank of the river. The Magistrate had thus no jurisdiction to proceed under section 133, but ought to have referred the parties to the remedy of a civil suit.

NOTES.

[The case of (1914) 36 All., 209 is similar. See also (1912) 16 I.C., 162 (Punjab).]

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[22 Bom. 996]

## APPELLATE CIVIL.

*The 8th December, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Lakshmibai and another..........(Original Defendants) Appellants

*versus*

Rajaji bin Daji............(Original Plaintiff) Respondent.*

***Hindu law—Adoption—Specifying a child for adoption does not necessarily prevent the adoption of another if the one specified die or be refused.***

**Where a husband authorising an adoption specifies the child he wishes to be taken, but that child dies or is refused by his parents, the authority given warrants (at least in Bombay) the adoption of another child. The presumption is that the husband desired an adoption, and by specifying the object merely indicated a preference.**

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*** Second Appeal, No. 502 of 1897.**

SECOND APPEAL from the decision of Rao Bahadur Chunilal D. Kavishankar, additional First Class Subordinate Judge of Satara with appellate powers.

One Bhau bin Bhagoji Patil died on 26th March 1890, leaving two widows named Tanu, the next friend of the plaintiff (a minor), and Lakshmibai (defendant No. 1). Tanu was the senior widow. The plaintiff alleged that on the 9th June 1893, he was adopted by Tanu, and sued for a declaration of his status as such.

**[997]** Evidence was given that the deceased Bhagoji had directed Tanu to adopt one Bala, who was the son of his sister Goju, or had at all events indicated a preference for that child, but that, as Goju refused to give her son in adoption, Tanu had adopted the plaintiff. The defendants disputed the validity of the plaintiff's adoption

Both the lower Courts held that the plaintiff's adoption was valid, and that he was entitled to the declaration prayed for.

The defendants preferred a second appeal.

*Lang* (Advocate-General) with *Vishnu K. Bhatavdeker* appeared for the Appellants (Defendants).

*Inverarity* with *Mahadeo V. Bhat* appeared for the Respondent (Plaintiff).

The following authorities were cited :—*Ramchandra* v. *Bapu*, P. J , 1877, p. 42 ; *Bayabai* v. *Bala*, 7 Bom. H. C. Rep , App., 1 ; West and Bühler, p. 965.

**Farran, C. J.** :—We think that the passage cited from West and Bühler, Volume II, page 965, correctly lays down the law for this Presidency. "It is common for a husband authorizing an adoption to specify the child he wishes to be taken. Should that child die, or be refused by his parents, the authority would still be held, at least in Bombay, to warrant the adoption of another child, unless indeed he had said 'such a child and no other.' The presumption is that he desired an adoption, and by specifying the object merely indicated a preference." It is, we think, borne out by the ruling in *Ramchandra Baji* v. *Bapu Khandu*, P. J., 1877, p 42. WESTROPP, C. J., thus states the law :—"Lalitabai could not have lawfully adopted Shivaji or any person other than Pudaji, *so long as Pudaji lived and were willing to be adopted*—for there could not be any consent on the part of Bhavanji to such an adoption implied in derogation of his express direction in favour of Pudaji."

It is not, however, actually necessary that we should decide the question in this case, for the Subordinate Judge, A. P., has found as a fact that the deceased Bhau did not so much direct that Bala, his sister's son, should be adopted, as indicate a pre-**[998]**ference for that boy, and in the absence of any objection raised by the appellants to the plaintiff's adoption on this ground, and having regard to the vagueness of the language used by Tanu and the other circumstances stated by the Subordinate Judge, A. P., we cannot say that his inference from the language used is incorrect. It is found as a fact, independently of the objection that the indicated boy was the sister's son of Bhau, that the mother of Bala refused to give him in adoption. Decree confirmed with costs.

*Decree confirmed.*

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**NOTES.**

[ See also (1903) 26 Mad., 681. ]

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[22 Bom. 998]

APPELLATE CIVIL.

*The 13th December, 1897.*

PRESENT:

SIR C. F. FARRAN, KT., CHIEF JUSTICE, AND, MR. JUSTICE CANDY.

Jeddi Subraya Venkatesh Shanbhog............(Original Opponent and Plaintiff) Appellant

*versus*

Ramrao Ramchandra Murdeshvar............(Original Petitioner and Defendant) Respondent.*

*Limitation Act (XV of 1877), Sch. II, Art. 179—Decree partly in favour of plaintiff and partly in favour of defendant—Application for execution by one party does not prevent limitation running against the other—Civil Procedure Code (Act XIV of 1882), Sec. 583.*

*A* obtained a decree against *B* for possession and for Rs. 27 mesne profits. In execution he got possession. On appeal, however, the decree was reversed so far as it ordered possession to be given to him, and the amount of mesne profits awarded to him was reduced to Rs. 13-8-0, The appellate decree was passed on the 6th June 1889.

On the 18th December 1891, the defendant *B* applied to be restored to possession. That application was dropped, and on the 24th September 1895 he made a second application. There had been nothing done in the interval except that in 1892 and again in 1894 the plaintiff had applied for execution in respect of the Rs. 13-8-0 awarded to him. The lower Courts were of opinion that the application in 1895 by the defendant was not barred by limitation by reason of the plaintiff's applications in 1892 and 1894, which they held to be an acknowledgment by the plaintiff of the defendant's right to execute his part of the decree.

*Held* (reversing the order of the lower Court) that the defendant's application was barred by limitation. The plaintiff's application in 1892 and 1894 did not operate as an acknowledgment so as to prevent limitation.

[999] SECOND APPEAL from the decision of E. H. Moscardi, District Judge of Kanara, confirming the order of Rao Saheb T. V. Kalsulkar, Subordinate Judge of Kumta, in an execution proceeding.

The plaintiff obtained a decree No. 89 of 1887 against defendant, awarding him possession of certain land and Rs. 27 as mesne profits, and in execution obtained possession.

Subsequently, in appeal, the decree was reversed so far as it ordered possession to be given to plaintiff, but was affirmed as to payment of mesne profits, the amount of which, however, was reduced to Rs. 13-8-0.

The appellate decree was passed on the 6th June 1889.

On the 18th December 1891, the defendant applied to be restored to possession, but the application was dropped.

In 1892 and again on 24th September 1894, the plaintiff applied for the recovery of the Rs. 13-8-0 awarded to him by the appellate decree, but both applications were disposed of for want of prosecution.

On 24th September 1895, the defendant filed the present darkhast applying to be restored to possession.

The plaintiff contended that the application was barred by limitation, and that the defendant had no right to claim mesne profits.

* Second Appeal, No. 988 of 1897.

The Subordinate Judge held that the darkhast was in time, and adjourned the case to determine the amount of mesne profits.

On appeal by plaintiff, the Judge confirmed the order. The following is an extract from his judgment:—

"On the point raised I find that the application is in time. The darkhasts of the plaintiff were requests for the execution of the District Court's decree, and were accompanied by copies of that decree, thereby implying, as it appears to me, that the decree was still in force, not only as regards the rights of the plaintiff thereunder, but also as regards those of the defendant, Now under section 19 of the Limitation Act, if before the expiration of the period prescribed for an application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed. Consequently I think that the darkhasts of 1892 and 1894 kept the defendant's claim alive, and that the lower Court was right in its conclusion that the present darkhast was in time."

[1000] The plaintiff preferred a second appea'.

*Ganpatrao S. Mulgaumkar*, for the Appellant (Plaintiff).

*Dattatraya A. Idgunji*, for the Respondent (Defendant).

**Farran, C. J.** :—The original decree in this case awarded possession of the land claimed in the plaint to the plaintiff and Rs. 27 as mesne profits. An appeal was filed by defendant, but before it was heard, possession of the land was in execution made over to the plaintiff. The decree of the appellate Court was passed on 6th June 1889. It reversed the original decree in so far as that decree awarded possession to the plaintiff, and reduced the amount of mesne profits to Rs. 13-8-0. The final decree was thus a decree for the plaintiff for Rs. 13-8-0, and the defendant under section 583 of the Civil Procedure Code was entitled in virtue of it to have possession of the land restored to him. In that sense it may be said to be a decree in favour of each party, though strictly speaking there was no part of the decree of which the defendant could demand execution. It is an express provision of the Code which gave the defendant the right to be reinstated in possession upon the reversal of the decree of the lower Court. If that decree had not been executed before the decree in appeal was passed, the defendant could not have invoked the aid of the Court in execution at all.

On the 18th December 1891, the defendant applied to be reinstated in possession. The application dropped. The defendant again on the 24th September 1895, presented a darkhast to be reinstated.

The defendant's application is *prima facie* time-barred. The lower Courts have held that it is in time, because the plaintiff in 1892 and again in 1894 applied for execution of the decree in respect of the Rs. 13-8-0 awarded to him. They have done so on the ground that the plaintiff by applying for execution of the decree in his favour acknowledged the defendant's right to execute his portion of the decree. We are unable to concur in that view. Admitting that an acknowledgment in writing is sufficient to give a fresh starting point in the case of the execution of a decree, as to which see *Trimbak* v. *Kashinath*, P. J., 1897, p. 101; *ante* p. 722, we think that [1001] here there is certainly in terms no acknowledgment by the plaintiff of the defendant's right, nor do we think that there is such an acknowledgment by necessary implication. If the defendant had bound himself not to redemand possession from the plaintiff, the plaintiff's application for execution of his money decree would have been couched in precisely the same language. The case of *Dharma* v. *Govind*, I. L.

R., 8 Bom., 99, shows what are the essentials of an acknowledgment relied upon to give a fresh starting point in limitation. In the cases referred to by Mr. Idgunji—*Janki Prasad* v. *Ghulam Ali*, I. L. R., 5 All., 201; *Fateh Muhammad* v. *Gopal Das*, I. L. R., 7 All., 424, and *Hingan Lal* v. *Mansa Ram*, I. L. R., 18 All., 384,—there were actual acknowledgments of liability under the decree. In this case, as we have said, there is none.

It is, however, contended that the plaintiff's application for execution satisfies the requirements of article 179. We think that there is no force in that contention. The decree here is not like a partition decree, which, though not in terms joint, enures equally for the benefit of the defendant and of the plaintiff—*Narayan* v. *Vithal*, P. J., 1886, p. 287; *Mohun Chunder* v. *Mohesh Chunder*, I. L. R., 9 Cal., 568, but is a several decree awarding Rs. 13-8-0 to the plaintiff and giving the defendant the right to be restored to possession of the lands in suit. The decree and application fall, we think, both within the letter and spirit of the first explanation to the article. See *Venubai* v. *The Collector Nasik*, I. L. R., 7 Bom., 552, in notes.

The order of the lower Court is reversed and the application is rejected, with costs throughout on applicant.

*Order reversed.*

*Note.*—On the 12th March 1898, this order was reversed on review. It appeared that in the darkhast of 24th September 1894, the defendant had applied for restitution under section 583 of the Civil Procedure Code (Act XIV of 1882). The lower Courts had omitted to notice this fact, and it was not, therefore, brought to the notice of the High Court in hearing the above second appeal. The defendant applied for a review and the High Court reversed the above order, holding that by reason of defendant's application of 24th September 1894, the present application was not barred.

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24. ***Undivided family—Ancestral property—Self-acquired property made ancestral by agreement—Operation of such agreement—Effect of such agreement on accumulations and accretions of the property***

TRIBHOVANDAS MANGALDAS *v* F YORKE SMITH . . . XXI 349

25. ***Widow—Adoption—Motive—Inquiry as to motives in making adoption irrelevant*** *Held* by a Full Bench (HOSKING J *dissenting*) that in the Bombay Presidency a widow having the power to adopt, and a religious benefit being caused to her deceased husband by the adoption any discussion of her motives in making the adoption is irrelevant

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26 ***Widow—Daughter—Custom, Proof of—Exclusion of women from succession—Gohel Girassias—High Court—Second appeal Interference in second appeal with findings of fact based on wrong views of law—Limitation*** Hathibhai, a Gohel Girassia, died in or about 1866 leaving a widow Motiba and a daughter Baiba, and possessed of certain lands Motiba died in 1887 In 1890 the plaintiffs, who were divided collaterals of Hathibhai, sued to recover the lands alleging that they succeeded thereto on the death of Hathibhai widows and daughters being excluded from inheritance according to the custom among the Gohel Girassias The lower Courts found that the lands were never in plaintiffs possession that Motiba held them till December 1882 since which time defendants N s 1 3 had them in their enjoyment as purchasers from her that the custom proved excluded daughters but not widows, from inheritance and that the claim was within time, having been made within twelve years of the death of Motiba On second appeal to the High Court *Held* (1) that the alleged custom excluding daughters was not proved; (2) that the plaintiffs should not have been allowed to shift the basis of their claim from an alleged custom which excluded both widows and daughters to one which only excluded daughters, (3) that since limitation must be applied to the plaintiffs' claim as they made it and tried to prove it, Motiba's possession was adverse to them and being for more than twelve years barred the suit If the decree appealed against is based on wrong views of the law of evidence, or on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved the High Court will interfere in second appeal *Bisvnath v Linganagaud*; *Bhagvandas v Rajmal*; *Shidhojirav v Naikojirav* and *Neelkisto v Beerchunder* referred to

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27 ***Widow—Funeral expenses of widow—Husband's estate chargeable with such expense*** Under the Hindu law the estate of the husband is liable for the funeral expenses of the widow, her stridhan cannot be charged with such expenses

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28. ***Widow—Maintenance—Separate maintenance and residence—Family property too small to admit of allotment of separate maintenance.*** Where the family income was too small to admit of an allotment to a widow of a separate maintenance, and there was no family house but a small portion of land which was the site of a house *Held* that the widow was not entitled to a separate maintenance, but might be allowed if she so desired to occupy during her lifetime a portion of the land, not exceeding one-third

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29. ***Widow—Powers of management—Lease granted by the widow for long term of years—Lease voidable on the widow's death but not ipso facto void—Suit by heir to recover property from lessee six years after widow's death—Compensation for tenants improvements—Lying by—Landlord and tenant*** A Hindu widow adopted a son but reserved to herself for life the right of managing her husband's property The adopted son sold his interest in the property to the plaintiff In 1885 the widow granted a lease of the property to defendants for fifty nine years at a rent of Rs. 50 a year She died the following year (1886) The defendants continued in possession of the property under the lease and expended money in improvements. In 1892 the plaintiff as purchaser from the adopted son sued for possession *Held*, that he was entitled to recover and to have the lease set aside but only on payment to the defendants of compensation for the sum properly expended by them in improving the land after the widow's death The lease granted by the widow Jankibai was not *ipso facto* void but only voidable by the plaintiff on her death. It did not necessarily determine at her death That being the legal position of the defendants, the plaintiff allowed the defendants to go on improving the property, and took no steps to warn the defendants until he brought

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**Jurisdiction**—*(continued.)*

6. *Money lent to public officer—Money lent to him in his official capacity—Jurisdiction of Subordinate Judge—Act XIV of 1869, s 32.* The plaintiff had contracted to supply materials requisite for a public building The defendant was the supervisor, Public Works Department, in charge of the work From time to time defendant borrowed money from the plaintiff, and *(inter alia)* four sums amounting to Rs. 385 which he paid as wages to labourers working under him. It was not proved, however, that he had borrowed the moneys as supervisor, and the defendant did not plead that he borrowed them in his official capacity *Held*, that inasmuch as a Public Works supervisor has not usually authority to borrow money for the purpose of the work of which he may be in charge, or in any way to pledge the credit of Government, the mere statement of the defendant when he borrowed the moneys that he wanted them to pay the labourers was not under the circumstances enough to show that the defendant borrowed them in his official capacity, and that the Subordinate Judge had authority to entertain the suit in respect of them. In claims arising out of contract the same test must be applied to determine the question of jurisdiction as in those having their origin in tort, *viz*, was the loan contracted by the defendant in his official capacity ?

HANMANT ANYABA *v.* RAJMAL MANIKCHAND . . ... XXII 170

7. *Partition—Property in different jurisdictions—Suit for partial partition—Suit for land—Letters Patent, 1865, cl 12—Practice—Procedure—Joint family—Onus of proof—Evidence of separate acquisition* The plaintiff sued for partition of certain property alleging it to be joint family property It consisted of a house in Bombay and certain fields at Vavla in the Thana District, outside the jurisdiction of the Court The parties were all resident in Bombay *Held*, that as to the Vavla property the Court had no jurisdiction, the plaintiff not having obtained leave to sue under cl 12 of the Letters Patent, 1865, but that the suit might proceed as regards the property in Bombay *Punchanun* v *Shib Chunder* followed As to the house in Bombay, the first defendant alleged that it was his self acquired property, that he had purchased it in his own name in 1863, out of his private funds, that there were no family funds, and that neither his father nor his brothers (the latter of whom were then very young) were in a position to contribute anything towards the purchase, that by his invitation his father and brother had lived with him in the house, that his father had died there and that one of his brothers had subsequently left the house and with his family had gone to reside elsewhere, that the plaintiff (the youngest brother of the first defendant) had continued to occupy a room in the house by the first defendant's permission up to the date of suit The plaintiff, on the other hand relied on the facts that the house was purchased and used as a family residence while the father and sons were all living in union, that it was brought in the name of the eldest son (defendant No 1), who was then the manager of the family, that the father lived and died there, and that he himself (the plaintiff) and his family had continued to live there, even after he had separated in food from his brother (defendant No 1) *Held*, that the house was liable to partition No doubt the *onus* of proof was upon the plaintiff The facts however, proved by him or admitted by the first defendant raised a strong presumption that the house was family property and against it there was only the first defendant's statement that the house was bought with his own money But there was nothing to show that he kept a private fund apart from the family funds He was the manager of the family and he kept no separate accounts

BALARAM BHASKARJI *v* RAMCHANDRA BHASKARJI .. ... XXII 922

8. *Partition—Valuation of a suit for partition—Suits Valuation Act (VII of 1887), s. 8* In a suit for partition of certain property, the value of the whole property sought to be divided was over Rs 5,000 Plaintiff valued his share at Rs. 250, and paid Court-fees on this amount. This suit was filed in the Court of a Subordinate Judge of the First Class *Held*, that the value of the subject-matter of the suit could not be held to be more than Rs 250, so that the suit ought to have been filed in the Court of the Second Class Subordinate Judge

MOTIBHAI *v.* HARIDAS ... ... ... ... ... XXII 831

*Remedy as between joint owners—Mamlatdar* See MAMLATDAR 3

9. *Small Cause Court—Subscriptions for building a temple—Person receiving such subscriptions—Trustee—Practice—Civil Procedure Code (Act XIV of 1882), s. 30.* A person collecting and receiving subscriptions for the purpose of building a temple, in pursuance of a resolution come to at a meeting of the community, holds them in the capacity of a trustee, and a suit in respect thereof should be filed, under s. 30 of the Civil Procedure Code (Act XIV of 1882), in a Subordinate Judge's Court and not in a Small Cause Court.

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**Landlord and Tenant**—*(continued.)*

did not purport to give vacant possession to the plaintiff. He thereupon passed a decree for the plaintiff. On appeal the District Judge reversed the decree, holding that the notice was a conditional relinquishment which terminated the tenancy. On appeal to the High Court. *Held* (confirming the decree of the Lower Appellate Court) that the defendants were not liable to the assessment Section 74 of the Bombay Land Revenue Code (Bombay Act V of 1879) only declares the customary common law on the subject of relinquishment of tenancy. A notice of relinquishment is not invalid because it does not purport to give and does not in fact give vacant possession to the inamdar The result is the same whether the fact that the possession is not vacant appears on the face of the notice or is shown otherwise A tenant giving up demised land to his landlord is bound to give him vacant possession. The result, however of his not doing so is not to continue the tenancy, but to create a claim for damages on the part of the landlord The tenant is liable in damages to the extent of the loss of rent which the landlord sustains during the actual period for which he is kept out of possession and expenses he is put to in recovering possession of the land

BALIARAMGIRI RAMCHANDRAGIRI INAMDAR *v* VASUDEV MORESHVAR NIPHADKAR ... XXII 348

*Inamdar—Permanent tenant—Notice to pay enhanced rent or quit the land—Denial of landlord's right to enhance rent—Suit to recover enhanced rent—Limitation—Limitation Act (XV of* 1877), s 23 See LIMITATION 1

3. *Lease—Lessee's covenant not to alienate—Alienation contrary to terms of lease—Absence of any clause as to re entry—Ejectment—Forfeiture* A clause in a lease whereby the lessee covenanted not to alienate, unaccompanied by any clause for re entry upon breach of the covenant, *held* to be a covenant merely and not a condition, and a suit for ejectment, brought by the lessor was dismissed *Narayan* v *Ali Saiba* followed

MADARSAHEB *v.* SANNABAWA GUJRANSHAH .. XXI 195

4. *Lease—Sub-lease—Ejectment of tenant—Position of sub tenant—No privity of contract between landlord and sub tenant—Notice to quit—Land Revenue Code (Bombay Act V of* 1879) s 84 A sub lease differs from an assignment of lease in that it creates no privity of contract between the sub tenant and the landlord The landlord has to deal with his lessee and not with the sub tenants of the latter A landlord putting an end by proper notice, to the tenancy of his tenant thereby determines the estate of the under-tenant of the latter

TIMMAPPA KUPPAYA *v* RAMA VENKANNA NAIK XXI 311

5. *Lease—Tenant over holding on expiration of lease—Nature of holding—Tenant by sufferance—Adverse possession—Limitation—Limitation Act (XV of* 1877), *sch II, art* 139 *Semble*—Under art 139, sch II of the Limitation Act (XV of 1877) time begins to run against a landlord when the period of a fixed lease expires, when there is no evidence from which a fresh tenancy can be inferred, and not at some indeterminate date after that period. Where a tenant holds over after the expiration of his lease without further agreement, such holding over, though by English law styled a tenancy by sufferance, is wrongful Slight evidence, however, will suffice to change his position into that of a tenant at will

KANTHEPPA RADDI *v.* SHESHAPPA . XXII 393

6. *Mulgeni lease—Forfeiture not followed by sale—Land Revenue Code (Bombay Act V of* 1879), *ss* 57 *and* 153—*Construction* A declaration of forfeiture, under s 153 of the Land Revenue Code (Bombay Act V of 1879), of the interests of a lessee holding under a permanent lease, not followed by a sale, but by an order transferring possession of the holding to the lessor under s 57, has not the effect of defeating prior incumbrances created by the lessee in favour of third persons

NARAYAN SHESHGIRI PAI *v.* PARSHOTAM SHESHGIRI .. ... XXII 389

7. *Possessory suit by landlord—Lease—Tenant can show that lease determined by sale.* In a possessory suit before a Mamlatdar, though it is not competent to a tenant to deny his landlord's title at the date of his lease, it is open to him to show that it has since determined, *e g.*, by a sale to him by the landlord, in which case the tenant no longer holds under a title derived from the landlord.

VEDU *v.* NILKANTH ... ... ... ... ... XXII 428

8. *Yearly tenancy—Notice to quit—Notice to make a fresh agreement with the landlord or to quit at the end of the year—Sufficient notice.* On the 28th September 1891, the plaintiff gave defendants, who held his land as annual tenants, a notice in the following terms :—"Therefore, within two days from the receipt of this

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**Limitation**—*(concluded.)*



**Limitation Act**—

XV of 1877—

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**Mortgage**—*(concluded.)*

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**Municipality—**

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**Partnership—(continued.)**

to describe him as constituted attorney of the Official Assignee of Madras. *Held*, that the summons might be amended at the hearing by substituting the name of the Official Assignee of Madras and disposed of on that basis It was contended that the creditor's petition in the Madras Insolvent Court disclosed no act of insolvency which could legally justify an adjudication under s. 9 of the Indian Insolvent Act (Stat. 11 and 12 Vic, c. 21), and that the adjudication order was, therefore, made by a Court not competent to make it within the meaning of s. 44 of the Indian Evidence Act (I of 1872), and that, consequently, both it and the vesting order were nullities, and the Official Assignee of Madras had no title to the attached property *Held*, that the order, although it might be erroneous and subject to reversal on appeal, was within the competency of the Madras Insolvent Court. *Held*, also, on the evidence that there was no proof of such collusion between the creditor and the insolvent in obtaining the order of adjudication as would bring that order within s. 44 of the Indian Evidence Act (I of 1872).

SARDARMAL JAGONATH *v.* ARANVAYAL SABHAPATHY MOODLIAR ... XXI 205

**Pauper—**

*Pauper appeal—Application for leave to appeal as a pauper—Such application rejected—Limitation for subsequent appeal—Limitation Act (XV of 1877), s 5, and sch II, arts.* 152 *and* 170—*Sufficient cause for delay—Civil Procedure Code (Act XIV of* 1882), *ss.* 409, 410, 413, 582A *and* 592 A plaintiff whose suit had been dismissed, presented an unstamped memorandum of appeal and with it a petition for leave to appeal as a pauper. Inquiry as to pauperism was directed, and in the result the leave to appeal as a pauper was refused, but the Judge gave leave to amend the memorandum of appeal by stating the claim at a lower valuation, thus reducing the amount of stamp fee required, and a week's time was granted to the appellant to pay the fee. The fee was duly paid, and the appeal was accepted, but when it came on for hearing it was dismissed as barred by limitation. On second appeal to the High Court *Held* (reversing the decree and remanding the case), that the appeal was not barred by limitation By FARRAN, C J, on the following grounds :—In the case of appeals, s 592 of the Civil Procedure Code (Act XIV of 1882), requires two separate documents to be presented,—a memorandum of appeal and an application for leave to appeal as a pauper. When the Judge disposes of the pauper application he does not thereby necessarily dispose of the appeal. He may still treat it as an existing appeal if the appellant desires to continue it The rule in s 413 of the Civil Procedure Code cannot apply to appeals, for, in view of the fact that the Limitation Act (XV of 1877, arts 152 and 170) prescribes the same time for filing an appeal and for applying for leave to appeal as a pauper, the practical result would be that in every case where an application for leave to appeal as a pauper is refused, the appeal if then presented would be time barred These considerations must have been in the mind of the Legislature when it enacted the Civil Procedure Code of 1882, as the Limitation Act was then in existence. The District Judge was, therefore, under no legal obligation to dismiss the appeal when he refused the appellant leave to appeal as a pauper, and that he did not do so was clear from the fact that he allowed the memorandum of appeal to be amended. Section 582A of the Civil Procedure Code (Act XIV of 1882) indicates the will of the Legislature that appeals shall not be rejected on the ground of their not being sufficiently stamped if such insufficient stamping arose from the appellant's mistake. In analogy thereto I think that the District Judge was acting within his powers when he allowed the appellant to stamp the memorandum of appeal. By CANDY, J, on the ground that under the circumstances there was sufficient cause for not presenting the appeal within the proper time, and that the delay might be excused under s 5 of the Limitation Act (XV of 1877)

BAI FUL *v.* DESAI MANORBHAI BHAVANIDAS .. ... ... XXII 849

**Payment into Court—**

*Practice—Procedure—Civil Procedure Code (Act XIV of* 1882), *s.* 379—*Suit for injunction or damages—Payment into Court by defendant to satisfy plaintiff's claim—Costs in such cases—Costs.* See PRACTICE 6.

**Penal Code—**

**Act XLV of 1860—**

s. 124A. "*Disaffection," Meaning of—Seditious publication.* The word "disaffection" in s. 124A of the Indian Penal Code (Act XLV of 1860) is used in a special sense as meaning political alienation or discontent, a spirit of disloyalty to the Government or existing authority. An attempt to excite feelings of disaffection

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**Practice**—*(continued.)*

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**Practice**—(*continued.*)

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**Privy Council—**



**Probate—**



**Promissory Note—**



**Receiver—**

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**Registration**—*(continued.)*

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**Vendor and Purchaser**—*(continued.)*

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## Wagering Contract—



## Widow—



## Will—

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